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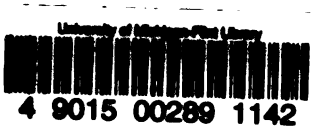
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IN THE

SUPREME COURT

OF THE

UNITED STATES

239, 240, 241 U. S.

BOOK 60,

LAWYERS' EDITION.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. EDWARD DOUGLASS WHITE.

ASSOCIATE JUSTICES,

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,

HON. WILLIAM R. DAY,

HON. CHARLES EVANS HUGHES,[1]

HON. WILLIS VAN DEVANTER,

HON. MAHLON PITNEY,

HON. JAMES CLARK MCREYNOLDS,

HON. LOUIS DEMBITZ BRANDEIS,[2]

ATTORNEY GENERAL,

HON. THOMAS WATT GREGORY.

SOLICITOR GENERAL,

HON. JOHN W. DAVIS.

CLERK,

JAMES D. MAHER, ESQ.

REPORTER,

HON. CHARLES HENRY BUTLER.

MARSHAL,

FRANK K. GREEN, ESQ.

[1] Resigned, June 10, 1916.

[2] Appointed to succeed Justice Joseph Rucker Lamar, who died January 2, 1916. Commission ordered recorded, June 5, 1916.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

From October 19, 1914 to June 12, 1916.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 59 L. ed., Appendix IV. p. 1529.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1914, 1915.	COMMISSIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I., PORTO RICO.†	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE CHARLES E. HUGHES, New York.	President TAFT.	SECOND. VERMONT, CONN., NEW YORK.	1910. (May 2.)	1910. (Oct. 10.)
ASSOCIATE JUSTICE MAHLON PITNEY, New Jersey.	President TAFT.	THIRD. NEW JERSEY, PA., DEL.	1912. (Mar. 13.)	1912. (Mar. 18.)
CHIEF JUSTICE EDWARD D. WHITE, Louisiana.	President TAFT.	FOURTH. MD., VA., N. C., W. VA., S. C.	1910. (Dec. 12.)	1910. (Dec. 19.)
ASSOCIATE JUSTICE JOSEPH R. LAMAR, Georgia.	President TAFT.	FIFTH. GA., ALA., FLA., MISS., LA., TEX.	1910. (Dec. 17.)	1911. (Jan. 3.)
ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SIXTH. KY., TENN., OHIO, MICH.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE JAMES C. McREYNOLDS, Tennessee.	President WILSON.	SEVENTH. IND., ILL., WIS.	1914. (Aug. 29.)	1914. (Oct. 12.)
ASSOCIATE JUSTICE WILLIS VAN DEVANTER, Wyoming.	President TAFT.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., OKLAHOMA, NEW MEX.	1910. (Dec. 16.)	1911. (Jan. 3.)
ASSOCIATE JUSTICE JOSEPH McKENNA, California.	President McKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA, HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

* Territories assigned to circuits by order of the Supreme Court.

† Porto Rico added to first circuit by act of Congress of January 28, 1915 (38 Stat. at L. 803, chap. 22).

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

June 12, 1916.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see *post*, Appendix VIII. p. 1263.

Names of Justices, and Whence Appointed.	By Whom Appointed.	Circuits. 1914, 1915.	Commissioned.	Sworn in.
Associate Justice OLIVER WENDELL HOLMES, Massachusetts.	President Roosevelt.	First. Me., N. H., Mass., R. I., Porto Rico.†	1902. (Dec. 4.)	1902. (Dec. 8.)
Associate Justice LOUIS D. BRANDEIS, Massachusetts.	President Wilson.	Second. Vermont, Conn., New York.	1916. (June 1.)	1916. (June 5.)
Associate Justice MAHLON PITNEY, New Jersey.	President Taft.	Third. New Jersey, Pa., Del.	1912. (Mar. 13.)	1912. (Mar. 18.)
Chief Justice EDWARD D. WHITE, Louisiana.	President Taft.	Fourth. Md., Va., N. C., W. Va., S. C. Fifth. Ga., Ala., Fla., Miss., La., Tex.	1910. (Dec. 12.)	1910. (Dec. 19.)
Associate Justice WILLIAM R. DAY, Ohio.	President Roosevelt.	Sixth. Ky., Tenn., Ohio, Mich.	1903. (Feb. 23.)	1903. (Mar. 2.)
Associate Justice JAMES C. McREYNOLDS, Tennessee.	President Wilson.	Seventh. Ind., Ill., Wis.	1914. (Aug. 29.)	1914. (Oct. 12.)
Associate Justice WILLIS VAN DEVANTER, Wyoming.	President Taft.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., Oklahoma, New Mex.	1910. (Dec. 16.)	1911. (Jan. 3.)
Associate Justice JOSEPH McKENNA, California.	President McKinley.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona, Hawaii.*	1898. (Jan. 21.)	1898. (Jan. 26.)

* Territories assigned to circuits by order of the Supreme Court.

† Porto Rico added to first circuit by act of Congress of January 28, 1915 (38 Stat. at L. 803, chap. 22).

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MANUEL CERECEDO, Andrés Grillasca, and Carlos Valle, Plffs. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1-3.)

Error to Porto Rico district court — jurisdiction — dismissal.

1. A writ of error to the district court of the United States for the district of Porto Rico must be dismissed where there is no bill of exceptions in the record and nothing which enables the court lawfully to ascertain the existence of the constitutional questions relied upon to confer jurisdiction.

[For other cases, see Appeal and Error, VII. 1, 4, in Digest Sup. Ct. 1908.]

Appeal — motion to dismiss — decision.

2. The postponing of the consideration of a motion to dismiss a writ of error from the Federal Supreme Court until the hearing on the merits is not a decision in the affirmative of the question of the power to review.

[On motions to dismiss appeal, generally, see Appeal and Error, VII. a, in Digest Sup. Ct. 1908.]

[No. 285.]

Argued and submitted October 13, 1915.
Decided October 25, 1915.

IN ERROR to the District Court of the United States for Porto Rico to review convictions of conspiracy. Dismissed for want of jurisdiction.

See same case below, 6 Porto Rico Fed. Rep. 626.

Messrs. **Paul Fuller** and **Howard Thayer Kingsbury** submitted the cause for plaintiffs in error.

Assistant Attorney General **Warren** argued the cause and filed a brief for defendant in error.

Solicitor General **Davis** also filed a brief for defendant in error.

Memorandum opinion by Mr. Chief Justice **White**, by direction of the court:

The plaintiffs in error prosecute this writ under the assumption that the court below denied rights asserted [3] by them under the Constitution, by refusing, as prayed, to return papers taken from them under a search warrant, and in permitting the papers over objection to be offered in evidence. There is no bill of exceptions in the record, and nothing which enables us to lawfully ascertain the existence of the constitutional questions relied upon. Clune v. United States, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125; Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28; Porto Rico v. Emmanuel, 235 U. S. 251, 255, 59 L. ed. 215, 217, 35 Sup. Ct. Rep. 33.

There is nothing, therefore, before us unless there be merit in contentions to the contrary which are pressed and which we briefly dispose of. First: On the face of things it is obvious that the postponing at the last term of the consideration of a motion to dismiss was not a decision of the question of power to review. Second: Even indulging, for the sake of the argument only, in the assumption of the correctness of the proposition urged that an extraordinary discretion might exist in some extreme case to supply the entire absence of a bill of exceptions, we see no ground whatever for the premise that this is a case of that character.

Dismissed for want of jurisdiction.

NOTE.—On appellate jurisdiction of Federal Supreme Court over Porto Rican courts—see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

ALI GEGIOW and Sabas Zarikoew, Petitioners,
v.
BYRON H. UHL, as Acting Commissioner of Immigration at the Port of New York.

(See S. C. Reporter's ed. 3–10.)

Habeas corpus — immigration cases.

1. An alien, whom the commissioner of immigration has detained for deportation for a reason not recognized as sufficient by the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), § 2, as amended by the act of March 26, 1910 (36 Stat. at L. 263, chap. 128, Comp. Stat. 1913, § 4244), § 1, enumerating the conditions upon which the allowance to land may be denied,—is entitled to demand his release upon habeas corpus.

[For other cases, see Habeas Corpus, 13–18, 188–191, in Digest Sup. Ct. 1908.]

Courts — conclusiveness of decisions of immigration officer.

2. The conclusiveness of the decisions of immigration officers under the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), § 25, is conclusiveness upon matters of fact, not upon questions of law.

[For other cases, see Courts, I. e, 4, in Digest Sup. Ct. 1908.]

Aliens — deportation — public charges.

3. Alien immigrants cannot be deported under the immigration act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), § 2, as amended by the act of March 26, 1910 (36 Stat. at L. 263, chap. 128), § 1, as "persons likely to become a public charge," merely because the labor market in the city of their immediate destination is overstocked.

[For other cases, see Aliens, VI. a, in Digest Sup. Ct. 1908.]

[No. 340.]

Argued October 13 and 14, 1915. Decided October 25, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the District Court for the Southern District of New York, dismissing a writ of habeas corpus. Reversed.

See same case below, 131 C. C. A. 641, 215 Fed. 573.

The facts are stated in the opinion.

Messrs. **Max J. Kohler** and **Morris Jablow** argued the cause, and, with Messrs. **Abram I. Elkus** and **Ralph Barnett**, filed a brief for petitioners:

The right to due process of law under the 5th Amendment in immigration cases is, of course, well established, and this forbids unlawfully assuming facts not cognizable on the theory of judicial notice; and also deciding a case on such undisclosed facts without giving the immigrant notice of such intention or an opportunity to meet such matter by proof.

Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 100, 47 L. ed. 721, 725, 23 Sup. Ct. Rep. 611; Re Can Pon, 93 C. C. A. 635, 168 Fed. 479; Davies v. Manolis, 103 C. C. A. 310, 179 Fed. 818; United States ex rel. Huber v. Sibray, 178 Fed. 144; Hanges v. Whitfield, 209 Fed. 675, affirmed in 138 C. C. A. 199, 222 Fed. 745; Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 346; Re Monaco, 86 Fed. 117; Re Gottfried, 89 Fed. 9; Roux v. San Francisco, 121 C. C. A. 523, 203 Fed. 413; Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978; Re Kornmehl, 87 Fed. 314; Ex parte Ung King Ieng, 213 Fed. 119; Ex parte Wong Tucy Hing, 213 Fed. 112; Re Gin Fung, 89 Fed. 153; United States ex rel. Bosny v. Williams, 185 Fed. 598; United States v. Wong Chung, 92 Fed. 141; Re Chinese Relators, 58 Fed. 554. See also Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 93, 57 L. ed. 431, 433, 434, 33 Sup. Ct. Rep. 185; United States v. 1500 Bales of Cotton, Fed. Cas. No. 15,958; Thayer, Ev. pp. 309, 310.

All the cases relied upon by the government below herein, and cited in the opinion of the circuit court of appeals (other than the Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336, which arose under a materially different law), arose under the Chinese exclusion laws, and not under the general immigration laws. The courts have strongly emphasized the fact that differences in the statutes render these two classes of cases inapplicable to each other, for an entirely different procedure is established by the Chinese exclusion laws than is prescribed by the immigration law.

Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 352; United States v. Sing Tuck, 194 U. S. 161, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621; Gonzales v. Williams, 192 U. S. 1, 16, 48 L. ed. 317, 322, 24 Sup. Ct. Rep. 177.

Even under the looser procedure applicable to Chinese exclusion cases, such departure from due process of law as is here

NOTE.—On habeas corpus in the Federal courts—see notes to Re Reinitz, 4 L.R.A. 236; State ex rel. Cochran v. Winters, 10 L.R.A. 616; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

On treaty guaranties to aliens, see note to Gandolfo v. Hartman, 16 L.R.A. 277.

involved has been held to authorize judicial review.

Re Can Pon, 93 C. C. A. 635, 168 Fed. 479.

The decision of the court in Nishimura Ekiu v. United States, supra, relied upon so much below, is not now applicable in view (a) of the marked changes in the statute since that case was decided, creating a quasi judicial board required to take testimony, and in the direction of conferring on the physicians, and not the lay inspectors, sole jurisdiction to note and certify physical, as well as mental, defects in immigrants (United States v. Petkos, 131 C. C. A. 274, 214 Fed. 978); (b) the later decisions of this court limiting it, especially the Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611, where it was distinguished on constitutional grounds; (c) the fact that here unlawful procedure, and no mere question of existence of facts, is involved; (d) because, despite our statute, the record here fails to show that relators were excluded on account of anything observed by the inspectors in their appearance; and (e) because the right since established of determining finally even rights to citizenship and other difficult questions of law and fact under the later acts in these administrative proceedings requires closer conformity to judicial procedure as necessary due process of law. It should also be noted that, (f) in general immigration cases the statute imposes the burden of proof on the government, while in Chinese cases it is on the alien, except in the single instance of "assisted immigrants," under the general immigration laws, in which case § 2 expressly throws it on the alien. 26 Ops. Atty. Gen. 414; United States ex rel. Castro v. Williams, 203 Fed. 156; Rodgers v. United States, 81 C. C. A. 454, 152 Fed. 352; Chin Bak Kan v. United States, 186 U. S. 193, 200, 46 L. ed. 1121, 1125, 22 Sup. Ct. Rep. 891; United States ex rel. De Rienzo v. Rodgers, 182 Fed. 274, affirmed in 107 C. C. A. 452, 185 Fed. 334; Ex parte Petkos, 212 Fed. 275; Ex parte Gregory, 210 Fed. 680; Ark Foo v. United States, 63 C. C. A. 249, 128 Fed. 698; United States v. Lee Chung, 206 Fed. 367.

There being no competent proof whatever in the record of the alleged employment conditions in Portland, nor of the alleged inability of petitioners to speak any dialect except their own unfamiliar one, or of other disability likely to affect ability to earn a living, their exclusion on the ground of likelihood to become a public charge is without any evidence, and is reviewable in the courts on habeas corpus, even independently of the errors of procedure involved.

Lewis v. Frick, 233 U. S. 291, 297–300, 58 L. ed. 967, 971–973, 34 Sup. Ct. Rep. 488; Zakonaite v. Wolf, 226 U. S. 272, 274, 57 L. ed. 218, 220, 33 Sup. Ct. Rep. 31; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; People ex rel. Kasschau v. Police Comrs. 155 N. Y. 40, 49 N. E. 257; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Williams v. United States, 124 C. C. A. 366, 206 Fed. 460, approving 189 Fed. 915; United States ex rel. Rosen v. Williams, 118 C. C. A. 632, 200 Fed. 541; United States ex rel. Bauder v. Uhl, 128 C. C. A. 560, 211 Fed. 628; United States ex rel. Goldberg v. Williams, 204 Fed. 828; Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978; Re Feinknopf, 47 Fed. 447; Re Cummings, 32 Fed. 75; Ex parte Saraceno, 182 Fed. 955; Frick v. Lewis, 115 C. C. A. 493, 195 Fed. 693; Davies v. Manolis, 103 C. C. A. 310, 179 Fed. 821; United States v. Passavant, 169 U. S. 16, 20, 21, 42 L. ed. 644, 645, 646, 18 Sup. Ct. Rep. 219; United States v. Haviland, 167 Fed. 414, affirmed in 100 C. C. A. 637, 177 Fed. 175; certiorari denied in 216 U. S. 618, 54 L. ed. 640, 30 Sup. Ct. Rep. 573; American School v. McAnnulty, 187 U. S. 94, 108, 47 L. ed. 90, 96, 23 Sup. Ct. Rep. 33; Public Clearing House v. Coyne, 194 U. S. 497, 515, 48 L. ed. 1092, 1101, 24 Sup. Ct. Rep. 789; Howe v. Parker, 111 C. C. A. 466, 190 Fed. 746; Williams v. United States, 206 Fed. 460; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Low Wah Suey v. Backus, 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359; Macy v. Browne, 140 C. C. A. 45, 224 Fed. 359.

A person cannot be excluded as likely to become a public charge unless there be some evidence of substantial affirmative disabilities, and all the agencies at the disposal of the immigrant to aid him in his new home, including the assistance of relatives not legally obligated to support him, and of friends, must be taken into account in deciding the "likely to become a public charge" issue.

Re Feinknopf, 47 Fed. 447; Re O'Sullivan, 31 Fed. 447; Re Bracmadfar, 37 Fed. 774; Re Day, 27 Fed. 678; United States v. Lipkis, 56 Fed. 427; Ex parte Saraceno, 182 Fed. 955; Ex parte Petkos, 212 Fed. 275; Williams v. United States, 124 C. C. A. 366, 206 Fed. 460; United States ex rel. Goldberg v. Williams, 204 Fed. 828.

Even as regards matters judicially noticeable, the authority relied upon should be produced in court, and the fact of judicial notice being taken spread upon the record before the close of the case, so that proof can be adduced by the other side to meet the same.

McKinnon v. Bliss, 21 N. Y. 214; Kaolatype Engraving Co. v. Hoke, 30 Fed. 444; Walton v. Stafford, 14 App. Div. 310, 43 N. Y. Supp. 1049; Dominici v. United States, 72 Fed. 46; Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 189, 190, 46 L. ed. 144, 146, 147, 22 Sup. Ct. Rep. 47; Thayer, Ev. chap. 7, p. 281; Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745.

Where courts take judicial notice of facts, and err in their assumed facts, a question of law is presented.

United States v. 1500 Bales of Cotton, Fed. Cas. No. 15,958; Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978.

Statutes like the immigration laws fall within the general class of statutes in derogation of personal liberty which should be construed in favor of individual liberty and personal right.

Moffitt v. United States, 63 C. C. A. 117, 128 Fed. 378; Tsoi Sim v. United States, 54 C. C. A. 154, 116 Fed 920; Redfern v. Halpert, 108 C. C. A. 262, 186 Fed. 150; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611; Lieber, Hermeneutics 3d ed. pp. 128, 129, 137; Martin v. Goldstein, 20 App. Div 206, 46 N. Y. Supp. 961, 26 Am. & Eng. Enc. Law, 2d ed. pp. 646, 648, 659, 661, 662.

Such uncertain, complex, ever-varying facts, changing constantly in point of time, and differing at the same time as to different places and lines of industry, and relating to distant places,—as labor conditions in their relation to a particular person's being able to get employment either in his specialty or any other,—cannot be noticed judicially by the courts.

Smid v. Bernard, 31 Misc. 38, 63 N. Y. Supp. 278; Market Nat. Bank v. Pacific Nat. Bank, 27 Hun, 465; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745; Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978.

Facts of recent occurrence relating to a limited section of country cannot be considered as covered by judicial knowledge, as matter of history.

16 Cyc. 868; Morris v. Harmer, 7 Pet. 554, 558, 8 L. ed. 781, 783; McKinnon v. Bliss, 21 N. Y. 216; North Hempstead v. Gregory, 53 App. Div. 355, 65 N. Y. Supp. 867; Market Nat. Bank v. Pacific Nat. Bank, 27 Hun, 465; Smid v. Bernard, 31 Misc. 35, 63 N. Y. Supp. 278.

Matters constantly changing materially, and not definitely fixed and "known by everybody," cannot thus be noticed.

16 Cyc. 871; Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126; Kokes v. State, 55 Neb. 701, 76 N. W. 467; First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412.

The courts should hesitate to take judicial notice of facts in controversy in the action.

North Hempstead v. Gregory, 53 App. Div. 350, 65 N. Y. Supp. 867; Patent Button Co. v. Consolidated Fastener Co. 84 Fed. 189; Walton v. Stafford, 14 App. Div. 313, 43 N. Y. Supp. 1049.

The limitations upon the right to notice facts judicially are more, not less, stringent, as applied to administrative bodies, which naturally are commonly composed of men of much less intelligence, judgment, and independence than are our courts, and especially as against aliens denied the right to counsel and advisers until after exclusion by the board, and commonly unfamiliar with our language and procedure.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 93, 57 L. ed. 431, 433, 434, 33 Sup. Ct. Rep. 185; Hanges v. Whitfield, 209 Fed. 675; People ex rel. Clarke v. Roosevelt, 168 N. Y. 488, 61 N. E. 783.

To vest such sweeping power in $1,800-a-year inspectors under the immigration laws, who are notoriously lacking in education and weak in general, but who are vested with power to pass on the rights of over a million persons a year, including claims to citizenship, would be a public calamity; and the present instance is the first one in which any court, in any reported decision, has sustained such claim.

Ex parte Petkos, 212 Fed. 275, reversed in 131 C. C. A. 274, 214 Fed. 978; Williams v. United States, 124 C. C. A. 366, 206 Fed. 460; United States ex rel. Bosny v. Williams, 185 Fed. 598; Roux v. San Francisco, 121 C. C. A. 523, 203 Fed. 413; Leung Jun v. United States, 96 C. C. A. 369, 171 Fed. 413; United States v. Chin Len, 109 C. C. A. 310, 187 Fed. 544; United States v. Wong Chung, 92 Fed. 141; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745; Jouras v. Allen, 138 C. C. A. 210, 222 Fed. 756.

Even if such facts regarding economic conditions can be noticed judicially, the alleged newspaper reports here involved could not lawfully be considered as the basis for judicial notice, and there is no other proof of the alleged facts in question.

Walton v. Stafford, 14 App. Div. 310, 43

N. Y. Supp. 1049; Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Downs v. New York C. R. Co. 47 N. Y. 83, 5 Am. Neg. Cas. 142; Langley v. Smith, 3 N. Y. S. R. 276; Harris v. Panama R. Co. 3 Bosw. 7; McKinnon v. Bliss, 21 N. Y. 215; Caldwell v. National Mohawk Valley Bank, 64 Barb. 333; Greenl. Ev. § 440, note; Morris v. Harmer, 7 Pet. 554, 8 L. ed. 781; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745.

Where the courts on habeas corpus assume jurisdiction to review an order of exclusion, they are themselves to determine the question of admissibility, and not merely to remand relator for a new hearing to the immigration authorities.

Chin Yow v. United States, 208 U. S. 8, 13, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201; United States v. Petkos, 131 C. C. A. 274, 214 Fed. 978; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 745; United States ex rel. D'Amato v. Williams, 193 Fed. 228.

Solicitor General Davis argued the cause and filed a brief for respondent:

Congress has complete power to exclude all aliens and to determine the conditions of their entry.

Lapina v. Williams, 232 U. S. 78, 88, 58 L. ed. 515, 518, 34 Sup. Ct. Rep. 196; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The administrative determination made the condition of entry need not be based upon a hearing at which the alien has an opportunity to present evidence.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Oceanic Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; Origet v. Hedden, 155 U. S. 228, 39 L. ed. 130, 15 Sup. Ct. Rep. 92.

When Congress has made a favorable administrative decision the sole and indispensable condition precedent to entry, and has declared an adverse decision to be final, the courts have no power to review the evidence upon which the latter is based.

Nishimura Ekiu v. United States, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336.

In the immigration act Congress has made the fact of the decision by immigration officials the sole condition of entry. The fact of the decision being established, any inquiry into the evidence is improper.

1. The act (§ 25) in unmistakable terms declares that the adverse administrative decision "shall be final."

Pearson v. Williams, 202 U. S. 281, 50 L. ed. 1029, 26 Sup. Ct. Rep. 608.

2. The statute imports that want of any sustaining evidence shall not of itself constitute a ground for judicial impeachment of the adverse administrative decision.

(a) The officers do not lose exclusive jurisdiction by judging all the evidence erroneously.

Chin Yow v. United States, 208 U. S. 8, 13, 52 L. ed. 369, 370, 28 Sup. Ct. Rep. 201; Harlan v. McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849.

(b) Want of any sustaining evidence in the record does not *per se* establish fraud or lack of good faith.

White v. Gregory, 130 C. C. A. 282, 213 Fed. 768; Nishimura Ekiu v. United States, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336.

3. Under this act the courts have no jurisdiction to review the evidence.

Fok Yung Yo v. United States, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; White v. Gregory, 130 C. C. A. 282, 213 Fed. 768; Lee Gon Yung v. United States, 185 U. S. 306, 46 L. ed. 921, 22 Sup. Ct. Rep. 690; Lee Yung v. Patterson, 186 U. S. 175, 46 L. ed. 1110, 22 Sup. Ct. Rep. 795; Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; Nichimura Ekiu v. United States, supra.

4. Cases under statutes providing for administrative proceedings of a different kind are not applicable.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Lewis v. Frick, 233 U. S. 291, 58 L. ed. 967, 34 Sup. Ct. Rep. 488; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31.

Mr. Justice Holmes delivered the opinion of the court:

The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration, and have sued out a writ of habeas corpus. The writ was dismissed by the district court and the circuit court of appeals. 211 Fed. 236; 131 C. C. A. 641, 215 Fed. 573. By the return it appears that they are part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary

Russian tongue, and in view of that fact it was suggested in a letter from the acting commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble incident to the immigration of foreigners generally which it is for legislators, not for commissioners, to consider, and may be laid on one side. The objection relied upon in the return is that the petitioners were "likely to become public charges for the following, among other reasons: That they arrived here with very little money [$40 and $25, respectively], and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded," etc. We assume the report to be candid, and, if so, it shows that the only ground for [9] the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as makeweights. It is true that the return says for that "among other reasons." But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on appeal; and as the order was general for a group of twenty it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter that we have to deal with is the construction of the statute with reference to the present case.

The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336, relied on by the government. As was said in Gonzales v. Williams, 192 U. S. 1, 15, 48 L. ed. 317, 322, 24 Sup. Ct. Rep. 177, "as Gonzales did not come within the act of 1891 [26 Stat. at L. 1084, chap. 551], the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary." Such a case stands no better than a decision without a fair hearing, which has been held to be bad. Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201. See further Zakonaite v. Wolf, 226 U. S. 272, 57 L. ed. 218, 33 Sup. Ct. Rep. 31; Lewis v. Frick, 233 U. S. 201, 297, 58 L. ed. 967, 971, 34 Sup. Ct. Rep. 488.

The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate [10] destination is overstocked. In the act of February 20, 1907, chap. 1134, § 2, 34 Stat. at L. 898, as amended by the act of March 26, 1910, chap. 128, § 1, 36 Stat. at L. 263, Comp. Stat. 1913, § 4244, determining who shall be excluded, "Persons likely to become a public charge" are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth. The persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after.

The statute deals with admission to the United States, not to Portland, and in § 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the general government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in § 1, but it is confined to those in the continental territory of the United States, and the matter is to be determined by the President. We cannot suppose that so much greater a power was intrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge.

Order reversed.

[11] CENTRAL TRUST COMPANY OF ILLINOIS and the Covington Savings Bank & Trust Company, as Trustee of the I. Rheinstrom & Sons Company, Bankrupt, Appts.,

v.

GEORGE LUEDERS & CO., G. S. Nicholas & Co., D. A. White Co., the E. Berghausen Chemical Co., the E. A. Conkling Box Co., T. A. Decker, B. F. Goodrich Co., and Hazel-Atlas Glass Co.

(See S. C. Reporter's ed. 11-13.)

Appeal — from circuit court of appeals — bankruptcy cases.

Causes requiring the determination of the validity of a state statute under the Federal Constitution are comprehended by the provisions of the act of January 28, 1915 (38 Stat. at L. 803, chap. 22), § 4, making final (except for a possible review by certiorari) "the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the bankruptcy act and in all controversies arising in such proceedings and cases."

[For other cases, see Appeal and Error, III. d, 2, e, in Digest Sup. Ct. 1908.]

[No. 445.]

Submitted October 12, 1915. Decided October 25, 1915.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Kentucky, allowing certain liens upon the property of a bankrupt. Dismissed for want of jurisdiction.

See same case below, 137 C. C. A. 387, 221 Fed. 829.

Messrs. **Judson Harmon, Edward Colston, A. W. Goldsmith, George Hoadly, Lessing Rosenthal,** and **Charles H. Hamill** submitted the cause for appellants. Mr. Leo F. Wormser was on the brief:

Where an act of Congress is directed to a class of cases which had so increased in number as to impose a burden of litigation upon this court, the act will be given effect in the light of the object of its enactment, and will not be construed as a limitation upon the jurisdiction of this court in a case not belonging to that class, even though the operation of the act must be restrained within narrower limits than its literal words import.

United States v. American Bell Teleph. Co. 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69; Petri v. Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. ed. 1144, 1146, 12 Sup. Ct. Rep. 325; Church of the Holy Trinity v. United States, 143 U. S. 457, 459, 463, 36 L. ed. 226, 228, 229, 12 Sup. Ct. Rep. 511; United States v. Rabinowich, 238 U. S. 78, 59 L. ed. 1211, 35 Sup. Ct. Rep. 682.

Where the correctness of a judgment of the circuit court of appeals depends upon the construction or application of the Constitution of the United States, the defeated party, provided it has asserted its constitutional rights from the outset, is entitled, as of right, to a re-examination of the judgment by this court, even though the decree of the district court was rendered sitting in bankruptcy.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

Mr. **Walter A. DeCamp** submitted the cause for appellees. Messrs. Dudley V. Sutphin, Leo J. Brumleve, Jr., Edwards F. Peters, and Paul V. Connolly were on the brief:

As this is one of the class of cases of which the courts of appeal have final jurisdiction, and as the case has been determined by the court of appeals on its merits, another appeal cannot be maintained to this court, even though the case involves constitutional rights. Such case can be taken to the Supreme Court only upon certiorari.

Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

Memorandum opinion by Mr. Justice **McReynolds,** by direction of the court:

The I. Rheinstrom & Sons Company was adjudged a bankrupt in April, 1912. Liens upon its property were claimed by appellees under a Kentucky statute which appellants (general creditors) maintained contravened the 14th Amendment to the Constitution of the United States. Overruling the referee, the district court allowed the liens (207 Fed. 119), and this action was approved by the circuit court of appeals, March 2, 1915, in an opinion which expressly upheld the

NOTE.—On appellate jurisdiction of Federal Supreme Court in bankruptcy cases, see note to James v. Stone, 57 L. ed. U. S. 573.

On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals —see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605, and St. Anthony Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

validity of the statute (221 Fed. 829). Appellees have moved to dismiss the present appeal.

Section 4, act of Congress, approved January 28, 1915 (38 Stat. at L. 803, 804, chap. 22), provides: "That the judgments and decrees of the circuit courts of appeals in all proceedings [13] and cases arising under the bankruptcy act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree."

Manifestly, the words of the quoted section include the decree below, and inhibit an appeal therefrom. It is argued, however, that they should be so construed as to exclude causes requiring interpretation of state statutes and application of the Federal Constitution, and thereby limited in effect to the supposed purpose of Congress to relieve this court only from the necessity of reviewing bankruptcy cases which "involve complicated questions of fact rather than of law." We see no reason to doubt that the plain language of the enactment aptly expresses the fixed legislative intent. The appeal is accordingly dismissed for want of jurisdiction.

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[14] SAMUEL STEWART, as Treasurer of Wyandotte County, Kansas, Plff. in Err.,
v.
CITY OF KANSAS CITY, Kansas.

(See S. C. Reporter's ed. 14-16.)

Error to state court — who may maintain — public officer.

1. A county treasurer has no such personal interest in the litigation as entitles him to maintain a writ of error from the Federal Supreme Court to review a judgment of a state court compelling him to account to a city within the county under certain taxing statutes of the state which the county treasurer asserts are, as construed by the state court, repugnant to the Federal Constitution.

[For other cases, see Appeal and Error, 2068, 2069, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

2. No substantial Federal question which will support a writ of error from the Federal Supreme Court to a state court is presented by the contention that taxpayers of a county, who reside outside of cities of the first class, are deprived of their property without due process of law and are denied the equal protection of the laws by state legislation under which, as construed by the state court, a county must reimburse a city of the first class within such county for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment, and at the same time must pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third class and by townships and school districts the rebates are charged to the county and the penalties credited to it.

[For other cases, see Appeal and Error, 1110-1137, in Digest Sup. Ct. 1908.]

[No. 284.]

Submitted October 18, 1915. Decided November 1, 1915.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Wyandotte County, in that state, requiring the County Treasurer to account to the city of Kansas City for certain sums due the city under taxing statutes of the state. Dismissed for want of jurisdiction.

See same case below, 90 Kan. 846, 136 Pac. 241; on rehearing, 92 Kan. 406, 140 Pac. 876.

The facts are stated in the opinion.

Messrs. L. W. Keplinger and C. W. Trickett submitted the cause for plaintiff in error.

Messrs. Richard J. Higgins and William H. McCamish submitted the cause for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This action originated in a petition for mandamus filed in the district court of Wyandotte county, Kansas, by defendant in

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On parties to appellate proceedings in Federal Supreme Court—see note to Amadeo use of Pastor Marquez Co. v. Northern Assur. Co. 50 L. ed. U. S. 723.

On necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

error against plaintiff in error, to require the latter to account for the sum of $30,840.24, alleged to be due defendant in error under certain taxing statutes of the state.

Judgment was entered for defendant in error, which was affirmed on appeal by the supreme court of the state. The case was then brought here.

Motion is made to dismiss, on the ground that no Federal question was raised or passed on by the state court, or alternatively to affirm the judgment.

The controversy is stated by the supreme court of the state as follows:

"The question in dispute concerns the disposition of the penalties imposed by law for delinquency in the payment of taxes levied by and for the city. In substance it is this: Is the county required to reimburse a city of the first class for the amount by which the taxes collected for the city are reduced by rebates granted for prompt payment, and at the same time to pay over to the city the amount collected as penalties for delay in the payment of taxes levied by the city, while in the case of taxes levied by cities of the second and third classes, and by townships and school districts, the rebates are charged to the county and the penalties credited to it?" [90 Kan. 847, 136 Pac. 241.]

The question was answered in the affirmative, citing and construing the state statutes, and upon a consideration of the legislative power of the state over its municipal subdivisions. Plaintiff in error urged and now urges that the [16] statutes so construed deprive taxpayers of the county who reside outside of cities of the first class of property without due process of law, and deny them the equal protection of the law.

Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the state, he yet attempts to resist one of its laws. Whether he may do so is purely a local question. Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51. He certainly has no personal interest in the litigation. Braxton County Ct. v. West Virginia, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275; McCandless v. Pratt, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 144; Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92.

If, however, plaintiff in error is not estopped by that consideration, he encounters another. It is manifest that the statute assailed was enacted by the state in regulation of its municipalities, and the power to do this is very broad. It was said in Chicago, B. & Q. R. Co. v. Otoe County, 16 Wall. 667, 21 L. ed. 375, that "counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the state, created to carry out its will." This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations, invest them with special powers, divide and apportion their property. Atty. Gen. ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; Braxton County Ct. v. West Virginia, supra. It would be difficult to define the restrictions upon this power of control and keep it efficient. It is very certain that the Kansas statute does not transcend the limitations. We think the questions raised are more formal than substantial, and the writ of error is dismissed.

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[17] UNITED STATES FIDELITY & GUARANTY COMPANY v. CHARLES J. RIEFLER and James A. Hall.

(See S. C. Reporter's ed. 17-25.)

Guaranty — notice of acceptance.

A bond under seal, delivered by the obligors to the obligee, conditioned upon the indemnification of the latter, a surety company, for all loss under an official bond upon which the surety company "has become or is about to become surety," is a completed contract of indemnity or guaranty which binds the obligors without any notice that it has been accepted and acted upon by the obligee.

[For other cases, see Guaranty, III., in Digest Sup. Ct. 1908.]

[No. 11.]

Argued October 21, 1915. Decided November 1, 1915.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit presenting questions as to whether a certain instrument was a completed contract of indemnity or guaranty. Answered in the affirmative.

The facts are stated in the opinion.

Mr. A. F. Reichmann argued the cause, and, with Messrs. Noble B. Judah, Monroe

NOTE.—On necessity of notice of acceptance to bind guarantor—see notes to William Deering & Co. v. Mortell, 16 L.R.A. (N.S.) 352; J. R. Watkins Medical Co. v. Brand, 33 L.R.A.(N.S.) 960; W. T. Rawleigh Medical Co. v. Laursen, 48 L.R.A. (N.S.) 198; and Davis Sewing Mach. Co. v. Richards, 29 L. ed. U. S. 480.

L. Willard, Henry M. Wolf, and Arthur M. Cox, filed a brief for the United States Fidelity & Guaranty Company:

A bond of indemnity is an engagement to secure or save harmless against loss or damage of a specified character; it is something given to a person to prevent his suffering damage, while a guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable for such payment or performance.

14 Am. & Eng. Enc. Law, 2d ed. p. 1127; 16 Am. & Eng. Enc. Law, 2d ed. pp. 168, 169; 20 Cyc. 1397, 1400, and note on p. 1402; 22 Cyc. 79, 80; 1 Brandt, Suretyship & Guaranty, 3d ed. § 5; Vandiver v. Pollak, 107 Ala. 547, 54 Am. St. Rep. 118, 19 So. 180.

Bonds of indemnity are orginal and primary obligations not within the statute of frauds; while contracts of guaranty are secondary or collateral undertakings and are within the scope of the statute.

14 Am. & Eng. Enc. Law, 2d ed. p. 1130; 16 Am. & Eng. Enc. Law, 2d ed. p. 169; 20 Cyc. 1402; 22 Cyc. 80; 1 Brandt, Suretyship & Guaranty, 3d ed. § 5; DeColyar, Guaranties, Principal & Surety, p. 1; Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109; Spurrier v. Nottingham, 7 Ky. L. Rep. 452; Campbell v. Pucket, 1 Posey, Unrep. Cas. (Tex.) 465; Hartley v. Sandford, 66 N. J. L. 40, 48 Atl. 1009; Hall v. Weaver, 34 Fed. 107; McIntosh-Huntington Co. v. Reed, 89 Fed. 464; Horn v. Bray, 51 Ind. 555, 19 Am. Rep. 742; Minick v. Huff, 41 Neb. 516, 59 N. W. 795; Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Fidelity & C. Co. v. Lawler, 64 Minn. 144, 66 N. W. 143; Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000; Smith v. Delaney, 64 Conn. 264, 42 Am. St. Rep. 181, 29 Atl. 496; Perley v. Spring, 12 Mass. 297; Aldrich v. Ames, 9 Gray, 76; Lucas v. Chamberlain, 8 B. Mon. 276; Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Bonebright v. Pease, 3 Mich. 318; Chapin v. Merrill, 4 Wend. 657; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875; Saint v. Wheeler & W. Mfg. Co. 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; Kearnes v. Montgomery, 4 W. Va. 29.

A guarantee must ordinarily exhaust his remedies against the person primarily liable before resorting to his guarantor; but an indemnitee can hold his indemnitor without first seeking reimbursement from any third person.

Pingrey, Suretyship & Guaranty, § 360; Page v. White Sewing Mach. Co. 12 Tex. Civ. App. 327, 34 S. W. 988; Reigart v. White, 52 Pa. 438; 20 Cyc. 1446, 1453; Springfield v. Boyle, 164 Mass. 591, 42 N. E. 333; Kempton v. Coffin, 12 Pick. 129; Conery v. Cannon, 20 La. Ann. 123; 22 Cyc. 102; Getty v. Schantz, 40 C. C. A. 560, 100 Fed. 577; Phenix Ins. Co. v. Louisville & N. R. Co. 8 Fed. 142; Osborne v. Smith, 5 McCrary, 487, 18 Fed. 126.

An indemnitee must have actually paid a judgment or given his own obligation to the creditor, which has been accepted as payment, before he can maintain an action upon the instrument of indemnity; while a guarantee may maintain an action against a guarantor to compel payment of the debt itself.

Central Trust Co. v. Louisville Trust Co. 40 C. C. A. 530, 100 Fed. 545; Resseter v. Waterman, 151 Ill. 177, 37 N. E. 875; Barclay v. Gooch, 2 Esp. 571; Carter v. Adamson, 21 Ark. 287; Solary v. Webster, 35 Fla. 363, 17 So. 646; Hoy v. Hansborough, 1 Freem. Ch. (Miss.) 533; Gregory v. Hartley, 6 Neb. 356; Aberdeen v. Blackmar, 6 Hill, 324; Hearn v. Lander, 11 Bush, 669; Miller v. Fries, 66 N. J. L. 377, 49 Atl. 674; Cochran v. Selling, 36 Or. 333, 59 Pac. 329.

While a guarantor's undertaking is for the benefit of the creditor, the undertaking of a surety's indemnitor is not. The creditor cannot maintain any action upon it.

United States use of Wood v. United Surety Co. 192 Fed. 994; State v. St. Louis & S. F. R. Co. 125 Mo. 596, 28 S. W. 1074; Texas Midland R. Co. v. Miers, — Tex. Civ. App. —, 37 S. W. 640.

As a general rule an indemnitor is neither a guarantor nor a surety; he is a principal, although he is frequently referred to by the courts as a surety.

Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218; Appleton v. Bascom, 3 Met. 169.

Historically, contracts of indemnity are creations of the common law, and are usually specialties (except the implied obligation created by law on the part of a principal to indemnify his surety when no express obligation has been given); while contracts of guaranty are commercial contracts having their origin in the rules of the law merchant, and are usually simple contracts.

Courtis v. Dennis, 7 Met. 510; Edmondston v. Drake, 5 Pet. 624, 8 L. ed. 251; Lee v. Dick, 10 Pet. 482, 9 L. ed. 503; Dan. Neg. Inst. ¶ 1755; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; Lawrence v. McCalmont, 2 How. 426, 11 L. ed. 326; Smith v. Dann, 6 Hill, 543; Lanusee v. Barker, 3 Wheat. 148, 4 L. ed. 356; Kincheloe v. Holmes, 7 B. Mon. 5, 45 Am. Dec. 41.

Instruments of guaranty (unlike instruments of indemnity) are divided into two

classes: (a) overtures or offers to guarantee and (b) absolute guaranties.

Pitman, Principal & Surety, p. 28; De Colyar, Guaranties, Principal & Surety, p. 3; 14 Am. & Eng. Enc. Law, 2d ed. p. 1145; 20 Cyc. 1404, 1407.

The doctrine that notice of acceptance is necessary to bind a guarantor applies only to instruments which are overtures or offers to guarantee.

Davis Sewing Mach Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Russell v. Clark, 7 Cranch, 69, 3 L. ed. 271; Edmondston v. Drake, 5 Pet. 624, 8 L. ed. 251; Douglass v. Reynolds, 7 Pet. 113, 8 L. ed. 626; Lee v. Dick, 10 Pet. 482, 9 L. ed. 503; Adams v. Jones, 12 Pet. 207, 9 L. ed. 1058; Reynolds v. Douglass, 12 Pet. 504, 9 L. ed. 1173; Barnes Cycle Co. v. Reed, 84 Fed. 603; Steadman v. Guthrie, 4 Met. (Ky.) 157; Kincheloe v. Holmes, 7 B. Mon. 5, 45 Am. Dec. 41; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583; Newman v. Streator Coal Co. 19 Ill. App. 594; Ruffner v. Love, 33 Ill. App. 601; Neagle v. Sprague, 63 Ill. App. 25; 20 Cyc. 1404, 1405.

The rule does not apply to instruments which are absolute guaranties.

Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; Wildes v. Savage, 1 Story, 22, Fed. Cas. No. 17,653; Kent v. Silver, 47 C. C. A. 404, 108 Fed. 365; Doud v. National Park Bank, 4 C. C. A. 607, 2 U. S. App. 655, 54 Fed. 846; Bond v. John V. Farwell Co. 96 C. C. A. 546, 172 Fed. 58; Cooke v. Orne, 37 Ill. 186; Newcomb Bros. Wall Paper Co. v. Emerson, 17 Ind. App. 482, 46 N. E. 1018; Sears v. Swift & Co. 66 Ill. App. 496; American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480; Acorn Brass Mfg. Co. v. Gilmore, 142 Ill. App. 567; Frost v. Standard Metal Co. 215 Ill. 240, 74 N. E. 139; Pressed Radiator Co. v. Hughes, 155 Ill. App. 80; Bryant v. Stout, 16 Ind. App. 380, 44 N. E. 68, 45 N. E. 343; William Deering & Co. v. Mortell, 21 S. D. 159, 16 L.R.A.(N.S.) 353, 110 N. W. 86; Lane v. Mayer, 15 Ind. App. 382, 44 N. E. 73; Shows v. Steiner, 175 Ala. 363, 57 So. 700; J. R. Watkins Medical Co. v. Brand, 143 Ky. 468, 33 L.R.A.(N.S.) 960, 136 S. W. 867; People's Bank v. Stewart, 152 Mo. App. 314, 133 S. W. 70; J. L. Mott Iron Works v. Clark, 87 S. C. 199, 69 S. E. 227; Bank of California v. Union Packing Co. 60 Wash. 456, 111 Pac. 573; Emerson Mfg. Co. v. Tvedt, 19 N. D. 8, 120 N. W. 1094; Sheppard v. Daniel Miller Co. 7 Ga. App. 760, 68 S. E. 451; Sheffield v. Whitfield, 6 Ga. App. 762, 65 S. E. 807; Booth v. Irving Nat. Exch. Co. 116 Md. 668, 82 Atl. 652; McConnon & Co. v. Laursen, 22 N. D. 604, 135 N. W. 213; Furst & B. Mfg. Co. v. Black, 111 Ind. 308, 12 N. E. 504.

The doctrine of notice of acceptance is not applicable to bonds of indemnity or to any form of instrument which is an original undertaking. A bond of indemnity or other original undertaking when executed, delivered, and acted upon becomes effective.

Haupt v. Cravens, 56 Tex. Civ. App. 253, 120 S. W. 541; McIntosh-Huntington Co. v. Reed, 89 Fed. 464; Newcomb Bros. Wall Paper Co. v. Emerson, 17 Ind. App. 482, 46 N. E. 1018; Wise v. Miller, 45 Ohio St. 388, 14 N. E. 218; Hall v. Weaver, 34 Fed. 104; Lane v. Mayer, 15 Ind. App. 382, 44 N. E. 73; Edward B. Bruce Co. v. Lambour, 123 La. 969, 49 So. 659; Haywood v. Townsend, 4 App. Div. 246, 38 N. Y. Supp. 517; Singer Mfg. Co. v. Freerks, 12 N. D. 595, 98 N. W. 705; Lachman v. Block, 47 La. Ann. 505, 28 L.R.A. 255, 15 So. 649; Swope v. Forney, 17 Ind. 385; Saint v. Wheeler & W. Mfg. Co. 95 Ala. 362, 36 Am. St. Rep. 210, 10 So. 539; Fidelity Mut. L. Ins. Co. v. Stegall, 27 Okla. 151, 111 Pac. 389; Wheeler v. Rohrer, 21 Ind. App. 477, 52 N. E. 780; Page v. White Sewing Mach. Co. 12 Tex. Civ. App. 327, 34 S. W. 988; White Sewing Mach. Co. v. Powell, 25 Ky. L. Rep. 94, 74 S. W. 746; Engler v. People's F. Ins. Co. 46 Md. 322; Walker v. Brinkley, 131 N. C. 17, 42 S. E. 333; Klosterman v. Olcott, 25 Neb. 382, 41 N. W. 250; Fiala v. Ainsworth, 63 Neb. 1, 93 Am. St. Rep. 420, 88 N. W. 135; Bank of United States v. Dandridge, 12 Wheat. 64, 6 L. ed. 552; Bird v. Washburn, 10 Pick. 223; Boyd v. Agricultural Ins. Co. 20 Colo. App. 28, 76 Pac. 986.

It is not necessary that the indemnitors should receive any benefit as a consideration to render them liable. The liability incurred by the indemnitee and the harm and injury suffered by it constitute a valid and sufficient consideration for the bond of indemnity.

Chapin v. Merrill, 4 Wend. 657; Emerson v. Slater, 22 How. 28, 16 L. ed. 360.

Mr. Walter McC. Allen argued the cause, and, with Mr. Albert Salzenstein, filed a brief for Charles J. Riefler et al.:

The instrument in suit was a mere offer, and not an absolute and complete obligation under the facts certified in the case.

Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; William Deering & Co. v. Mortell, 21 S. D. 159, 16 L.R.A.(N.S.) 353, 110 N. W. 86; Barnes Cycle Co. v. Reed, 84 Fed. 603, 33 C. C. A. 646, 63 U. S. App. 279, 91 Fed. 481; 20 Harvard L. Rev. 486; Lachman v. Block, 47 La. Ann. 505, 28 L.R.A. 255, 15 So. 649.

The instrument in suit is not a bond of

indemnity. While under the facts certified it does not evidence a completed contract of any kind, yet as an instrument it is, as to the defendants who signed it, as distinguished from Dooling, who did not sign it, one of guaranty, and not of indemnity.

16 Am. & Eng. Enc. Law, 2d ed. p. 168; 22 Cyc. 79, 80; 14 Am. & Eng. Enc. Law, 2d ed. p. 1128; Pingrey, Suretyship & Guaranty, § 4; 20 Cyc. 1397, 1400; Kearnes v. Montgomery, 4 W. Va. 29; Courtis v. Dennis, 7 Met. 518; Hall v. Weaver, 34 Fed. 106; Brandt, Suretyship & Guaranty, § 1; 15 Laws of England (Halsbury) p. 444.

Mutuality of assent is essential to every contract, and requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to make a binding contract. In this case there was no signification of assent or notice of acceptance to the defendant of the instrument in suit, and hence, as said instrument was, under the facts certified, merely offered for acceptance or rejection, it never became a binding obligation, regardless of the question as to whether it was in form an instrument of guaranty or of indemnity.

Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173; Lachman v. Block, 47 La. Ann. 505, 28 L.R.A. 255, 15 So. 649; William Deering & Co. v. Mortell, 21 S. D. 159, 16 L.R.A.(N.S.) 353, 110 N. W. 86; Bishop v. Eaton, 161 Mass. 496, 12 Am. St. Rep. 437, 37 N. E. 665; 22 Cyc. 81; Anson, Contr. 15, 16; Frost v. Standard Metal Co. 215 Ill. 240, 74 N. E. 139, 116 Ill. App. 642; Ruffner v. Love, 33 Ill. App. 601; Newman v. Streator Coal Co. 19 Ill. App. 602; Sears v. Swift & Co. 66 Ill. App. 496; Meyer v. Ruhstadt, 66 Ill. App. 346; Acme Mfg. Co. v. Reed, 197 Pa. 359, 80 Am. St. Rep. 832, 47 Atl. 205.

The fact that the instrument in suit was in the form of a bond under seal does not take it out of the general rule requiring notice of acceptance.

Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686; Hall v. Weaver, 34 Fed. 104; Burke v. Delaney, 153 U. S. 235, 38 L. ed. 700, 14 Sup. Ct. Rep. 816; Jordan v. Davis, 108 Ill. 336; Philadelphia, W. & B. R. Co. v. Howard, 13 How. 334, 14 L. ed. 168; Rountree v. Smith, 152 Ill. 493, 38 N. E. 680; Stanley v. White, 160 Ill. 605, 43 N. E. 729; Ware v. Allen, 128 U. S. 597, 32 L. ed. 565, 9 Sup. Ct. Rep. 174; Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601; 4 Wigmore, Ev. §§ 2408, 2410, 2442; Curry v. Colburn, 99 Wis. 319, 67 Am. St. Rep. 860, 74 N. W. 778.

Mr. Justice Holmes delivered the opinion of the court:

The facts certified are simple. One Dooling, being required to give an official bond, applied in Springfield, Illinois, to an agent of the plaintiff in error, a bonding company having its home office in Baltimore, Maryland, was informed that the company would become his surety only on condition that he furnish indemnity, and was handed a printed form of indemnity bond. The defendants in error, at Dooling's request, signed and sealed this bond for the purposes therein expressed, and authorized Dooling to deliver it to the company through its Springfield agent, which Dooling did. The agent, who is not shown to have had authority to execute bonds, forwarded it for acceptance. The company, relying upon it, became surety for Dooling. One of the recitals of the bond was that the company "has become or is about to become surety, at the request of the said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof." The condition was that Dooling should keep the company indemnified for all loss by reason of its suretyship. A copy of the company's bond was not attached and at the date of the indemnity bond had not been executed. Dooling was not a party to the indemnity bond. The defendants in error received no pecuniary consideration for their act and were not notified of the acceptance of their bond or of the execution of the other by the company. The questions propounded are: [24] "(1) Was the instrument which was signed by Riefler and Hall, and relied on by the company, a completed contract of indemnity or guaranty? (2) Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the company, in accordance with Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686, and Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 29 L. ed. 480, 6 Sup. Ct. Rep. 173? (3) And, if in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?"

If the bond in suit had been delivered directly to the company and had been pronounced satisfactory there would have been no need to notify Riefler and Hall of the company's subsequently executing the Dooling bond. Riefler and Hall assumed an obligation in present words to indemnify

the company against an exactly identified suretyship that the company had gone or was about to go into, as they stated. The company was about to go into it and went into it. If Riefler and Hall had made only a parol offer in the same terms, the company, by becoming surety, would have furnished the consideration that would have converted the offer into a contract; but notice is held necessary in Davis Sewing Mach. Co. v. Richards. If it had been a covenant, the company's act would have satisfied the condition upon which the covenant applied. O'Brien v. Boland, 166 Mass. 481, 483, 44 N. E. 602. As it was a bond, the company's entering into its undertaking in like manner furnished the subject-matter to which the obligation by its terms applied. In the case of either covenant or bond there was no need for notice that an event had happened that the defendants' contract contemplated as sure to happen, if it had not already come to pass.

The only ground for hesitation is that seemingly the bond in suit might have been rejected by the company as unsatisfactory, and that therefore it may be argued [25] that Riefler and Hall were entitled to notice that it had been accepted. But we are of opinion that, in the circumstances of this case, it is reasonable to understand that they took the risk. They were chargeable with notice that by their act their bond had come to the hands of the company. The bond on its face contemplated that the company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee, and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery, by which the obligee might have made it ineffectual, has not been fulfilled. The contract is complete without the notice (Butler's Case, 3 Coke, 25, 26b; Xenos v. Wickham, L. R. 2 H. L. 296, 36 L. J. C. P. N. S. 313, 16 L. T. N. S. 800, 16 Week. Rep. 38, 13 Eng. Rul. Cas. 422; Pollock, Contr. 8th ed. 7, 8), and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied (Bird v. Washburn, 10 Pick. 223). In Davis v. Wells, F. & Co. the guaranty was an open, continuing one up to $10,000, but it was under seal, and was held binding, although additional reasons were advanced.

We answer the first question: Yes.

Mr. Justice McKenna dissents.

60 L. ed.

[26] ALBERT STEINFELD, R. K. Shelton, J. N. Curtis, Silver Bell Copper Company, and Mammoth Copper Company, Appts., and Plffs. in Err.,

v.

LOUIS ZECKENDORF and Hiram W. Fenner, Receiver.

(See S. C. Reporter's ed. 26-31.)

Appeal — mode of review.

1. Writ of error is the only mode of reviewing in the Federal Supreme Court a decree of the supreme court of the state of Arizona which affirmed a decree of the trial court, entered pursuant to the mandate of the Federal Supreme Court, which had previously reversed a decree in the case on an appeal taken while Arizona was still a territory, and had remanded the case to the state court as successor of the territorial court for such further proceedings as might not be inconsistent with the opinion of the Federal Supreme Court.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Appeal — mandate — compliance.

2. The only question open in the Federal Supreme Court when reviewing a judgment entered pursuant to the mandate of that court on a prior appeal which remanded the case "for such further proceedings as may not be inconsistent with the opinion of this court" is whether or not the judgment below is inconsistent with such opinion; and where it plainly is not, there is no reason for disturbing the judgment.

[For other cases, see Appeal and Error, 5565-5583, 5599-5604, in Digest Sup. Ct. 1908.]

[No. 239.]

Argued October 19, and 20, 1915. Decided November 1, 1915.

APPEAL from, and IN ERROR to, the Supreme Court of the State of Arizona to review a decree which, on a third appeal, dismissed an appeal from a decree of the Superior Court in and for Pima County, in that state, entered pursuant to the mandate of the Federal Supreme Court on a former appeal. Appeal dismissed. Judgment affirmed on writ of error.

See same case below, 15 Ariz. 335, 138 Pac. 1044.

The facts are stated in the opinion.

Messrs. James M. Beck and Francis J. Heney argued the cause, and, with Mr. Eugene S. Ives, filed a brief for appellants and plaintiffs in error:

The jurisdiction of this court on the former appeal was limited to the single question of law, Do the findings of fact support the judgment? And consequently

NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

that was the subject-matter of the proceeding here.

Zeckendorf v. Steinfeld, 225 U. S. 445, 56 L. ed. 1156, 32 Sup. Ct. Rep. 728; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 1131, 31 Sup. Ct. Rep. 27; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 513, 33 L. ed. 436, 10 Sup. Ct. Rep. 177.

This court, in the exercise of such appellate jurisdiction, cannot and will not supply, by intendment or inference, any missing material fact, even if there were sufficient evidence or sufficient probative facts in the findings, from which the lower court might have inferred such missing material fact. To do so would be to usurp the functions of the trial court, whose indispensable duty it is to make that inference of fact for itself. This well-settled principle of law applies in all classes of cases in which the appellate jurisdiction of this court is limited by regulatory acts of Congress to questions of law only. No distinction is made on account of the nature or character of the case or of the method by which it was tried in the court of original jurisdiction, or of the name applied to the procedure by which it reached this court for review. The rule applies alike to appeals from Federal courts in admiralty cases; to writs of error to Federal courts in common-law actions, whether tried with or without a jury; and to appeals from the court of claims; and to writs of error to the highest appellate court of a state; as well as to both appeals from and writs of error to territorial supreme courts.

Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 27 L. ed. 337, 1 Sup. Ct. Rep. 582; Burr v. Des Moines R. & Nav. Co. 1 Wall. 99, 17 L. ed. 561; Hecht v. Boughton, 105 U. S. 235, 20 L. ed. 1018; Lincoln v. French, 105 U. S. 614, 26 L. ed. 1189; French v. Edwards, 21 Wall. 147, 22 L. ed. 534; Ex parte French, 91 U. S. 423, 23 L. ed. 249; Ex parte Medway, 23 Wall. 504, 23 L. ed. 160; Dower v. Richards, 151 U. S. 659, 38 L. ed. 306, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Wilson v. Merchants' Loan & T. Co. 183 U. S. 121, 46 L. ed. 113, 22 Sup. Ct. Rep. 55; Raimond v. Terrebonne Parish, 132 U. S. 192, 33 L. ed. 309, 16 Sup. Ct. Rep. 57; Lehnen v. Dickson, 148 U. S. 71, 37 L. ed. 373, 13 Sup. Ct. Rep. 481; Barnes v. Williams, 11 Wheat. 415, 6 L. ed. 508; Powers v. United States, 56 C. C. A. 128, 119 Fed. 563; The E. A. Packer, 140 U. S. 360, 35 L. ed. 453, 11 Sup. Ct. Rep. 794; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 1131, 31 Sup. Ct. Rep. 27; Idaho & O. Land Improv. Co. v. Bradford, 132 U. S. 513, 33 L. ed. 436, 10 Sup. Ct. Rep. 177.

The case of French v. Edwards, 21 Wall. 147, 22 L. ed. 534 (as construed by this court in the case of Ex parte French, 91 U. S. 423, 23 L. ed. 249), and the case of Ex parte Medway, 23 Wall. 504, 23 L. ed. 160, are on all fours with the case at bar.

The mandates of this court are to be interpreted according to the subject-matter of the proceeding here, and, if possible, so as not to cause injustice.

Wayne County v. Kennicott, 94 U. S. 499, 24 L. ed. 260.

Whenever a trial court fails to find any material fact by reason of a wrong theory of the case, adopted either by itself or an intermediate appellate court, the court of last resort, if it reverses the judgment, should direct or at least authorize a new trial to prevent injustice to appellee or defendant in error.

Edmonston v. McLoud, 16 N. Y. 543; Griffin v. Marquaidt, 17 N. Y. 28; Ball v. Rankin, 23 Okla. 801, 101 Pac. 1105.

When an appellate court, on the evidence as it is presented in the record, or on findings of fact which are conclusive upon it, reverses, generally, the judgment of the lower court, an appellee or defendant in error is entitled as a matter of right to a retrial of the case, and the mandate of this court should be interpreted accordingly.

Lincoln v. French, 105 U. S. 614, 26 L. ed. 1189; Elliott, App. Proc. § 580; Talcott v. Delta County Land & Cattle Co. 19 Colo. App. 11, 73 Pac. 256; Falkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386; Stearnes v. Aguirre, 7 Cal. 443; Prentice v. Crane, 240 Ill. 238, 88 N. E. 654; Ryan v. Tomlinson, 39 Cal. 639.

Should the court, however, conclude that its opinion and decision on the former appeal must be interpreted as in effect as instruction to the trial court to enter judgment against Steinfeld on the first cause of action, then, nevertheless, that judgment is erroneous, and is too large.

Re Washington & G. R. Co. 140 U. S. 92, 35 L. ed. 340, 11 Sup. Ct. Rep. 673; Himely v. Rose, 5 Cranch, 313, 3 L. ed. 111; McMannomy v. Chicago, D. & V. R. Co. 167 Ill. 497, 47 N. E. 712.

Messrs. Edwin A. Meserve and Frank H. Hereford argued the cause and filed a brief for appellee and defendant in error Louis Zeckendorf:

When a case has once been decided by this court on appeal and remanded, whatever was before this court and disposed of by its decree is considered as finally settled.

Re Potts, 166 U. S. 263–268, 41 L. ed. 994–996, 17 Sup. Ct. Rep. 520; Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1044; The Lady Pike (Pearce v. Germania Ins. Co.) 96 U. S. 461, 24 L. ed. 672; Re Sanford

Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Wayne County v. Kennicott, 94 U. S. 499, 24 L. ed. 260; Sherman v. Ward, 9 Ariz. 327, 83 Pac. 356; Snyder v. Pima County, 6 Ariz. 41, 53 Pac. 6; Humphrey v. Baker, 103 U. S. 736, 26 L. ed. 456; Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; Kingsbury v. Buckner, 134 U. S. 671, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 487.

So conclusive are all matters, whether of law or of fact, presented to this court and decided by it on appeal, that it will not permit even the vital question of jurisdiction to be raised in a case after it has decided it and by mandate sent it back to the lower court.

Skillern v. May, 6 Cranch, 267, 3 L. ed. 220, first appeal, 4 Cranch, 137, 2 L. ed. 574; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611.

There was no intimation in the opinion of this court in this case of an intention to authorize or grant a new trial, or to authorize in any other way the taking of new testimony. Under similar circumstances this court has repeatedly asserted that appellants have no such right.

Gaines v. Rugg, supra; 2 Enc. U. S. Sup. Ct. Rep. 412–415.

And even when this court remanded a case with instructions to grant a new trial, it held that the lower court had no power to consider at such new trial either law or facts decided in the case by this honorable court.

Wayne County v. Kennicott, 94 U. S. 498, 24 L. ed. 260.

If authority were needed to show that the mandate in this case is not open to any such construction as appellants attempt to place upon it, we cite the language of the mandate of this court on first appeals, and the interpretation of that language by this court on second appeals in the following cases:

C. & A. Potts & Co. v. Creager, 155 U. S. 597–610, 39 L. ed. 275–280, 15 Sup. Ct. Rep. 194, 2d appeal, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; Stewart v. Salamon, 94 U. S. 434, 437, 24 L. ed. 275, 276, 2d appeal, 97 U. S. 361–365, 24 L. ed. 1044–1046; The Lady Pike, 21 Wall. 1–17, 22 L. ed. 499–504, 2d appeal, 96 U. S. 461, 24 L. ed. 672; Sanford Fork & Tool Co. v. Howe, B. & Co. 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621, 2d appeal, 160 U. S. 247–259, 40 L. ed. 414–417, 16 Sup. Ct. Rep. 291; Kennicott v. Wayne County, 16 Wall. 452–471, 21 L. ed. 319–322, 2d appeal, 94 U. S. 499, 24 L. ed. 260; Camou v. United States, 171 U. S. 277, 43 L. ed. 163, 18 Sup. Ct. Rep. 855, 2d appeal, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 505.

There is no distinction between cases here on appeal where the facts are presented by findings in the nature of a special verdict from those where the facts are brought up by a full transcript of the evidence. In support of this statement we cite the following cases coming up from territorial courts and from the court of claims, in which cases this court, after a consideration of the case on appeal, upon the law and facts of the case, has reversed the action of the lower court, and instructed the lower court to enter a final and definite judgment upon the law and the facts:

Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Ivinson v. Hutton, 98 U. S. 79, 25 L. ed. 66; First Nat. Bank v. Yankton County, 101 U. S. 129, 25 L. ed. 1046; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Stoffela v. Nugent, 217 U. S. 499, 54 L. ed. 856, 30 Sup. Ct. Rep. 600; Quinn v. United States, 99 U. S. 30, 25 L. ed. 269; Union P. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274; United States v. Perryman, 100 U. S. 235, 25 L. ed. 645; United States v. Murray, 100 U. S. 536, 25 L. ed. 756; United States v. Shewsbury, 90 U. S. 508, 23 L. ed. 78; United States v. Landers, 92 U. S. 77, 23 L. ed. 603; United States v. Diekelman, 92 U. S. 520, 23 L. ed. 742; Garfielde v. United States, 93 U. S. 242, 23 L. ed. 779; Lake Superior & M. R. Co. v. United States, 93 U. S. 442, 23 L. ed. 965.

Mr. Selim M. Franklin argued the cause, and, with Mr. Edwin F. Jones, filed a brief for appellee and defendant in error Hiram W. Fenner:

As the state supreme court found that the judgment of the superior court was in accordance with the mandate of this court, and its own mandate, the appeal from that judgment was properly dismissed.

Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1044; Humphrey v. Baker, 103 U. S. 736, 26 L. ed. 456; Mackall v. Richards, 116 U. S. 45, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; Kingsbury v. Buckner, 134 U. S. 671, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31–38, 37 L. ed. 986–989, 14 Sup. Ct. Rep. 4; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 487.

The findings of fact of the territorial

court, made under the provisions of this act of Congress, are conclusive upon this court.

Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1, 19, 41 L. ed. 327, 334, 17 Sup. Ct. Rep. 7; Harrison v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129; Eagle Min. & Improv. Co. v. Hamilton, 218 U. S. 513, 54 L. ed. 1131, 31 Sup. Ct. Rep. 27; Gildersleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282; Idaho & O. Land Improv. Co. v. Bradbury, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; Eilers v. Boatman, 111 U. S. 356, 28 L. ed. 454, 4 Sup. Ct. Rep. 432, 15 Mor. Min. Rep. 471; Zeckendorf v. Johnson, 123 U. S. 617, 31 L. ed. 277, 8 Sup. Ct. Rep. 261.

The findings of fact so made by the supreme court of the territory in accordance with the act of Congress, being conclusive on this honorable court, must necessarily be conclusive on all of the courts subordinate to this court.

A second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered or determined on the first appeal or writ of error.

Re Potts, 166 U. S. 263-268, 41 L. ed. 994-996, 17 Sup. Ct. Rep. 520; Re Sanford Fork & Tool Co. 160 U. S. 247-259, 40 L. ed. 414-417, 16 Sup. Ct. Rep. 291; Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647.

Mr. Justice Holmes delivered the opinion of the court:

This case first came here by appeal from the supreme court of Arizona while Arizona was still a territory. Before the decision by this court, Arizona became a state, and the judgment, so far as now in controversy, having been reversed, the case was remanded "for such further proceedings as may not be inconsistent with the opinion of this court,"—the formula usual in cases coming from a state. 225 U. S. 445, 459, 56 L. ed. 1156, 1164, 32 Sup. Ct. Rep. 728. The ground for the present attempt to reopen the merits is that the state court has misinterpreted the mandate that it received. Martin v. Hunter, 1 Wheat. 304, 354, 4 L. ed. 97, 109. See Julian v. Central Trust Co. 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399.

The case is stated at length in the former decision. All [29] that is necessary to explain the present question may be put in shorter form. The suit was brought by Zeckendorf as a stockholder in the Silver Bell Mining Company to recover money alleged to belong to the company and appropriated by Steinfeld. There was a further cause of action alleged, but that has been disposed of. The money represents the proceeds of the Silver Bell mine and a group of mines adjoining the Silver Bell and purchased by Steinfeld, it was assumed by the parties, as trustee for the company. Steinfeld sold all the mines for $515,000, $115,000 cash, $400,000 in notes for $100,000 each, and his action was confirmed. At the time of the conveyance to the purchaser it was agreed by a contract in writing that the purchase price should belong to the Silver Bell Copper Company, and in the same instrument it was provided that the four notes should be held by Steinfeld as trustee and as security against his personal obligations in the matter. Steinfeld received the cash and the proceeds of the first two notes, paid certain liabilities of the company, and deposited the residue, except $50,000 attached in his hands, in the Bank of California in his own name.

In December, 1903, Zeckendorf brought a suit to restrain the turning over of the deposited funds by the bank to Steinfeld, and on December 26, 1903, a stockholders' meeting was held at which all parties were represented and a vote of rescission was passed upon which the present question arises. For Steinfeld it is argued that the whole agreement was rescinded. The other side contends that the rescission went only to the clause giving Steinfeld a right to the personal custody of the money. The directors, consisting of Steinfeld and his creatures, although not understanding the rescission to go beyond the indemnity clause, passed a vote behind Zeckendorf's back under which the proceeds of the sale were divided and one half given to Steinfeld. After the judgment of this court, the state court conceived itself bound by the mandate to [30] enter judgment for the plaintiff, and did so. It now is contended on Steinfeld's part that he never has had his day in court to present his case; for, it is said, the territorial court simply ruled as matter of law that the vote of rescission rescinded the contract *in toto*, and this court, if it thought, as it did, that the ruling was wrong, properly could do no more than to send the case back for a finding of fact as to the true purport of the vote. If this should be done, Steinfeld alleges that he has evidence that he wishes to present.

A court is not necessarily precluded from construing a document because the construction is affected by facts and circumstances not open to dispute. But the question now is not whether this court was right or wrong, but what it did. The man-

date issued within the memory of present members of the court, and there is no doubt that the court below did what we intended that it should. In the time of Edward I., Hengham interrupted discussion of the Stat. Westm. II., by saying, "We know it better than you, for we made it." *Ne glosez point le Statut; nous le savoms meuz de vous, qar nous les fcimes.* Y. B. 33 Edw. I. Mich. Rolls ed. 83. However it may be as to a statute, the objection seems reasonable when applied to a mandate that has been followed as it was meant, and the following words, among others, show clearly enough that we expressed our intent: "In our view the facts found show that . . . the subsequent attempt to rescind the action by which the proceeds of the sale of the English group of mines became the property of the Silver Bell Company, and to give the proceeds to Steinfeld, must be held for naught." 225 U. S. 450. If the territory had not become a state, a judgment would have been ordered. The more reserved phrase was used by reason of the change, but with no change in what consistency with our opinion was deemed to require.

We see no reason for supposing that cases were intended [31] to come to this court from Arizona in other than the usual form. Therefore in any event this appeal would have to be dismissed. To meet this possibility a writ of error was allowed at the last moment. We have considered the record as if made up under the writ. But, apart from technical objections that have been urged, the only question that would be open is whether the judgment below was inconsistent with the opinion of this court; and, as it very plainly is not, there is no reason for disturbing it. Our mandate was not concerned with the allowance of attorneys' fees and some other matters that were argued, and therefore they present no Federal question and need not be considered.

Appeal dismissed.

Judgment affirmed.

MANILA INVESTMENT COMPANY et al., Appts.,
v.
PARK TRAMMELL et al., as Trustees, etc.

(See S. C. Reporter's ed. 31–33.)

Federal courts — jurisdiction — frivolous Federal question.

No real and substantial controversy involving the construction or effect of the Federal Constitution which would support the jurisdiction of a Federal district court is presented by a bill which seeks to establish a trust in real property upon the ground that the board of trustees of the internal improvement fund of Florida, after having contracted to convey the land in question to complainants, afterwards, by formal resolution, repudiated its former action, refused to recognize the alleged trust, declared complainants' title to be null and void, and conveyed a part of the land to others, which action by such board as an agency of the state is asserted to amount to a taking of complainants' property without due process of law, contrary to U. S. Const., 14th Amend., since the allegations relied upon to give jurisdiction show a breach of contract merely, and bring the case within the principles of prior decisions of the Federal Supreme Court.

[For other cases, see Courts, 489–494, in Digest Sup. Ct. 1908.]

[No. 250.]

Submitted October 12, 1915. Decided November 1, 1915.

APPEAL from the District Court of the United States for the Southern District of Florida to review a decree which dismissed, for want of jurisdiction, the bill in a suit to establish a trust in real property. Affirmed.

Messrs. **N. B. K. Pettingill** and **Arthur F. Odlin** submitted the cause for appellants:

It has often happened that jurisdiction has been retained to decide a doubtful Federal question even when, upon full consideration, complainant's rights have been determined to be without the constitutional protection claimed.

Field v. Barber Asphalt Paving Co. 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; Fayerweather v. Ritch, 195 U. S. 276, 299, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; Siler v. Louisville & N. R. Co. 213 U. S. 175, 190, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451.

Whether or not, upon full consideration, this court may decide appellants to be entitled to the protection of the "due-process" clause of the 14th Amendment, the denial of the right to such protection should not be affirmed without that full consideration.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 49, 54 L. ed. 921, 926, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676. See also Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757.

The allegations of our bill bring the case well within a long line of the decisions of this court wherein it has been held that

similar action by administrative boards, or other governmental agencies, constitute a wrong within the inhibition of the 14th Amendment.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 663, 22 L. ed. 455, 461; Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. ed. 616, 618; Cole v. LaGrange, 113 U. S. 1, 4, 28 L. ed. 896, 897, 5 Sup. Ct. Rep. 416; Cornelius v. Kessel, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; Pennoyer v. McConnaughty, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Scott v. McNeal, 154 U. S. 34, 50, 38 L. ed. 896, 903, 14 Sup. Ct. Rep. 1108; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 235, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 81, 46 L. ed. 815, 22 Sup. Ct. Rep. 585; Walla Walla v. Walla Walla Water Co. 172 U. S. 7, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

Mr. Thomas F. West, Attorney General of Florida, and Mr. E. J. L'Engle submitted the cause for appellees. Mr. P. H. Odom was on the brief:

It is necessary that the bill should clearly state and show that a Federal question is actually involved. The mere suggestion that such a question is involved or likely to be involved is not sufficient. The bill must state in positive language facts showing the manner and connection in which the Federal question has arisen.

Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; 4 Enc. U. S. Sup. Ct. Rep. 992, note 25.

The facts must clearly show the nature of the suit, and it must plainly appear that the action arises under the Constitution, laws, or treaties of the United States. There must be a real and substantial dispute as to the effect or construction of the Constitution or of some treaty of the United States upon which the determination of the case depends.

McCain v. Des Moines, 174 U. S. 169, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905.

The mere averment that a question exists under the Constitution of the United States is not sufficient to give jurisdiction, where the question is so wanting in merit as to be frivolous or without any support whatever.

Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

The repudiation by a public officer of a contract or grant, even if based upon the unconstitutionality of a statute, as the bill alleges, is not a denial of due process of law within the purview of the Constitution. All the rights of the appellants which have existed still exist, and can be enforced in any court of competent jurisdiction.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Dawson v. Columbia Ave Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; McCormick v. Oklahoma City, 236 U. S. 657, 59 L. ed. 771, 35 Sup. Ct. Rep. 455; Ramapo Water Co. v. New York, 236 U. S. 579, 59 L. ed. 731, 35 Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544, 31 Sup. Ct. Rep. 452.

The mere violation of law by a state agency is not a denial of due process of law.

Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Missouri v. Dockery, 191 U. S. 165, 48 L. ed. 133, 63 L.R.A. 571, 24 Sup. Ct. Rep. 53; 5 Enc. U. S. Sup. Ct. Rep. 545, notes 4 and 5.

Memorandum opinion by Mr. Justice Day, by direction of the court:

This case was begun in the district court of the United States for the southern district of Florida, upon a bill praying to have the title to certain lands decreed to be held in trust for complainants by the board of trustees of the internal improvement fund of Florida, and to recover lands deeded to others, but likewise held in trust for com-

plainants. The court below dismissed the bill for want of jurisdiction.

An examination of the bill shows that the ground of recovery rests upon the allegation that the trustees contracted to convey the lands in question to the complainants, and afterwards, by formal resolution, the board repudiated its former action, and refused to recognize the alleged trust, and declared the complainants' title null and void. Complainants contend that this action by the trustees, as an agency of the state, in repudiation of its former action, and the conveyance of part of the land to others, in violation of the trust, constituted a taking of its property without due process of law, in violation of the provisions of the 14th Amendment. This is the only ground of Federal jurisdiction insisted upon.

The case presented no real and substantial controversy involving the construction or effect of the Federal Constitution. The allegations relied upon to give jurisdiction show a breach of contract merely, and bring the case within the principles decided by this court in St. Paul Gaslight [33] Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; Shawnee Sewerage Drainage Co. v. Stearns, 220 U. S. 462, 55 L. ed. 544, 31 Sup. Ct. Rep. 452; McCormick v. Oklahoma City, 236 U. S. 657, 59 L. ed. 771, 35 Sup. Ct. Rep. 455.

Affirmed.

WILLIAM TRUAX, Sr., Wiley E. Jones, Attorney General of the State of Arizona, and W. G. Gilmore, County Attorney of Cochise County, Arizona, Appts.,
v.
MIKE RAICH.

(See S. C. Reporter's ed. 33–44.)

States — immunity from suit — suit against state officers.

1. A suit by an alien to restrain the attorney general and county attorney from enforcing to his injury the Arizona anti-alien labor law of December 14, 1914, which he asserts is repugnant to the Federal Constitution, cannot be regarded as a suit against the state.

[For other cases, see States, IX. c, 2, in Digest Sup. Ct. 1908.]

Injunction — restraining criminal proceedings.

2. Equity has jurisdiction to restrain the criminal prosecution of an employer under the Arizona anti-alien labor law of December 14, 1914, at the instance of an alien employee who alleges that the act violates the Federal Constitution and that its enforcement will result in his immediate discharge from employment, although such employment may be one at will, rather than for a term.

[For other cases, see Injunction, I. d, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — discrimination against aliens — classification.

3. The discrimination against aliens lawfully resident in the state, which is produced by the provisions of Ariz. act of December 14, 1914, that every employer of more than five workers at any one time, "regardless of kind or class of work or sex of workers shall employ not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof," renders the statute invalid under U. S. Const., 14th Amend., as denying the equal protection of the laws, and such statute cannot be justified as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction.

[For other cases, see Constitutional Law, IV. a, 2, b, in Digest Sup. Ct. 1908.]

[No. 361.]

Argued October 15, 1915. Decided November 1, 1915.

APPEAL from the District Court of the United States for the District of Arizona to review a decree enjoining the enforcement of the Arizona anti-alien labor law. Affirmed.

See same case below, 219 Fed. 273.

The facts are stated in the opinion.

Mr. Leslie C. Hardy and Mr. Wiley E. Jones, Attorney General of Arizona, argued

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NOTE.—Generally, on suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; and Hans v. Louisiana, 33 L. ed. U. S. 842.

On suits against state officers as suits against a state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

On injunction against criminal proceedings—see notes to Crighto v. Dahmer, 21 L.R.A. 84; Hall v. Dunn, 25 L.R.A.(N.S.) 193; and Denton v. McDonald, 34 L.R.A. (N.S.) 454.

As to power of state, under the 14th Amendment to the United States Constitution, to deny to aliens the right to engage in a lawful occupation—see notes to Com. v. Hana, 11 L.R.A.(N.S.) 799; People v. Crane, L.R.A.1916D, 569.

the cause, and, with Messrs. George W. Harben, J. Addison Hicks, and W. B. Cleary, filed a brief for appellants:

The servant cannot complain for the master of a threatened injury to the latter by public officers of the state of Arizona, and to this extent an injunction against the institution of criminal proceedings against the master at the instance of the servant is contrary to the powers of a court of equity.

McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498.

The law in question is a valid exercise of the police power of the state because it is a law enacted to preserve the safety and welfare of the state and its citizens.

Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Greer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Noble State Bank v. Haskell, 219 U. S. 575, 55 L. ed. 341, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 299.

Mr. **Alexander Britton** argued the cause, and, with Messrs. Evans Browne and Francis W. Clements, filed a brief for appellee:

The 14th Amendment to the Constitution of the United States is not confined to the protection of citizens of the United States, but is universal in its application to all citizens within the territorial jurisdiction without regard to any difference of race, color, or nationality, and the promise of equal protection of the law is equivalent to the pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S. 356–369, 30 L. ed. 220–226, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989.

It is equally true that among the rights so guaranteed to resident aliens, as well as citizens, is that of freely contracting to render service and perform labor, and to follow any ordinary lawful vocation. No impediment should be interposed to these rights of everyone, except such as are applied to the same pursuits by others under like circumstances and conditions.

People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746–762, 28 L. ed. 585–588, 4 Sup. Ct. Rep. 652; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Powell v. Pennsylvania, 127 U. S. 678–684, 32 L. ed. 253–256, 8 Sup. Ct. Rep. 992, 1257; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240.

The law of Arizona contravenes the 14th Amendment to the Constitution of the United States, and is not a proper exercise of the police power of the state.

People v. Crane, 165 App. Div. 449, 150 N. Y. Supp. 933; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543.

This is not necessarily a suit in equity to enjoin a criminal proceeding, but in any event it is fully justified in order to prevent the invasion of the rights of property of appellee by the enforcement of an unconstitutional law, the enforcement of which works a direct injury and irreparable harm to him.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Cummings v. Missouri, 4 Wall. 320, 18 L. ed. 362; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550.

Mr. Justice **Hughes** delivered the opinion of the court:

Under the initiative provision of the Constitution of Arizona (art. 4, § 1) there was adopted the following measure which was proclaimed by the governor as a law of the state on December 14, 1914:

An Act to Protect the Citizens of the United States in Their Employment against Noncitizens of the United States, in Arizona, and to Provide Penalties and Punishment for the Violation Thereof.

Be it enacted by the People of the State of Arizona:

Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the state of Arizona, regardless of

kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some subdivision thereof.

Sec. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred ($100) dollars, and imprisoned for not less than thirty (30) days.

Sec. 3. Any employee who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred ($100) dollars, and imprisoned for not less than thirty (30) days. Laws of Arizona, 1915. Initiative Measure, p. 12.

[36] Mike Raich (the appellee), a native of Austria, and an inhabitant of the state of Arizona, but not a qualified elector, was employed as a cook by the appellant William Truax, Sr., in his restaurant in the city of Bisbee, Cochise county. Truax had nine employees, of whom seven were neither "native born citizens" of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the district court of the United States for the district of Arizona, asserting, among other things, that the act denied to him the equal protection of the laws and hence was contrary to the 14th Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the state, and W. G. Gilmore, the county attorney of Cochise county, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms, and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction *pendente lite*. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the county attorney of Cochise county, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The [37] defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the state of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties, and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by § 266 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243]. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in Ex parte Young, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which has repeatedly been followed. Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; Hopkins v. Clemson Agri. College, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; Philadelphia Co. v. Stimson, 223 U. S. 607, 620, 56 L. ed. 572, 576, 32 Sup. Ct. Rep. 340; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312.

It is also settled that while a court of equity, generally speaking, has "no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors" (Re Sawyer, 124 U. S. 200, 210, 31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction

obtains, and equitable jurisdiction exists to restrain criminal prosecutions [38] under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, supra; Philadelphia Co. v. Stimson, 223 U. S. 621, 56 L. ed. 577, 32 Sup. Ct. Rep. 340. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. Moran v. Dunphy, 177 Mass. 485, 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Berry v. Donovan, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; Brennan v. United Hatters, 73 N. J. L. 729, 743, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; London Guarantee & Acci. Co. v. Horn, 101 Ill. App. 355, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; Blumenthal v. Shaw, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954. It is further urged that the complainant cannot sue save to redress his own grievance (McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 162, 59 L. ed. 169, 174, 35 Sup. Ct. Rep. 69); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the [39] alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question, then, is whether the act assailed is repugnant to the 14th Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. (See Gegiow v. Uhl, decided October 25, 1915 [239 U. S. 3, ante, 114, 36 Sup. Ct. Rep. 2].) Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, "any person within its jurisdiction," as it has frequently been held, includes aliens. "These provisions," said the court in Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064 (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." See also Wong Wing v. United States, 163 U. S. 228, 242, 41 L. ed. 140, 145, 16 Sup. Ct. Rep. 977; United States v. Wong Kim Ark, 169 U. S. 649, 695, 42 L. ed. 890, 907, 18 Sup. Ct. Rep. 456. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against [40] both aliens and the citizens of other states. Thus in McCready v. Virginia, 94 U. S. 391, 396, 24 L. ed. 248, 249, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in Patsone v. Pennsylvania, 232 U. S. 138, 145, 146, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the

state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Blythe v. Hinckley, 180 U. S. 333, 341, 342, 45 L. ed. 557, 562, 563, 21 Sup. Ct. Rep. 390); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time, "regardless of kind or class of work, or sex of workers," shall employ "not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof." It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employees. The purpose of an act must be found in its natural operation and effect (Henderson v. New York [Henderson v. Wickham] 92 U. S. 259, 268, 23 L. ed. 543, 547; Bailey v. Alabama, 219 U. S. 219, 244, 55 L. ed. 191, 202, 31 Sup. Ct. Rep. 145), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "an act to protect the citizens of the United States in their employment against noncitizens [41] of the United States, in Arizona." As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalized citizens who, by reason of change of residence, might not be at the time qualified electors in any subdivision of the United States; but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that "the employment of aliens, unless restrained, was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere [42] fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. Fong Yue Ting v. United States, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor;" that is, the restriction is limited to those businesses in which more than five workers are employed, and to the ratio fixed. It is em-

phasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44. If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage [43] less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (Consolidated Coal Co. v. Illinois, 185 U. S. 203, 207, 46 L. ed. 872, 875, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 551, 53 L. ed. 315, 321, 29 Sup. Ct. Rep. 206; Miller v. Wilson, 236 U. S. 373, 384, 59 L. ed. 628, 632, 35 Sup. Ct. Rep. 342); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law.

The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention, in view of the invalidity of the act under the 14th Amendment.

Order affirmed.

Mr. Justice McReynolds, dissenting:

I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against [44] a state, to which the 11th Amendment declares "the judicial power of the United States shall not be construed to extend." Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. If Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away

That the challenged act is invalid I think admits of no serious doubt.

RIO GRANDE WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
THOMAS B. STRINGHAM et al.

(See S. C. Reporter's ed. 44–48.)

Error to state court — final judgment.

1. A judgment of the highest state court, which reversed a judgment below in favor of defendants in a suit by a railway company to quiet title to a strip of land claimed and used by it as a right of way under the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat. 1913, § 4921), and to which defendants asserted title under a patent to a placer mining claim, and remanded the cause with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question 100 feet wide on each side of the center of the track," is a final judgment within the meaning of the Judicial Code, § 237, governing writs of error

Note.—As to when judgment sought to be reviewed in Federal Supreme Court is that of highest state court—see note to Norfolk & S. Turnp. Co. v. Virginia, 56 L. ed. U. S. 1082.

As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

As to land grants to railroads generally —see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

from the Federal Supreme Court to state courts.

[For other cases, see Appeal and Error, I. d, 24, in Digest Sup. Ct. 1908.]

Error to state court — decision of Federal question.

2. A decision of the highest state court, which, on a second appeal, affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the Federal question relied upon to confer jurisdiction was involved in the first decision, and that decision was final, in the sense of the Judicial Code, § 237, governing writs of error to state courts.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Public lands — railway land grant — right of way.

3. Neither a mere easement nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the railway company ceases to use or retain the land for the purpose for which it is granted, carrying with it the incidents and remedies usually attending the fee,— is what was granted by the railway right-of-way act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat. 1913, § 4921), which grants to a railway company complying with its requirements "a right of way," and declares that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

[For other cases, see Public Lands, 320-329, in Digest Sup. Ct. 1908.]

[Nos. 4 and 5.]

Submitted October 19, 1915. Decided November 1, 1915.

IN ERROR to the Supreme Court of the State of Utah to review a decree which reversed a decree of the District Court of Salt Lake County, in that state, in favor of defendants in a suit to quiet title, and remanded the case with a direction to enter a judgment for plaintiff. Affirmed.

Also IN ERROR to the Supreme Court of the State of Utah to review a decree which, on a second appeal, affirmed a decree of the District Court of Salt Lake County, in that state, in favor of plaintiff in the same suit. Dismissed for want of jurisdiction.

See same case below, No. 4, 38 Utah, 113, 110 Pac. 868; No. 5, 39 Utah, 236, 115 Pac. 967.

The facts are stated in the opinion.

Messrs. Waldemar Van Cott, E. M. Allison, Jr., and William D. Riter submitted the cause for plaintiff in error.

No appearance for defendants in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a suit to quiet the title to a strip of land claimed and used by the plaintiff as a railroad right of way under the act of March 3, 1875, chap. 152, 18 Stat. at L. 482, Comp. Stat. 1913, § 4921, and to which the defendants asserted title under a patent for a placer mining claim. At the trial the facts were specially found and judgment for the defendants was entered upon the findings. In reviewing that judgment, the supreme [46] court of the state, accepting the findings below, held that the plaintiff, in virtue of proceedings had in the Land Department under the right-of-way act while the land was yet public, acquired a right of way 200 feet wide through the lands afterwards embraced in the mining claim, and that the defendants' title under the placer patent was subject to this right of way, and thereupon reversed the judgment and remanded the case with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question 100 feet wide on each side of the center of the track." 38 Utah, 113, 110 Pac. 868. Acting upon this direction, the trial court vacated its prior judgment and entered another, adjudging the plaintiff to be "the owner of a right of way" through the mining claim 100 feet wide on each side of the center line of the railroad, declaring the plaintiff's title to such right of way good and valid, and enjoining the defendants from asserting any claim whatever to the premises, or any part thereof, adverse to the plaintiff's "said right of way." The plaintiff again appealed, insisting that it was only adjudged to be the owner of a right of way when, according to the true effect of the right-of-way act, it had a title in fee simple, as was asserted in its complaint. But the judgment was affirmed, the court saying (39 Utah, 230, 115 Pac. 967):

"If counsel for appellant thought that this court, in the prior opinion, did not correctly define and determine the extent of appellant's rights to the land in dispute, or did not fully safeguard its rights as defined and adjudged, they should have filed a petition for a rehearing. This they did not do. The conclusions of law and judgment having been drawn and entered in conformity with the decision of this court, we are precluded from further considering the case. The former decision became, and is, the law of the case, and this court, as well as the litigants, are bound thereby."

[47] Being in doubt which of the judgments of the appellate court should be brought here for review to present properly the question respecting the nature of its title, the plaintiff concluded to bring up both, each by a separate writ of error.

Manifestly the first judgment was final

within the meaning of Judicial Code, § 237 [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214]. It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court. Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881. And as the question sought to be presented arises upon the first judgment,—it being final in the sense of § 237,—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here. See Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 Sup. Ct. Rep. 430.

What the act relied upon grants to a railroad company complying with its requirements is spoken of throughout the act as a "right of way;" and by way of qualifying future disposals of lands to which such a right has attached, the act declares that "all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee. New Mexico v. United States Trust Co. 172 U. S. 171, 183, 43 L. ed. 407, 411, 19 Sup. Ct. Rep. 128; Northern P. R. Co. v. Townsend, 190 U. S. 267, 271, 47 L. ed. 1044, 1046, 23 Sup. Ct. Rep. 671; United States v. Michigan, 190 U. S. 379, 398, 47 L. ed. 1103, 1110, 23 Sup. Ct. Rep. 742; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 570, 49 L. ed. 312, 323, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517. [48] The judgment under review does not in words so characterize the plaintiff's right, nor was it essential that it should do so. It describes the right in the exact terms of the right-of-way act, and evidently uses those terms with the same meaning they have in the act. So interpreting the judgment, as plainly must be done, we think it accords to the plaintiff all to which it is entitled under the act.

In No. 4, judgment affirmed.

In No. 5, writ of error dismissed.

HENRY BRIGGS, Appt.,
v.
UNITED SHOE MACHINERY COMPANY.

(See S. C. Reporter's ed. 48-50.)

Federal courts — jurisdiction — suit arising under patent laws.

A suit does not arise under the patent laws of the United States so as to be justiciable by a Federal district court, where the dominant and ultimate object of the bill is to enforce payment of royalties reserved to the plaintiff by a contract whereby he sold to the defendant certain existing and contemplated patents for improvements in machinery, and, in order to clear the way for a recovery of all the royalties claimed, it seeks the annulment of a patent for such an improvement issued after the contract and then assigned to the defendant, and also an adjudication that the plaintiff is entitled to a patent for the improvement covered by such patent.

[For other cases, see Courts, 553-569, in Digest Sup. Ct. 1908.]

[No. 638.]

Submitted October 12, 1915. Decided November 1, 1915.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, a suit to enforce the payment of patent royalties under contract. Affirmed.

Mr. **William A. Milliken** submitted the cause for appellant.

Mr. **Horace A. Dodge** submitted the cause for appellee. Mr. Alex. D. Salinger was on the brief.

Memorandum opinion by Mr. Justice **Van Devanter**, by direction of the court:

Whether this suit between citizens of the same state is one arising under the patent laws is the only question presented by this direct appeal under Judicial Code, § 238, [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215]. The district court gave a negative answer to the question, and dismissed the suit for want of jurisdiction.

The bill shows that its dominant and ultimate object is to enforce payment of royalties reserved to the plaintiff by a contract whereby he sold to the defendant certain existing and contemplated patents for improvements in shoe-sewing machines, and that to clear the way for a recovery of all the royalties claimed it seeks the annulment

of a patent for such an improvement issued to Andrew Eppler after the contract, and then assigned to the defendant, and also an adjudication that the plaintiff is entitled to a patent for the improvement covered by the Eppler patent.

A suit for royalties reserved upon the sale of a patent right is not a suit arising under the patent laws. This is settled by repeated decisions. Albright v. Teas, 106 U. S. 613, 27 L. ed. 295, 1 Sup. Ct. Rep. 550; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 285, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Geneva Furniture Mfg. Co. v. Karpen, 238 U. S. 254, 259, 59 L. ed. 1295, 1297, 35 Sup. Ct. Rep. 788, and cases cited.

While the patent laws (Rev. Stat. §§ 4915, 4918, Comp. Stat. 1913, §§ 9460, 9463) permit an applicant for a patent whose application has been refused by the Commissioner of Patents, or by the court of appeals[1] of the District of Columbia upon appeal from the Commissioner, to establish his right to receive a patent by a suit in equity, and also permit a patentee to maintain a suit in equity against the owner of an interfering [50] patent to annul the latter, the present bill falls so far short of presenting a case within either section that it reasonably cannot be said to invoke the application of either. Recognizing that this is so, counsel for the plaintiff, in his brief, not only frankly concedes that he finds no statute in point, but endeavors to maintain the jurisdiction of the district court by a reference to the general powers of Federal courts when sitting as courts of equity; evidently forgetting that such powers can be exerted only in cases otherwise within the jurisdiction of those courts as defined by Congress.

Some stress is laid in the brief upon portions of the bill charging fraud in the procurement of the Eppler patent, but as only the United States can maintain a bill to annul the patent on that ground (Mowry v. Whitney, 14 Wall. 434, 20 L. ed. 858; United States v. American Bell Teleph. Co. 128 U. S. 315, 368, 32 L. ed. 450, 462, 9 Sup. Ct. Rep. 90; United States v. American Bell Teleph. Co. 159 U. S. 548, 555, 40 L. ed. 255, 258, 16 Sup. Ct. Rep. 69) these allegations cannot affect the solution of the question of jurisdiction here presented.

Our conclusion is that this is not a suit arising under the patent laws.

Decree affirmed.

[1] See § 9, act Feb. 9, 1893, chap. 74, 27 Stat. at L. 434, Comp. Stat. 1913, § 9456.

60 L. ed.

PENNSYLVANIA COMPANY, Plff. in Err.,
v.
MARION DONAT.

(See S. C. Reporter's ed. 50–52.)

Appeal — affirmance on motion — frivolous contention.

The contention that a railway yard conductor, injured while occupied in the removal of two empty cars from a private switch track to permit the switching thereon of two loaded coal cars which had come from without the state, consigned to the owner of such track, was, as a matter of law, not engaged at the time in interstate commerce, is so frivolous as to require an affirmance on motion of a judgment of a circuit court of appeals approving the action of the trial court in submitting the question to the jury, where the submission of such question is the sole error asserted.
[For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.]

[No. 564.]

Submitted October 18, 1915. Decided November 1, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the District Court for Indiana in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 139 C. C. A. 665, 224 Fed. 1021.

Messrs. Samuel O. Pickens and Frederic D. McKenney submitted the cause for plaintiff in error. Messrs. Elmer E. Leonard, James H. Rose, and Fred E. Zollars were on the brief:

The facts developed in this case clearly show that at the time of the injury to the defendant in error he was not engaged in interstate commerce.

United States v. Western & A. R. Co. 184 Fed. 336; Atchison, T. & S. F. R. Co. v. United States, 117 C. C. A. 341, 198 Fed. 637; United States v. New York C. & H. R. R. Co. 205 Fed. 428; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163.

Messrs. Rufus S. Day, Samuel Herrick, R. B. Newcomb, and James B. Harper submitted the cause for defendant in error. Messrs. A. G. Newcomb, E. C. Chapman, George M. Skiles, Thomas J.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

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Green, Roscoe C. Skiles, and Otto E. Fuelber were on the brief:

There was little evidence, if any, which even indirectly tended to show that the plaintiff was not engaged in interstate commerce when he was injured, and the court was entirely fair with the defendant when he allowed the jury to decide the question.

New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S 156, 162, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

Memorandum opinion by Mr. Justice McReynolds, by direction of the court:

The question presented upon this writ of error is "so frivolous as not to need further argument," and the motion to affirm the judgment below must be granted. (Rule 6, § 5.)

Basing his claim upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), Marion Donat began the original action in the United States district court for Indiana against the Pennsylvania Company, a carrier by railroad, to recover damages for personal injuries alleged to have been suffered by him while employed as a yard conductor. The trial court refused a request to charge that he was not engaged in interstate commerce when the accident occurred, and therefore could not recover. [52] This refusal is the sole ground upon which error is now asserted.

Two loaded coal cars coming from without the state were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch track connecting with the yard; and, acting under instructions, Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that, in order to complete this movement, it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal, defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (139 C. C. A. 665, 224 Fed. 1021) the circuit court of appeals was clearly right. New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 262, 263, 59 L. ed. 1298, 1299, 1300, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

Affirmed.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
JOHN F. DEVINE, as Administrator of the Estate of William J. Mason, Deceased.

(See S. C. Reporter's ed. 52-54.)

Error to state court — Federal question — employers' liability.

1. Federal questions which will give jurisdiction to the Federal Supreme Court of a writ of error to a state court in a case arising under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), are presented by contentions that the trial court erred in refusing to instruct a verdict on the ground that there was no evidence tending to show either negligence or that the carrier or the deceased at the time of the particular transaction from which the injury arose was engaged in interstate commerce, and in further refusing to instruct the jury that a state statute limiting the amount of recovery was controlling.

[For other cases, see Appeal and Error, 1751-1797, in Digest Sup. Ct. 1908.]

Error to state court — dismissal on motion.

2. A writ of error from the Federal Supreme Court to a state court will not be dismissed on motion where the Federal questions involved are not wholly frivolous.

[For other cases, see Appeal and Error, VII. 1, 2, in Digest Sup. Ct. 1908.]

Error to state court — affirmance on motion — lack of merit in Federal question.

3. The contention on a writ of error to

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to the necessity of color of merit in Federal question to sustain writ of error to state court—see note to Offield v. New York, N. H. & H. R. Co. 51 L. ed. U. S. 231.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. L.R.A.1915C, 47.

a state court in a case arising under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), that the trial court should have instructed a verdict in favor of the railway company, on the ground that there was no evidence tending to show either negligence or that the company or the deceased at the time of the particular transaction from which the injury arose was engaged in interstate commerce,—is too lacking in substance to prevent the granting of a motion to affirm, where what is really involved is a mere dispute concerning the weight of conflicting tendencies of proof.

[For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.]

Error to state court — affirmance on motion — lack of merit in Federal question.

4. The want of merit in the contention that a state statute limiting the amount of recovery is controlling in a suit arising under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), is so well established by previous decisions of the Federal Supreme Court concerning the exclusive operation and effect of that statute over the subject with which it deals that the presence of such question in the case will not prevent the Federal Supreme Court from granting a motion to affirm the judgment on a writ of error to a state court.

[For other cases, see Appeal and Error, VII. g, in Digest Sup. Ct. 1908.]

[No. 391.]

Submitted October 25, 1915. Decided November 8, 1915.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Illinois Appellate Court, affirming a judgment of the Circuit Court of Cook County, in that state, in favor of plaintiff in an action under the Federal employers' liablity act. Affirmed.

See same case below, 266 Ill. 248, 107 N. E. 595.

Messrs. Thomas P. Littlepage and M. L. Bell submitted the cause for plaintiff in error:

A Federal right has been denied as a result of a finding of fact which is without support in the evidence.

Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 4 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

The claim that defendant in error did not show that at the time of the accident deceased was employed in interstate commerce is a question which can now be reviewed.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 277, 57 L. ed. 1179, 1185, 1186, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. ed. 1433, 1435, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

Even if, according to the Illinois procedure, the claim had not been properly raised prior to the time the supreme court was reached, the fact that the supreme court in its decision considered and passed upon the question shows that it was raised for the purpose of this court's consideration on a writ of error.

North Carolina R. Co. v. Zachary, 232 U. S. 257, 58 L. ed. 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

There was power in Congress to regulate the relations between a common carrier and its employee only when by so doing it was at the same time making valid regulations as to interstate commerce.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 48, 56 L. ed. 327, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The state has power to regulate all the relations between master and servant, even though both are engaged in interstate commerce, until Congress acts with reference to some particular relation.

Missouri P. R. Co. v. Castle, 224 U. S. 541, 544, 56 L. ed. 875, 878, 32 Sup. Ct. Rep. 606.

We claimed in the trial court, in the appellate court, and in the supreme court that under the proper construction of the Federal employers' liability act the judgment should not have been for a greater sum than $10,000, which claim was denied. Such a question is subject to review on this writ of error.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 57 L. ed. 1179, 1185, 33 Sup. Ct. Rep. 858; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 499, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475.

The finding of negligence on the part of plaintiff in error is without support in the evidence. Such a claim involves a Federal question reviewable in this court.

Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. ed. 1433, 1435, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 277, 281, 57 L. ed. 1179, 1186, 1187, 33 Sup Ct. Rep. 858.

Mr. James C. McShane submitted the cause for defendant in error:

The Federal act covers the entire subject

as to the amount of damages recoverable in such cases, and it follows that it supersedes the state act in that regard.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 158, 57 L. ed. 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 703, 57 L. ed. 1033, 33 Sup. Ct. Rep. 703; Thornbro v. Kansas City, M. & O. R. Co. 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1915D, 314; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 47 L.R.A.(N.S.) 31, 155 S. W. 1119; Louisville & N. R. Co. v. Stewart, 157 Ky. 642, 163 S. W. 755; Chesapeake & O. R. Co. v. Dwyer, 157 Ky. 590, 163 S. W. 752.

A question of fact decided on by a jury in a state court cannot be re-examined by the Supreme Court of the United States upon writ of error.

3 Foster, Fed. Pr. 5th ed. p. 2396; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Southern R. Co. v. Carson, 194 U. S. 136–140, 48 L. ed. 907–910, 24 Sup. Ct. Rep. 609.

Counsel will no doubt concede, as they did in the state court, that if there was one or more cars, either loaded or empty, in deceased's train, which was then being moved upon an interstate journey, deceased was necessarily employed in interstate commerce within the meaning of the act.

See St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 157, 57 L. ed. 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159.

Memorandum opinion by Mr. Chief Justice White, by direction of the court:

The recovery under the employers' liability act in the trial court, affirmed by the intermediate and supreme court, was for the damage caused by the death of Mason through the negligence of the defendant company. 266 Ill. 248, 107 N. E. 595. [54] Two propositions are relied upon for reversal: first, a refusal to instruct a verdict on the ground that there was no evidence tending to show either negligence or that the company or the deceased at the time of the particular transaction from which the injury arose was engaged in interstate commerce; and second, a further refusal to instruct that a state statute limiting the amount of recovery was controlling although the suit was under the act of Congress. These contentions are Federal (Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. ed. 1433, 1435, 35 Sup. Ct. Rep. 865), and there is jurisdiction, as we do not find them wholly frivolous.

Overruling the motion to dismiss, we come to consider whether we should grant the motion to affirm, and for that purpose we must decide whether the propositions are so wanting in substance as not to require further argument. Rule 6, paragraph 5. We are of the opinion that, as to both propositions, an affirmative answer is required. We say this because as to the first it is apparent that there is no ground upon which to rest the assertion that there was no tendency of proof whatever on the subjects stated, but, to the contrary, the record makes it clear, and the arguments in support of the proposition demonstrate, that it alone involves a mere dispute concerning the weight of conflicting tendencies of proof. And the same conclusion is necessary as to the second, because in substance and effect the want of merit in that proposition has by necessary intendment been so conclusively established by the previous decisions of this court concerning the exclusive operation and effect of the employers' liability act over the subject with which it deals as to exclude all ground for the contention which the proposition makes. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53–55, 56 L. ed. 327, 347, 348, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 66, 67, 57 L. ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 655, 59 L. ed. 1160, 1162, 35 Sup. Ct. Rep. 704.

Affirmed.

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[55] CHARLES M. STRATTON, Plff. in Err.,

v.

WALKER B. STRATTON.

(See S. C. Reporter's ed. 55–57.)

Error to state court — judgment of highest court of state.

A judgment of an Ohio district court of appeals is not that of the highest court of

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NOTE.—As to when writ of error may run to inferior state court—see note to Kentucky v. Powers, 50 L. ed. U. S. 633.

As to when judgment sought to be reviewed in Federal Supreme Court is that of highest state court—see note to Norfolk & S. Turnp. Co. v. Virginia, 56 L. ed. U. S. 1082.

the state in which a decision in the suit can be had, which alone is reviewable in the Federal Supreme Court, where the supreme court of Ohio has not been called upon to decide whether or not it will exert its discretionary power under the state Constitution and laws to review judgments of the district courts of appeals in cases of public or great general interest.

[For other cases, see Appeal and Error, 1147–1167, in Digest Sup. Ct. 1908.]

[No. 618.]

Submitted October 25, 1915. Decided November 8, 1915.

IN ERROR to the Court of Appeals of the Seventh Appellate District of the State of Ohio to review a judgment in favor of plaintiff on the trial *de novo* of an action on a contract which had been appealed to that court from the Common Pleas Court of Jefferson County in that state. Dismissed for want of jurisdiction.

Mr. **Addison C. Lewis** submitted the cause for plaintiff in error. Mr. David M. Gruber was on the brief.

Mr. **D. A. Hollingsworth** submitted the cause for defendant in error. Messrs. C. A. Vail and E. E. Erskine were on the brief.

Memorandum opinion by Mr. Chief Justice **White**, by direction of the court:

To reverse a judgment rendered by the Ohio court of appeals of the seventh appellate district on the ground of [56] Federal errors committed, this writ of error is prosecuted to that court. There is a motion to dismiss, based on the ground that the court of last authority, the supreme court of the state, was the highest court in which a decision in the suit could be had. This rests not upon the contention that in all cases, as a matter of right and of duty, the supreme court was given authority to review the judgments and decrees of the courts of appeals, but upon the proposition that, under the Constitution and laws of Ohio, the supreme court was vested with power to review in every case the judgments or decrees of the courts of appeals where, in the exercise of its judgment, the supreme court deemed them to be of such public or great general interest as to require review.

The premise upon which the proposition is based being undoubtedly accurate, indeed, not disputable (Ohio Const. art. 4, § 2; Akron v. Roth, 88 Ohio St. 457, 103 N. E. 465), we think the motion to dismiss must prevail. True, it is urged that under the Ohio law the jurisdiction of the supreme court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest,—an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws. When the significance of the proposition upon which the claim of jurisdiction is based is thus fixed, it is not open to contention, as it has long since been adversely disposed of. Fisher v. Perkins (Fisher v. Carrico) 122 U. S. 522, 30 L. ed. 1192, 7 Sup. Ct. Rep. 1227; Mullen v. Western Union Beef Co. 173 U. S. 116, 43 L. ed. 635, 19 Sup. Ct. Rep. 404. Indeed, conforming to the rule thus thoroughly established, the practice for years has been in the various states where discretionary power [57] to review exists in the highest court of the state, to invoke the exercise of such discretion in order that, upon the refusal to do so, there might be no question concerning the right to review in this court. See Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 339; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

Dismissed for want of jurisdiction.

CITY OF NEW YORK, Petitioner,
v.
WILLIAM SAGE, Jr.

(See S. C. Reporter's ed. 57–62.)

Damages — eminent domain — union with other lands.

1. Compensation to the owner of one of many parcels of land taken by eminent

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NOTE.—On special value of property for purpose for which it is taken as an element of compensation in condemnation proceedings—see notes to Sargent v. Merrimac, 11 L.R.A.(N.S.) 996, and McGovern v. New York, 46 L.R.A.(N.S.) 392.

As to damages in acquisition of water supply by right of eminent domain—see note to Stearns v. Barre, 58 L.R.A. 240.

On removal of causes in cases of diverse citizenship—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskins v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

domain for a site for a reservoir for a municipal water supply should not include any part of an increase in value for that purpose due to its union with other parcels if such union would not have been practicable, or have been attempted, except by the intervention of eminent domain.
[For other cases, see Damages, VI. m, in Digest Sup. Ct. 1908.]

Removal of causes — time for removal — condemnation proceedings.

2. Condemnation proceedings cannot be deemed to have been commenced before a conveyance of the land so as to preclude the vendee from removing the suit to a Federal court for diverse citizenship, where the petition for the appointment of commissioners was not filed until after the conveyance had been made, although the maps showing the parcels of real estate to be taken had been filed, and notices had been posted on the property before such conveyance.
[For other cases, see Removal of Causes, VII. a, in Digest Sup. Ct. 1908.]

[No. 34.]

Argued October 27, 1915. Decided November 8, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, confirming the report of commissioners in condemnation proceedings. Reversed.

See same case below, 124 C. C. A. 251, 206 Fed. 369.

The facts are stated in the opinion.

Messrs. **Louis C. White** and **William McM. Speer** argued the cause, and, with Mr. Frank L. Polk, filed a brief for petitioner:

The circuit court of appeals erred in holding this case to be within the principle laid down in Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; McGovern v. New York, 229 U. S. 363, 57 L. ed. 1228, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729.

The state courts having held that there can be no recovery for reservoir availability and adaptability of parcels taken by the city of New York for the Ashokan reservoir, considered in connection with other parcels, the Federal court will accept those decisions as the law of the state of New York, and as binding on it.

Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

Mr. Edward A. Alexander argued the cause and filed a brief for respondent:

The city acquires no legal title to land by merely filing maps, and it only commences the proceeding when its petition for the acquisition of land has been filed in court.

1 Cyc. 751; Re Bradley, 70 Hun, 104, 23 N. Y. Supp. 1127.

A condemnation case is a special proceeding, and not an action within the New York Code.

2 Lewis, Em. Dom. p. 929; King v. New York, 36 N. Y. 182; Re Peterson, 94 App. Div. 143, 87 N. Y. Supp. 1014; Re Rochester, 102 App. Div. 99, 92 N. Y. Supp. 478.

The making and filing of a descriptive map of a proposed reservoir is not a taking, unless expressly made so by statute.

15 Cyc. 658, 659; New York C. & H. R. R. Co. v. State, 37 App. Div. 57, 55 N. Y. Supp. 685; 2 Lewis, Em. Dom. 3d ed. § 566, pp. 1007 et seq.

The findings of the commissioners of appraisal constituted a finding of fact that the market value of the parcel of land in question had been enhanced by reason of the fact that it was part of a natural reservoir site, for which there had been previous demands in the open market.

Re Simmons, 130 App. Div. 354, 114 N. Y. Supp. 571; McGovern v. New York, 229 U. S. 363, 371, 57 L. ed. 1228, 1231, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876; People v. Fish, 125 N. Y. 150, 26 N. E. 319; People v. Cignarale, 110 N. Y. 23, 17 N. E. 135; New York v. Smith, 138 N. Y. 676, 34 N. E. 400; Knight v. Wilson, 55 Hun, 559, 9 N. Y. Supp. 20; Gibbons v. Van Alstyne, 29 N. Y. S. R. 461, 9 N. Y. Supp. 156; Mandeville v. Reynolds, 68 N. Y. 534; Devlin v. Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744; Jencks v. Smith, 1 N. Y. 94.

The adaptability of land for use as a reservoir, or for water supply purposes, has been uniformly taken into consideration as an element of value of such land in a number of well decided and carefully considered cases, both in the United States and Great Britain.

Re Gilroy, 85 Hun, 424, 32 N. Y. Supp. 891; Re Daly, 72 App. Div. 396, 76 N. Y. Supp. 28; Re Gough [1904] 1 K. B. 417, 73 L. J. K. B. N. S. 228, 68 J. P. 229, 52 Week. Rep. 552, 90 L. T. N. S. 43, 20 Times L. R. 179; College Point v. Dennett, 5 Thomp. & C. 217, 2 Hun, 669; Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 160, affirmed in

112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Gearhart v. Clear Spring Water Co. 202 Pa. 292, 51 Atl. 891; Moulton v. Newburyport Water Co. 137 Mass. 163; San Diego Land & Town Co. v. Neale, 78 Cal. 63, 3 L.R.A. 83, 20 Pac. 372; Sargent v. Merrimac, 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970; Seattle & M. R. Co. v. Mulphine, 4 Wash. 457, 30 Pac. 720; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; 2 Lewis, Em. Dom. § 479; 4 Sedgw. Damages, § 1179; 15 Cyc. 757, 758.

This case is within the principle laid down in Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206.

2 Lewis, Em. Dom. 3d ed. § 707, p. 1233; 6 Sedgw. Damages § 1075; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; Seattle & M. R. Co. v. Mulphine, 4 Wash. 457, 30 Pac. 720; Re Staten Island R. Co. 10 N. Y. S. R. 393; Sanitary Dist. v. Loughran, 160 Ill. 365, 43 N. E. 359; Payne v. Kansas & A. Valley R. Co. 46 Fed. 557.

While, in this case, the evidence is undisputed that there were prior demands for this property for reservoir purposes, not only on behalf of the city, but on behalf of other municipalities, and on behalf of the Ramapo Water Company, it is unnecessary to prove any prior demands in order to entitle the owner to this element of value in his property, and evidence introduced to prove such element of value is not, in any sense, speculative.

Langdon v. New York, 133 N. Y. 628, 630, 31 N. E. 98; Orleans & J. R. Co. v. Jefferson & L. P. R. Co. 51 La. Ann. 1615, 26 So. 278; Galesburg & G. E. R. Co. v. Milroy, 181 Ill. 247, 54 N. E. 939; Calumet River R. Co. v. Moore, 124 Ill. 334, 15 N. E. 764; Muskeget Island Club v. Nantucket, 185 Mass. 303, 70 N. E. 61; Fosgate v. Hudson, 178 Mass. 225, 59 N. E. 809; Fales v. Easthampton, 162 Mass. 422, 38 N. E. 1129; West Virginia, P. & T. R. Co. v. Gibson, 94 Ky. 236, 21 S. W. 1055; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399, 8 So. 173; Mississippi River Bridge Co. v. Ring, 58 Mo. 496; Low v. Concord R. Co. 63 N. H. 557, 3 Atl. 739; Muller v. Southern Pacific Branch R. Co. 83 Cal. 240, 23 Pac. 265; St. Louis Terminal R. Co. v. Heiger, 139 Mo. 315, 40 S. W. 947; Hooker v. Montpelier & W. River R. Co. 62 Vt. 49, 19 Atl. 775; Chicago, K. & N. R. Co. v. Davidson, 49 Kan. 589, 31 Pac. 131; King v. Turnbull Real Estate Co. 8 Can. Exch. 163; Wilson v. Equitable Gas Co. 152 Pa. 569, 25 Atl. 635; Montana R. Co. v. Warren, 6 Mont. 275, 12 Pac. 641; Smith v. Com. Ann. Cas. 1912C, 1239, note.

Chandler-Dunbar Water Power Co. v. United States, 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 54 L. ed. 725, 30 Sup. Ct. Rep. 459; McGovern v. New York, 229 U. S. 363, 57 L. ed. 1228, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876; and the Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729,—do not apply to the facts in the case at bar.

The fact that the defendant in error did not, or could not, alone use his property as a reservoir site, does not deprive the property of its value as a reservoir site, or a portion of a reservoir site.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. ed. 206, 208; Great Falls Mfg. Co. v. United States, 16 Ct. Cl. 199, affirmed in 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Chicago & N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 609; Hooker v. Montpelier & W. River R. Co. 62 Vt. 49, 19 Atl. 775; Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792; Mississippi River Bridge Co. v. Ring, 58 Mo. 491.

The fact that the defendant in error was the owner of only a part of the reservoir site does not prevent that element of value from being considered. It only goes to the weight that should be given to the evidence, and the amount that should be allowed for this element of value.

San Diego Land & Town Co. v. Neale, 78 Cal. 63, 3 L.R.A. 83, 20 Pac. 372; Tynemouth v. Northumberland, 89 L. T. N. S. 557, 67 J. P. 425, 19 Times L. R. 630.

The valuation which the commissioners of appraisal placed upon this property was not its valuation to the city of New York, but was merely what they considered to be the fair and reasonable market value of the property, taking into consideration as an element in its value the fact that it is adaptable and available to a certain special and profitable use which the city is now making of it.

16 Cyc. 1135, 1136.

The Federal courts will not accept the decisions of a state court as binding upon them on questions of general law.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 109, 27 L. ed. 325, 327, 1 Sup. Ct. Rep. 425; Smith v. Alabama, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 443, 32 L. ed. 788, 792, 9 Sup. Ct. Rep 469; Independent School Dist. v. Rew, 55 L.R.A. 364, 49 C. C. A.

198, 111 Fed. 1; Beard v. Independent Dist. 31 C. C. A. 562, 60 U. S. App. 372, 88 Fed. 375; Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson, 130 Fed. 152; Union Bank v. Oxford, 90 Fed. 7; Brunswick Terminal Co. v. National Bank, 88 Fed. 607; Hunt v. Hurd, 39 C. C. A. 226, 98 Fed. 683; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Manship v. New South Bldg. & L. Asso. 110 Fed. 845; Re Hull, 115 Fed. 858; Jones v. Southern P. Co. 75 C. C. A. 602, 144 Fed. 973, 7 Ann. Cas. 256.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding for the taking of land for the Ashokan reservoir, similar to the one before us in McGovern v. New York, 229 U. S. 363, 57 L. ed. 1228, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876. After commissioners were appointed to ascertain the compensation to be paid, the case was removed to the circuit court, diverse citizenship being alleged. There was a motion to remand which was overruled, and subsequently the commissioners reported that "the sum of $7,624.45 for land and buildings and the further sum of $4,324.45 for reservoir availability and adaptability, being a grand total of the sum of $11,948.90, is the sum ascertained and determined by us . . . to be paid to the owners of and all persons interested in said land for the taking of the fee thereof, designated . . . as Parcel 733." They also recommended the allowance of 5 per cent on the above award for legal fees and expenses, and of $1,372.31 to named witnesses in specified sums. The report was confirmed by the circuit judge (190 Fed. 413), and afterwards by the circuit court of appeals (124 C. C. A. 251, 206 Fed. 369).

Upon an inspection of the record it appears to us, as the language of the commissioners on its face suggests, that their report does not mean that the claimant's land had a [61] market value of $11,948.90, —that it would have brought that sum at a fair sale,—but that they considered the value of the reservoir as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot, to the owner of the land, subject to the opinion of the court upon the point of law thus raised. Upon that point we are of opinion that they were wrong.

The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact, —not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

It is said that in this case there was testimony that the lot was worth more than the total allowed. But the only [62] explanation of the separation of items by the commissioners is that they were not prepared to say that the market value of the lot was $11,948.90, seeing that the claimant bought it a few days before for $4,500, but that they thought the additional value gained by the city's act should be taken into account and shared between the city and the owner of the land,—a proposition to which we cannot assent. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 451, 57 L. ed. 1511, 1562, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; McGovern v. New York, 229 U. S. 363, 372, 57 L. ed. 1228, 1232. 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876.

The motion to remand was made on the ground that Sage bought after the condemnation proceedings were commenced, and therefore was not entitled to remove the suit to the circuit court. The maps showing the parcels of real estate to be taken had been filed and notices had been posted on the property before the conveyance to Sage, but the petition for the appointment of commissioners was not filed until after it had been made. We see no reason to differ from the opinion of the judges below that the proceeding was not commenced at the date when Sage took.

Decree reversed.

HENRY LA ROQUE, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 62–68.)

Indians — allotment — death before selection.

1. Selections on the part of living Indians only, acting for themselves or through designated representatives, were contemplated by the general Indian allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), which, after authorizing a survey of the reservation to be allotted, provided for an allotment in severalty of a designated area "to any Indian located thereon," and then directed that all allotments "be selected by the Indians, heads of families selecting for their minor children," and the agents selecting for orphan children, and that "if any one entitled to an allotment shall fail to make a selection within four years" the Secretary of the Interior may direct a selection for such Indian to be made by an agent.

[For other cases, see Indians, VIII., in Digest Sup Ct. 1908.]

Indians — allotment — death before selection.

2. The death of a Chippewa Indian before selecting or receiving his allotment under the Nelson act of January 14, 1889 (25 Stat. at L. 642, chap. 24), must be deemed to terminate all right to an allotment on his behalf, in view of the provisions of that act that allotments thereunder are to be made in conformity with the general allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), which contemplates selections on the part of living Indians only, acting for themselves or through designated representatives, there being nothing demanding a different conclusion in the provisions of the Nelson act for a census of the Indians (which includes the name of the Indian in question), "for the purpose," among others, "of making the allotments" contemplated by that act, nor in the report of the negotiations with the Indians resulting in the contemplated cession.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Limitation of actions — suit to cancel patent — Indian lands.

3. The six years' limitation prescribed by the act of March 3, 1891 (26 Stat. at L. 1099, chap. 561, Comp. Stat. 1913, § 5114), § 8, for suits by the United States to vacate and annul patents does not govern a suit to cancel a so-called trust patent for an allotment in an Indian Reservation on the ground that the allotment was made inadvertently and in contravention of the Nelson act of January 14, 1889 (25 Stat. at L. 642, chap. 24), since such section, being a part of the public land laws, refers only to patents issued for public lands of the United States, and has no application to reserved Indian lands.

[For other cases, see Limitation of Actions, I. d, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — suit to cancel trust patent.

4. Jurisdiction of a Federal court to entertain a suit by the United States to cancel a so-called trust patent for an allotment in an Indian Reservation, on the ground that the allotment was made inadvertently and in contravention of the Nelson act of January 14, 1889 (25 Stat. at L. 642, chap. 24), is not affected by the provisions of the act of April 23, 1904 (33 Stat. at L. 297, chap. 1489, Comp. Stat. 1913, § 4212), limiting and defining the authority of the Secretary of the Interior to correct mistakes in, and to cancel, trust patents for Indian allotments.

[For other cases, see Courts, V. c, 4, in Digest Sup. Ct. 1908.]

[No. 240.]

Argued and submitted October 15 and 18, 1915. Decided November 8, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the Circuit Court for the District of Minnesota, remanded a suit by the United States to cancel a trust patent for an Indian allotment, with instructions to enter a decree in favor of the government. Affirmed.

See same case below, 117 C. C. A. 349, 198 Fed. 645.

The facts are stated in the opinion.

Mr. J. T. Van Metre argued the cause and filed a brief for appellant:

The title the Indians had to the White Earth Reservation was that of a fee simple, it having been conveyed to them by the United States as part consideration for lands ceded by them to the government.

New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Holden v. Joy, 17 Wall. 211, 21 L. ed. 523; United States v. Brooks, 10 How. 442, 13 L. ed. 489; Marsh v. Brooks, 8 How. 223, 12 L. ed. 1056; United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; White v. Wright, 83 Minn. 222, 86 N. W. 91; Seneca Nation of Indians v. Hugarboom, 132 N. Y. 493, 30 N. E. 983, Prentice v. Stearns, 20 Fed 819; United States v. Reese, 5 Dill. 405, Fed. Cas. No. 16,137; Mitchel v. United States, 15 Pet. 52, 10 L. ed. 658.

Where a treaty contains words of conveyance, it operates as a grant *in præsenti*, and the title vests by operation of the treaty.

Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; United States v. New York Indians, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 487, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Webster

v. Reid, Morris (Iowa) 467; United States v. Brooks, 10 How. 442, 13 L. ed. 489.

The land ceded to the United States under the treaty of April 18, 1867, belonged to these Indians, and was a valuable consideration for the sale to them of the White Earth Reservation.

New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Holden v. Joy, 17 Wall. 211, 21 L. ed. 523; Mitchel v. United States, 9 Pet. 748, 9 L. ed. 296; Crews v. Burcham, 1 Black, 352, 17 L. ed. 91.

It was proper for, and within the power of, the United States to convey the territory comprising the White Earth Reservation to the Indians, although it was then a part of the public domain.

Holden v. Joy, 17 Wall. 211, 21 L. ed. 523; Johnson v. M'Intosh, 8 Wheat. 598, 5 L. ed. 694.

While a patent to the White Earth Reservation was not given or promised by the treaty of April 18, 1867, yet a patent is not necessary to convey a complete title.

Francis v. Francis, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; United States v. Brooks, 10 How. 442, 13 L. ed. 489.

Restrictions upon alienation do not debase the title below a fee simple.

Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697.

The act of January 14, 1889, was in all essentials a treaty, and was in its nature contractual.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565.

There is no inconsistency in permitting an allotment after death.

Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; United States v. Dowden, 194 Fed. 475.

Failure or refusal to make the allotment could not militate against the rights of the person entitled thereto.

Lytle v. Arkansas, 9 How. 314, 13 L. ed. 153; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 91, 21 L. ed. 86; Smith v. Bonifer, 132 Fed. 889; United States v. Dowden, 194 Fed. 475.

This act must be construed in the light in which the Indians were made to understand it.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667; United States v. Choctaw Nation, 119 U. S. 27, 30 L. ed. 314, 7 Sup. Ct. Rep. 75; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662; United States v. Choctaw Nation, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565.

The report of the negotiations are contained in House Ex. Doc. 247, 51st Congress, 1st session. The court may take judicial notice of such documents.

New York Indians v. United States, 170 U. S. 1, 32, 42 L. ed. 927, 938, 18 Sup. Ct. Rep. 531.

The law of descent in the state where the land is situated shall apply after issuance of the patent. Not the final patent, but the first or trust patent.

Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; United States v. Park Land Co. 188 Fed. 383; Beam v. United States, 89 C. C. A. 240, 162 Fed. 260; Worcester v. Georgia, 6 Pet. 515, 582, 8 L. ed. 483, 508; Re White Earth Indian Reservation, 36 Land Dec. 210.

Subsequent acts of Congress giving the Secretary of the Interior jurisdiction to determine heirship of Indians do not apply to the descent of allotments on the White Earth Reservation.

Vachon v. Nichols-Chisholm Lumber Co. 126 Minn. 303, 144 N. W. 223, 148 N. W. 288; Re White Earth Indian Reservation, 36 Land Dec. 210; Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 190; 26 Am. & Eng. Enc. Law, 714; Endlich, Interpretation of Statutes, 695; 1 Sutherland, Stat. Contr. 2d ed. 493.

The instrument here sought to be canceled is a "patent" within the meaning of the statute of limitations.

La Clair v. United States, 184 Fed. 128; Libby v. Clark, 118 U. S. 250, 30 L. ed. 133, 6 Sup. Ct. Rep. 1045; Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Wiggan v. Conolly, 163 U. S. 56, 41 L. ed. 69, 16 Sup. Ct. Rep. 914; Starr v. Campbell, 208 U. S. 527, 52 L. ed. 602, 28 Sup. Ct. Rep. 365; Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 Sup. Ct. Rep. 358; Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Goat v. United States, 224 U. S. 458, 56 L. ed. 841, 32 Sup. Ct. Rep. 541; Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Re White Earth Indian Reservation, 36 Land. Dec. 210.

After the death of Vincent La Roque, and

after the issuance of this patent in 1902, the appellant, admittedly an adult mixed-blood Indian, held this land in fee simple upon the approval of the Clapp amendment.

United States v. Park Land Co. 188 Fed. 383; Beam v. United States, 89 C. C. A. 240, 162 Fed. 260; Stephenson v. Lohn, 115 Minn. 166, 131 N. W. 1018; Vachon v. Nichols-Chisholm Lumber Co. 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

Statutes of limitation are applicable to individual Indians after allotment.

Schrimpscher v. Stockton, 183 U. S. 290, 46 L. ed. 203, 22 Sup. Ct. Rep. 107

This court has repeatedly upheld the statutes of limitation.

United States v. Des Moines Nav. & R. Co. 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; Curtner v. United States, 149 U. S. 671, 37 L. ed. 893, 13 Sup. Ct. Rep. 985, 1041; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; United States v. Hodge, 13 How. 478, 14 L. ed. 231; Clementson v. Williams, 8 Cranch, 72, 3 L. ed. 491; M'Cluny v. Silliman, 3 Pet. 270, 7 L. ed. 676; Richards v. Maryland Ins. Co. 8 Cranch, 84, 3 L. ed. 496; Bank of United States v. Daniel, 12 Pet. 32, 9 L. ed. 989; Lewis v. Marshall, 5 Pet. 470, 8 L. ed. 195.

Independent of U. S. Rev. Stat. § 2448, Comp. Stat. 1913, § 5098, the courts have always held that the title to the land designated in a patent issued in the name of an Indian reservee or allottee after his death insured to his heirs, devisees, or assigns.

Doe ex dem. Mann v. Wilson, 23 How. 457, 16 L. ed. 584; Elwood v. Flannigan, 104 U. S. 562, 26 L. ed. 842; Vachon v. Nichols-Chisholm Lumber Co. 126 Minn. 303, 144 N. W. 223, 148 N. W. 288.

Yet this court has held directly that this law, § 2448, supra, applies to individual Indian lands.

Crews v. Burcham, 1 Black, 352, 17 L. ed. 91.

The cause for cancelation in the case at bar is none of those specified in the act of April 23, 1904, and no fraud is charged in obtaining its issuance.

La Clair v. United States, 184 Fed. 137.

Assistant Attorney General Knaebel submitted the cause for the United States. Mr. S. W. Williams was on the brief:

Much is said in the appellant's brief concerning the effect of treaties, particularly the treaty of April 18, 1867, which established the White Earth Reservation. Counsel assert that by this the fee was granted *in præsenti*. Even if so, it was manifestly a grant to the tribe as a quasi corporation. The individual gained no title or right to title. He was not a tenant in common. He had nothing to transmit by inheritance. He was simply one of a membership constantly changing and shifting through birth and death, resignation and adoption, each of whose constituents, while he lived and remained a member, had doubtless a usufructuary right, a voice in the administration of the tribal estate, and an expectancy that, when the estate came to be distributed (if it ever did), he would receive his just share with the other members existing at that time.

Sizemore v. Brady, 235 U. S. 441, 449, 59 L. ed. 308, 311, 35 Sup. Ct. Rep. 135; McKee v. Henry, 119 C. C. A. 412, 201 Fed. 76; Ligon v. Johnston, 90 C. C. A. 486, 164 Fed. 670; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

The Nelson act intends that allotments shall be made to living members only.

Re Dole, 30 Land Dec. 532; Re Shaw, 40 Land Dec. 9; Fairbanks v. United States, 223 U. S. 215, 56 L. ed. 409, 32 Sup. Ct. Rep. 292; Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302.

In the case of the Five Civilized Tribes the dominant objects were to protect the rights of all the members against the selfish aggressions of a few, partition the tribal lands, break up the tribal governments, and prepare the way for a new state.

Woodward v. De Graffenried, 238 U. S. 284, 59 L. ed. 1310, 35 Sup. Ct. Rep. 764.

The acts and agreements relating to the reservations of those tribes accordingly confer the right to allotments on the persons living at stated times, and provide in so many words that, in case of death before allotment, the allotment shall go to the heirs.

Skelton v. Dill, 235 U. S. 206, 208, 59 L. ed. 198, 199, 35 Sup. Ct. Rep. 60.

It is elementary that, like a deed to a fictitious person (Moffat v. United States, 112 U. S. 24, 31, 28 L. ed. 623, 625, 5 Sup. Ct. Rep. 10), a deed to a grantee not *in esse* at the time, even though the habendum be to him and his "heirs," is an absolute nullity.

1 Devlin, Deeds, 3d ed. § 187; 3 Washb. Real Prop. 6th ed. 2121; 2 Minor, Real Prop. § 1088; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; Baker v. Lane, 82 Kan. 715, 28 L.R.A.(N.S.) 405, 109 Pac. 182.

The "patents" intended by the limitation act of March 3, 1891, are patents conveying the legal title such as are issued under the general land laws; the term has no proper application to such an instrument as the one here in question.

Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 Sup. Ct. Rep. 368; United States v. Stone, 2 Wall. 525, 535, 17 L. ed. 765, 767; Maxwell Land-Grant Case, 121 U. S. 325, 380, 30 L. ed.

949, 958, 7 Sup. Ct. Rep. 1015; United States v. Rickert, 188 U. S. 432, 436, 47 L. ed. 532, 535, 23 Sup. Ct. Rep. 478; Re Bergen, 30 Land Dec. 258.

The provision in the act of April 23, 1904, declaring that conditional patents issued upon Indian allotments may not be canceled without authority of Congress except in certain cases therein specially provided for is but a limitation upon the power of the Secretary, and was not intended to deprive the courts of authority inherently vested in them.

Re Bergen, 30 Land Dec. 258; United States v. Chehalis County, 217 Fed. 284.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to cancel a so-called trust patent for an allotment in the White Earth Indian Reservation in Minnesota on the ground that the allotment was made inadvertently and in contravention of the act of January 14, 1889, chap. 24, 25 Stat. at L. 642, known as the Nelson act. In the circuit court there was a decree dismissing the bill [64] upon the merits, and this was reversed by the circuit court of appeals with instructions to enter a decree according to the prayer of the bill, subject to a qualification not here material. 117 C. C. A. 349, 198 Fed. 645.

The facts are not in dispute and are these: Vincent La Roque, in whose name the trust patent issued, was a Chippewa Indian born in 1883 of parents residing on the White Earth Reservation, and was among those whose names were included in the census of Minnesota Chippewas, made under the Nelson act. Had he lived he would have been entitled to take an allotment under that act. He died shortly after 1889 without an allotment being selected by or for him. Thereafter an application in his name for the allotment in question was presented to the allotting officers, and upon this application the allotment was made and the trust patent was issued, both in his name, as if the selection were made while he was living. Henry La Roque, the defendant, is his father, and as sole heir claims the land under the allotment and trust patent.

Whether the Nelson act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto, but who should die without selecting or receiving them, is the principal question for decision. The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians, and that he so instructed the allotting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; United States v. Hammers, 221 U. S. 220, 225, 228, 55 L. ed. 710, 714, 715, 31 Sup. Ct. Rep. 593; Logan v. Davis, 233 U. S. 613, 627, 58 L. ed. 1121, 1128, 34 Sup. Ct. Rep. 685. Not only so, but it receives additional force from its adoption by the circuit court of appeals for the eighth circuit [65] in Woodbury v. United States, 95 C. C. A. 498, 170 Fed. 302, where it was said by District Judge Amidon, in speaking for that court: "Until the allotment was made, Woodbury's right was personal,—a mere float,—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

The Nelson act embodied a plan for securing a cession by the several bands of Chippewa Indians in Minnesota of all reservations occupied by them except portions of the White Earth and Red Lake reservations required to make allotments, for removing to the White Earth Reservation all the bands save those on the Red Lake Reservation, for making allotments in severalty in the unceded lands, and for disposing of the ceded lands, placing the net proceeds at interest and distributing them in severalty at the end of fifty years. Section 1 required that a census be made of each tribe or band for the purpose of ascertaining whether the proper number of Indians assented to the cession and "of making the allotments and payments" contemplated; and § 3 directed that, following the census, the cession and the removal to the White Earth Reservation, allotments in severalty be made, as soon as practicable, to the Red Lake Chippewas in the Red Lake Reservation, and to the others in the White Earth Reservation, "in conformity with" the general allotment act of February 8, 1887, chap. 119, 24 Stat. at L. 388, Comp. Stat. 1913 § 4195, subject to a proviso that any Indian living on any of the ceded reservations might, in his discretion, take his allotment therein instead of moving to the White Earth Reservation.

The general allotment act of 1887, in con-

formity with which the Chippewa allotments were to be made, after [66] authorizing a survey of the reservation to be allotted, provided for an allotment in severalty of a designated area "to any Indian located thereon," and then directed that all allotments "be selected by the Indians, heads of families selecting for their minor children," and the agents selecting for orphan children, and that "if anyone entitled to an allotment shall fail to make a selection within four years . . . the Secretary of the Interior may direct a selection for such Indian" to be made by an agent.

We think the terms of the general act contemplated only selections on the part of living Indians, acting for themselves or through designated representatives. The express provision for selections in behalf of children and of Indians failing to select for themselves, and the absence of any provision in respect of Indians dying without selections, are persuasive that no selections in the right of the latter were to be made. In other words, as to them there was no displacement of the usual rule that the incidents of tribal membership, like the membership itself, are terminated by death. See Gritts v. Fisher, 224 U. S. 640, 642, 56 L. ed. 928, 931, 32 Sup. Ct. Rep. 580; Oakes v. United States, 97 C. C. A. 139, 172 Fed. 305, 307. It is upon this view that the execution of the general act and other similar acts has proceeded. Re Dole, 30 Land Dec. 532; Re Shaw, 40 Land Dec. 9; Re Instructions, 42 Land Dec. 446; Re Gassman, 42 Land Dec. 582; Woodbury v. United States, supra.

As calling for a different construction of the Nelson act the defendant relies upon the provision for a census of the Indians, and upon the report of the negotiations with them resulting in the cession contemplated by the act, the contentions advanced being that the provision for a census makes it clear that the census when completed was to be accepted as finally determining who were to receive allotments, and that the report of the negotiations shows that the Indians gave their assent to the cession in the belief that the right to select and receive an allotment would not [67] be terminated by death, but would pass to the heirs of the deceased. We are unable to assent to either contention. While the act directed that a census be made "for the purpose," among others, "of making the allotments" contemplated, we think this meant nothing more than that the census should serve as a preliminary guide in ascertaining to whom allotments should be made. There was no direction that it be treated as controlling, or that allotments be made to all whose names appeared therein, or only to them. The work of allotment could not be undertaken at once. The cession was not to be effective until approved by the President. Many of the Indians were to be removed from the ceded reservations to the White Earth Reservation, and much other work was required to prepare the way. So, it must have been contemplated that many changes would occur in the membership of the several bands through deaths and births before the allotments could be made. In Fairbanks v. United States, 223 U. S. 215, 56 L. ed. 409, 32 Sup. Ct. Rep. 292, we held that children born into the bands after the census were entitled to allotments, although not listed in it, and we perceive no reason for giving the census any greater effect in this case than was given to it in that. No doubt it is to be accepted as an authorized listing of the members of the several bands who were living when it was made, but it has no other bearing in cases like the present. The contention that the Indians understood that the right to select and receive an allotment would not be terminated by death, but would pass to the heirs of the deceased, is based upon excerpts from addresses, made to the Indians by the commissioners representing the government in the negotiations. Even when read apart from the context these excerpts afford little basis for the contention, and when read with the context they make against the contention rather than for it. The real effect of what was said was that on the death of any Indian "after receiving an allotment" the land would pass [68] to his heirs, which is quite consistent with our construction of the act.

The suit was brought between six and seven years after the date of the trust patent, and because of this it is urged that the suit was barred by § 8 of the act of March 3, 1891, chap. 561, 26 Stat. at L. 1099, Comp. Stat. 1913, § 5114 (see also chap. 559, p. 1093), which provides that "suits by the United States . . . to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." This contention must be overruled upon the authority of Northern P. R. Co. v. United States, 227 U. S. 355, 367, 57 L. ed. 544, 550, 33 Sup. Ct. Rep. 368, where it was held that this section is part of the public land laws and refers to patents issued for public lands of the United States. This trust patent was not issued for public lands of the United States, but for reserved Indian lands to which the public land laws had no application. And it may be well to observe in passing that the circuit court of appeals directed that there be embodied in the decree a provision that the government

holds the lands in the same way it held them before the patent was issued,—that is, as reserved Indian lands.

Another objection to the suit is predicated upon the act of April 23, 1904, chap. 1489, 33 Stat. at L. 297, Comp. Stat. 1913, § 4212, limiting and defining the authority of the Secretary of the Interior to correct mistakes in and to cancel trust patents for Indian allotments; but of this it is enough to say that we concur in the view of the Circuit Court of Appeals that this section, which makes no reference to the courts, discloses no purpose to restrict or define their jurisdiction or powers in suits such as this.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[69] CHARLES W. ANDERSON, Collector of Internal Revenue, etc., Petitioner,

v.

FORTY-TWO BROADWAY COMPANY.

(See S. C. Reporter's ed. 69–73.)

Internal revenue — corporation tax — deducting interest on mortgage debt.

1. The amount to be deducted, on account of interest paid by a realty corporation upon its mortgage indebtedness, when fixing the excise tax imposed by the act of August 5, 1909 (36 Stat. at L. 112, chap. 6, Comp. Stat. 1913, § 6307), § 38, upon the conduct of business in a corporate capacity, is governed by the express provision of ¶ 2 of that section, that in ascertaining net income there shall be deducted from gross income interest actually paid by the corporation within the year on its "bonded or other indebtedness" in an amount not exceeding its capital stock, the effect of which provision is not limited in this respect by anything in the first clause of said paragraph which permits the deduction of "all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges, such as rentals or franchise payments required to be made as a condition to the continued use or possession of property," nor by the language of ¶ 1 of such section, measuring the tax by reference to the corporation's "entire net income."

[For other cases, see Internal Revenue, III., in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — classification — corporation tax.

2. Construing the provisions of the act of August 5, 1909 (36 Stat. at L. 112, chap. 6, Comp. Stat. 1913, § 6307), § 38, imposing an excise tax measured by net income upon the carrying on of business in a corporate capacity, as preventing a realty corporation from deducting from gross income the interest paid on mortgage indebtedness in excess of its capital stock, does not render the act repugnant to the Federal Constitution as creating an arbitrary and unreasonable classification.

[For other cases, see Constitutional Law, IV. a, in Digest Sup. Ct. 1908.]

[No. 246.]

Argued October 18, 1915. Decided November 8, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of New York in favor of plaintiff in an action against a collector of internal revenue for the refund of a tax. Reversed and remanded to the District Court for further proceedings.

See same case below, 130 C. C. A. 338, 213 Fed. 777.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for petitioner:

Courts will hesitate by construction to negative the operation of a part of an act of Congress.

Montclair Twp. v. Ramsdell, 107 U. S. 147, 152, 27 L. ed. 431, 432, 2 Sup. Ct. Rep. 391.

Moreover, a court will never undertake to construe a statute unless there is disclosed a patent ambiguity.

United States v. Wiltberger, 5 Wheat. 76, 95, 5 L. ed. 37, 42; United States v. Baltimore & O. S. W. R. Co. 222 U. S. 8, 13, 56 L. ed. 68, 69, 32 Sup. Ct. Rep. 6.

The argument made on behalf of the respondent that a construction of the act depriving mortgagors of the right to deduct as an expense, interest paid on mortgages, would work a great hardship and injustice upon a single class of taxpayers, and thus render the act unconstitutional, has been held unsound by this court.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Stratton's Independence v.

NOTE.—On constitutional equality in the United States in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

As to when taxes illegally assessed may be recovered back—see notes to Phelps v. New York, 2 L.R.A. 626; State ex rel. McCarty v. Nelson, 4 L.R.A. 300; and Erskine v. Van Arsdale, 21 L. ed. U. S. 63.

On the constitutionality of an income tax —see notes to Alderman v. Wells, 27 L.R.A. (N.S.) 864; and State ex rel. Bolens v. Frear, L.R.A.1915B, 569.

Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136. See also 28 Ops. Atty. Gen. 199.

The "net income" to 1 per cent of which the tax is to be equivalent is to be computed, not according to principles of bookkeeping which would be applied by the accountants or officers or stockholders of the corporation, but upon a basis specifically set forth by Congress in the act itself.

Stratton's Independence v. Howbert, supra.

A realty company, not being within the specifically enumerated exceptions, necessarily falls within the description of every corporation organized for profit and having a capital stock represented by shares.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 302, 303, 57 L. ed. 842, 845, 33 Sup. Ct. Rep. 419; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 55 L. ed. 428, 31 Sup. Ct. Rep. 361; Lewellyn v. Pittsburgh, B. & L. E. R. Co. 137 C. C. A. 617, 222 Fed. 181.

Mr. Roger S. Baldwin argued the cause and filed a brief for respondent:

The word "bond" should not be construed to include a mortgage. A bond and a mortgage are separate securities though for the same debt, and the one does not include the other. Thus a bond is defined in Bouvier's Law Dictionary as being "an obligation in writing and under seal," and this definition is supported by the authorities.

Koshkonong v. Burton, 104 U. S. 668, 673, 26 L. ed. 886, 888.

A construction of the act which would deprive mortgagors of the right to deduct, as an expense, interest paid on mortgages, would work a great hardship and injustice imposed upon no other class of taxpayers. Such construction would create an arbitrary and unreasonable classification, and the act if so construed might, on this ground, be held to be unconstitutional under the 5th Amendment to the Constitution of the United States.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 111, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30.

The corporation tax act should be administered upon the basis of "receipts" and "payments," as expressly provided in the law.

Mutual Ben. L. Ins. Co. v. Herold, 198 Fed. 214, affirmed in 120 C. C. A. 256, 201 Fed. 918.

[70] Mr. Justice Pitney delivered the opinion of the court:

This was an action to recover a tax alleged to have been erroneously imposed upon respondent for the year 1910 under the corporation tax act of August 5, 1909 (36 Stat. at L. 112, chap. 6, § 38, Comp. Stat. 1913, § 6307), and paid under protest, respondent contending that, in ascertaining its net income for the purposes of the tax, the entire amount of the interest paid by it within the year upon its mortgage indebtedness ought to have been allowed, the result of which would have been to leave no net income to be taxed; whereas the assessing officer allowed a deduction of interest upon an amount equal only to the capital stock of the company.

Respondent is a corporation of the class commonly known as realty corporations, was organized for the purpose of constructing and renting a building in the city of New York, and transacts no other business. Its paid-up capital stock is only $600, while it has a bonded indebtedness of $4,750,000, secured by mortgages upon its real estate, consisting of a piece of land purchased and a building constructed upon it substantially with borrowed money, to secure the repayment of which the bonds and mortgages were given.

Both the district court (209 Fed. 991) and the circuit court of appeals (130 C. C. A. 338, 213 Fed. 777) held that the interest payments upon the entire mortgage indebtedness were deductible from the gross income of the corporation under clause 1 of ¶ 2, of § 38 of the act, and gave judgment against the collector for a refund of the entire tax.

Those portions of the section that are essential to a determination of the controversy are set forth in the margin.[1] The district court, conceding that the provision [71] of the third clause of the second paragraph, standing alone, would constitute sufficient authority for the action of the assessor, nevertheless held that the force of this provision must be limited, in view of the general purpose of the section to tax only "net income" (construed to mean "gross income after deducting all outgo necessarily incident to the business"), and also in view of the first clause of the second paragraph, which permits of a deduction of "all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business

[1] Sec. 38. That every corporation . . . organized for profit and having a capital stock represented by shares . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing

and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property." The court therefore held that, in the case of such a corporation as respondent, the amounts paid for interest on the mortgages must be deducted in order to arrive at net income. The circuit court of appeals entertained a similar view, holding that such interest payments, in the case of a realty corporation, were ordinary and necessary expenses in the maintenance and operation of the business, and were also charges required [72] to be paid as a condition to the continued use or possession of its property, within the meaning of subdivision 1; and that subdivision 3 must be limited in its effect to "the usual corporate indebtedness which is not an ordinary expense of maintenance, nor a charge, payment of which is a condition of the continued use or possession of property."

With these views we cannot agree. There was error, as it seems to us, in seeking a theoretically accurate definition of "net income," instead of adopting the meaning which is so clearly defined in the act itself.

As has been repeatedly pointed out by this court in previous cases (Flint v. Stone Tracy Co. 220 U. S. 107, 145, 150, 151, 55 L. ed. 389, 411, 413, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; McCoach v. Minehill & S. H. R. Co. 228 U. S. 295, 306, et seq., 57 L. ed. 842, 847, 33 Sup. Ct. Rep. 419; United States v. Whitridge, 231 U. S. 144, 147, 58 L. ed. 159, 161, 34 Sup. Ct. Rep. 24; Stratton's Independence v. Howbert, 231 U. S. 399, 414, 58 L. ed. 285, 291, 34 Sup. Ct. Rep. 136), the act of 1909 was not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of business in a corporate capacity, the tax being measured by reference to the income in a manner prescribed by the act itself. And it is very clear, from a reading of § 38, that the phrase "entire net income," as used in its first paragraph, has no other meaning than that which is particularly set forth in the second paragraph, which declares, in terms, how "such net income shall be ascertained." It may well be that mortgage interest may, under special circumstances, be treated as among the "ordinary and necessary expenses," or as included among the charges "required to be made as a condition to the continued use or possession of property." See 28 Ops. Atty. Gen. 198. But interest upon the "bonded or other indebtedness" of the corporation, whether such indebtedness be secured by mortgage or not, comes within the specific provision of the third clause, whose effect, in our opinion, is not in this respect limited by anything contained in the first. Congress evidently had in view the fact that some corporations (other than banks and like [73] institutions, which, for obvious reasons, are separately considered), carry a current indebtedness exceeding the amount of the paid-up capital stock, and, with respect to such corporations, intended to limit the interest deduction to so much of the indebtedness as did not exceed the capital. Nor can we see the least ground for the insistence that this results in an arbitrary classification. It is not necessary to attribute to Congress a purpose to discourage or impose an extra burden upon corporations carrying on their operations with a nominal capital stock, or with an indebtedness largely exceeding the amount of the capital. It is more reasonable to say that Congress deemed that where the indebtedness does exceed the capital it should no longer be treated as an incident, but that the carrying of the indebtedness should be considered as a principal object of the corporate activities, that the operations of such a corporation are conducted more for the benefit of the creditors than of the stockholders, and that the contribution of the corporation to the expenses of the government should be admeasured with this fact in view. There is no question of the power of Congress to adopt such a basis of distinction, and, since the line must be drawn somewhere, it was certainly not arbitrary to draw it at the precise point where the pecuniary interest of creditors overbalanced that of stockholders.

Judgment reversed, and the cause re-

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business by such corporation . . . equivalent to 1 per centum upon the entire net income over and above $5,000 received by it from all sources during such year. . . . Provided, however, That nothing in this section contained shall apply to [certain specified classes of organizations, not including realty corporations].

Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; . . (third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, . . . and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposit; . . .

manded to the District Court for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[74] UNITED STATES, Plff. in Err.,
v.
M. J. BARNOW.

(See S. C. Reporter's ed. 74–80.)

False personation — nonexisting office or employment.

1. A false representation as to some office or employment which has no legal or actual existence, as well as a false personation of a particular Federal officer or employee, or false pretense of holding an office or employment that actually exists in the Federal government, is comprehended by the provisions of the Federal Criminal Code, § 32, for the punishment of one who, with intent to defraud, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department, or any officer of the government thereof, and takes upon himself to act as such, or who, in such pretended character, demands or obtains anything of value from any person or from the United States or any department, or officer of the government.

State — relation to Federal government — crimes.

2. Congress did not encroach upon the functions of the several states to protect their own citizens and residents from fraud by enacting the provisions of the Federal Criminal Code, § 32, under which a person may be criminally punished for falsely assuming or pretending, with intent to defraud, to be a Federal officer or employee, although the office or employment to which the accused pretends title may have no legal or actual existence.

[For other cases, see States, IV. k, in Digest Sup. Ct. 1908.]

False personation — complete offense — injury to party defrauded.

3. The consummation of the fraud, with consequent injury to the party defrauded, is not essential to complete the offense denounced by the Federal Criminal Code, § 32, which provides for the punishment of one who, with intent to defraud, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any department, or any officer of the government thereof, and takes upon himself to act as such, or who, in such pretended character, demands or obtains anything of value from any person or from the United States or any department, or officer of the government.

[No. 454.]

Argued October 18, 1915. Decided November 8, 1915.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania to review a judgment sustaining a demurrer to an indictment which charges the false personation of a Federal employee. Reversed and remanded for further proceedings.

See same case below, 221 Fed. 140.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. Robert Szold, filed a brief for plaintiff in error:

The distinction between false personation of an individual and false pretense of official authority appears in many statutes and decisions.

Young v. Rex, 3 T. R. 98, 1 Revised Rep. 660; Reg. v. Hague, 4 Best & S. 715, 33 L. J. Mag. Cas. N. S. 81, 10 Jur. N. S. 359, 9 L. T. N. S. 648, 12 Week. Rep. 310, 9 Cox, C. C. 412; Whiteley v. Chappell, 11 Cox, C. C. 307, 38 L. J. Mag. Cas. N. S. 51, L. R. 4 Q. B. 147, 19 L. T. N. S. 355, 17 Week. Rep. 176; People v. Maurin, 77 Cal. 436, 19 Pac. 832; People v. Knox, 119 Cal. 73, 51 Pac. 19.

Pretense of official authority may be accomplished without reference to any existing individual.

Littell v. United States, 95 C. C. A. 148, 169 Fed. 620; United States v. Ballard, 118 Fed. 757; United States v. Brown, 119 Fed. 482; United States v. Curtain, 43 Fed. 433; Brown v. State, — Tex. Crim. Rep. —, 170 S. W. 714; Com. v. Connolly, 97 Mass. 591; Lansing v. People, 57 Ill. 241.

The intent to defraud being present, a failure to consummate the fraud is no defense.

Com. v. Wilgus, 4 Pick. 177; Pearce v. State, 115 Ala. 115, 22 So. 502; State v. Thatcher, 35 N. J. L. 445; Reg. v. Bloomfield, Car. & M. 537, 6 Jur. 224; State v. Lewis, 41 La. Ann. 590, 6 So. 536; 2 Whart. Crim. Law, 11th ed. 1641, § 1467; Rex v. Ady, 7 Car. & P. 140; Hess v. State, 5 Ohio, 12, 22 Am. Dec. 767; State v. Washington, 1 Bay, 120, 1 Am. Dec. 601; Com. v. Ladd, 15 Mass. 526; United States v. Lawrence, 13 Blatchf. 211, Fed. Cas. No. 15,572.

To sustain a charge of fraud it is not necessary to show any injury in pecuniary or property sense sustained by the person defrauded.

Haas v. Henkel, 216 U. S. 462, 480, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112; United States v. Plyler, 222 U. S. 15, 17, 56 L. ed. 70, 32 Sup. Ct. Rep. 6.

Mr. **Daniel Thew Wright** argued the cause, and, with Messrs. T. Morris Wampler and Henry D. Green, filed a brief for defendant in error:

The act creates two distinct offenses.

United States v. Curtain, 43 Fed. 433; United States v. Taylor, 108 Fed. 621; United States v. Farnham, 127 Fed. 478; United States v. Rush, 196 Fed. 570; Littell v. United States, 95 C. C. A. 148, 169 Fed. 821.

The construction sought by the government would invalidate the statute.

United States v. Fox, 95 U. S. 670–673, 24 L. ed. 538–540; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

An element made essential to guilt by the statute must be alleged and proven in the courts.

United States v. Farnham, 127 Fed. 478; People v. Cronin, 80 Mich. 646, 45 N. W. 479.

[75] Mr. Justice **Pitney** delivered the opinion of the court:

This case is brought here under the criminal appeals act (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704), to review a judgment of the district court (221 Fed. 140), sustaining a demurrer to an indictment founded upon § 32 of the Criminal Code of March 4, 1909 (35 Stat. at L. 1088, 1095, chap. 321, Comp. Stat. 1913, §§ 10,165, 10,196). By that section these offenses are prohibited:

(1) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employee acting under the authority of the United States, or any department, or any officer of the government thereof, and taking upon oneself to act as such.

(2) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employee, etc., and in such pretended character demanding or obtaining from any person or from the United States, or any department, or any officer of the government thereof, any money, paper, document, or other valuable thing.

The indictment contains six counts, of which the first, third, and fifth are based upon the former, and the second, fourth, and sixth upon the latter of these prohibitions. The first count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employee of the United States acting under the authority of the United States, to wit, an agent employed by the government to sell a certain set of books entitled, "Messages and Papers of Presidents," and did then and there take upon himself to act as such agent, in that he visited the person named and falsely pretended to him that he was such an employee of the United States, employed as aforesaid for the purpose aforesaid. The third and fifth counts differ only as to the names of the persons mentioned and the dates of the alleged offenses.

[76] The second count charges that defendant, with intent to defraud a certain person named, did falsely pretend to be an employee of the United States acting under the authority of the United States, to wit, an agent employed by the government to sell a certain set of books entitled, "Messages and Papers of Presidents," and in such pretended character did obtain from the person named the sum of $10, which he would not have given to defendant unless he had supposed him to be an employee of the government, and had supposed that the money was to be paid over to the government on account of the subscription price of the books, etc. The fourth and sixth counts are in like form.

It was and is admitted that there was not in existence such an employee or such an employment as it was alleged the defendant pretended.

The district court held that the gist of the offense is the false personation of an officer or employee of the United States, and in order to constitute such an offense there must be personation of some particular person or class of persons, since there cannot be a false personation of a supposititious individual who never existed or whose class never existed. Upon this construction of the statute, all of the counts fell.

We think this is to read the act in too narrow a sense. Not doubting that a false personation of a particular officer or employee of the government, or a false pretense of holding an office or employment that actually exists in the government of the United States, is within the denunciation of § 32, we think it has a broader reach. No convincing reason is suggested for construing it more narrowly than the plain import of its language. To "falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any department, or any officer of the government thereof," is the thing prohibited. One who falsely assumes or pretends [77] to hold an office that has a *de jure* existence is admittedly within its meaning. That is, where the assumption or pretense is false in part, but contains a modicum of truth, the statute is violated. Why should it be deemed less an offense where the assumption or pretense is entirely false, as where the very office or em-

ployment to which the accused pretends title has no legal or actual existence? It is insisted that the words next following—"shall take upon himself to act as such, or shall in such pretended character demand or obtain," etc.—indicate an intent to punish only false personation of existing officers or employees, and not a false representation as to some supposititious employment by the government. But to "take upon himself to act as such" means no more than to assume to act in the pretended character. It requires something beyond the false pretense with intent to defraud; there must be some act in keeping with the pretense (see People v. Cronin, 80 Mich. 646, 45 N. W. 479); but it would strain the meaning of the section to hold that the offender must act as a veritable officer of the government would act. And so, in the second branch of the section, the demanding or obtaining of the thing of value must be done "in such pretended character," —words that are far from importing that the office or employment must be one that is duly established by law.

It is said that to give to the statute the broader meaning extends it beyond the limitations that surround the power of Congress, and encroaches upon the functions of the several states to protect their own citizens and residents from fraud. We are referred to United States v. Fox, 95 U. S. 670, 672, 24 L. ed. 538, 539, where it was declared by Mr. Justice Field, speaking for the court: "An act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States unless it have some relation to the execution of a power of Congress, or to some matter [78] within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate." Accepting this criterion, the legislation now under consideration is well within the authority of Congress. In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or, at least, Congress reasonably might so consider it—not only that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the government? It is the false pretense of Federal authority that is the mischief to be cured; of course, only when accompanied with fraudulent intent, but such a pretense would rarely be made for benevolent purposes. Now, the mischief is much the same, and the power of Congress to prevent it is quite the same, whether the pretender names an existing or a nonexisting office or officer, or, on the other hand, does not particularize with respect to the office that he assumes to hold. Obviously, if the statute punished the offense only when an existing office was assumed, its penalties could be avoided by the easy device of naming a nonexistent office.

Therefore, it seems to us, the statute is to be interpreted according to its plain language as prohibiting any false assumption or pretense of office or employment under the authority of the United States, or any department or officer of the government, if done with an intent to defraud, and accompanied with any of the specified acts done in the pretended character, and the district court [79] erred in attributing to the act a more restricted meaning.

We think there was further error in the ruling of the court that the even-numbered counts must fall for the reason, as expressed in the opinion, that there was no allegation to sustain a charge that the person alleged to be defrauded was deprived of any right, interest, or property, or that he was cheated or overreached. In this the court followed United States v. Rush, 196 Fed. 579.

Since our review, under the criminal appeals act, is confined to passing upon questions of statutory construction, we are not here concerned with the interpretation placed by the court upon the indictment. United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 338, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141, and cases cited. We must, for present purposes, accept that interpretation; hence, we express no opinion as to whether the district court erred in holding that the even-numbered counts did not allege a consummated fraud. The question with which we have to deal is whether the second branch of § 32 of the Criminal Code, upon which the even-numbered counts are founded, requires that the fraud shall be consummated, with consequent injury to the party defrauded, in order that the offense shall be complete.

It has been held that in an indictment under § 5440, Rev. Stat., for a conspiracy to defraud the United States, it is not essential that the conspiracy shall contemplate a financial loss, or that one shall result; and that the statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the

government. Haas v. Henkel, 216 U. S. 462, 479, 54 L. ed. 569, 577, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112. And with respect to § 5418, Rev. Stat., prohibiting the forging of any public record "for the purpose of defrauding the United States," a similar decision was reached. United States v. Plyler, 222 U. S. 15, 56 L. ed. 70, 32 Sup. Ct. Rep. 6.

Like reasoning, we think, must be applied to § 32 of [80] the Criminal Code, whether the United States or "any person" be the intended victim. If, with intent to defraud, and by falsely assuming or pretending to be an officer or employee acting under the authority of the United States, the accused shall, in the pretended character, have demanded or obtained any money, paper, document, or other valuable thing, the offense is complete, notwithstanding some valuable consideration was offered or given by the pretended employee for that which he demanded or obtained. It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether one who has parted with his property upon the strength of a fraudulent representation of Federal employment has received an adequate *quid pro quo* in value determinative. Of course, we do not mean to intimate that it may not in a proper case be taken into consideration as a circumstance evidential upon the question of intent.

The judgment must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[81] NATIONAL BANK OF ATHENS, Appt.,
v.
F. C. SHACKELFORD, Trustee in Bankruptcy for J. N. Webb.

(See S. C. Reporter's ed. 81, 82.)

Appeal — review of facts — concurrent findings.

Concurrent findings of the two lower courts that, as a matter of fact, a mortgage on real property was void as to the creditors of the mortgagor because it was executed and withheld from record for the purpose of hindering, delaying, or defrauding them, will not be disturbed on appeal unless clearly shown to be erroneous.

[For other cases, see Appeal and Error, 4931–4959, in Digest Sup. Ct. 1908.]

[No. 40.]

Argued October 29, 1915. Decided November 8, 1915.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of Georgia, adjudging a mortgage deed invalid as against general creditors of the mortgagor. Affirmed.

See same case below, 125 C. C. A. 575, 208 Fed. 677.

The facts are stated in the opinion.

Mr. John J. Strickland argued the cause, and, with Mr. Roy M. Strickland, filed a brief for appellant.

Messrs. Lamar C. Rucker and Horace M. Holden argued the cause, and, with Messrs. Stephen C. Upson, Andrew J. Cobb, and Howell C. Erwin, filed a brief for appellee.

Mr. Justice McReynolds delivered the opinion of the court:

This controversy arose in a bankruptcy proceeding, and was begun in the United States district court for the northern district of Georgia. Appellant claims that it holds a valid lien on certain real estate in the city of Athens, formerly the property of the bankrupt, Webb, under a mortgage deed executed by him November 6, 1911, [82] but not recorded until noon, August 14, 1912, a few hours before the petition in involuntary bankruptcy was filed. Among other things, the trustee asserts that the mortgage is void as to creditors because fraudulently withheld from record. Bankruptcy act, § 70. Georgia Code, 1910, § 3224.

Having heard the witnesses and upon the entire evidence, the district court, citing and purporting to follow Re Duggan, 106 C. C. A. 51, 183 Fed. 405 (1910), found and adjudged the deed invalid as against general creditors. Affirming this action, the circuit court of appeals for the fifth circuit declared: "The evidence in this case tends strongly to show that, although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was with-

Note.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605; and St. Anthony Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

held from record, so as not to affect the mortgagor's credit; and we therefore concur with the trial judge in his disposition of the case." 125 C. C. A. 575, 576, 208 Fed. 677, 678. In the Duggan Case the same court had held fraudulent and void, both as to prior and subsequent creditors, a chattel mortgage executed by a bankrupt, but withheld from record under agreement so to do because of the effect which recordation would have on her credit.

Considering all said and adjudicated by the two courts below, we must conclude they concurred in finding, as matter of fact, that the mortgage in question was void as to creditors because executed and withheld from record for the purpose of hindering, delaying, or defrauding them. The rule is well settled that a finding of this nature will not be disturbed upon review here unless clearly shown to be erroneous. Washington Securities Co. v. United States, 234 U. S. 76, 78, 58 L. ed. 1220, 1222, 34 Sup. Ct. Rep. 725; Stuart v. Hayden, 169 U. S. 1, 14, 42 L. ed. 639, 643, 18 Sup. Ct. Rep. 274. An examination of the record reveals no clear error, and, accordingly the judgment appealed from must be affirmed.

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[83] CORNELIUS B. PARKER and Janie B. Parker, His Wife, Appts.,
v.
ANTONIO MONROIG et al.

(See S. C. Reporter's ed. 83–87.)

Husband and wife — community property — conveyance without wife's consent.

1. A contract between a married man owning an option to buy certain real property and a corporation, by which the latter, as part consideration for its agreement to purchase a part of the property embraced in the option, was given an easement of way over the entire property, is not invalid because the wife did not assent thereto, as is essential in Porto Rico to the valid disposition of real property by the community, since by such contract the exercise of the option was submitted to a limitation which followed the property into the hands of the community and diminished the estate which it would otherwise have been entitled to under the option, and the community is therefore under a legal obligation to respect and give effect to the easement,—especially since the community secured through the contract with the corporation the means, in part, at least, to enable it to acquire, under the option, the property which remained.

[For other cases, see Husband and Wife, II. c; II. g, in Digest Sup. Ct. 1908.]

Limitation of actions — when action barred — specific performance.

2. The right to enforce full performance of an agreement by the holder of an option on real property to grant to a corporation upon condition of its purchase of a part of the property, an easement of way over the entire property, is not barred where the former refuses to grant the easement over that part of the property embraced in the option which was not included in the corporation's purchase, by the limitation prescribed by Porto Rico Code 1913, § 4481, which on its face is plainly applicable only to actions for lesion in cases of sale embraced by § 4480 of the same Code.

[For other cases, see Limitation of Actions, III. g, in Digest Sup. Ct. 1908.]

[No. 287.]

Submitted October 12, 1915. Decided November 15, 1915.

APPEAL from the District Court of the United States for Porto Rico to review a decree in favor of complainant in a suit for specific performance. Affirmed.

See same case below, 6 Porto Rico Fed. Rep. 595.

The facts are stated in the opinion.

Mr. N. B. K. Pettingill submitted the cause for appellants:

In Porto Rico real estate of a conjugal partnership can be alienated only with the consent of both husband and wife.

Amadeo v. Registrar of Property, 3 D. P. R. 134; Caballero v. Registrar of Property, 12 P. R. R. 214; Boscio v. Registrar of Property, 14 P. R. R. 605; Vidal v. Registrar of Property, 12 P. R. R. 198.

Any leasehold right capable of being recorded in the registry is real property.

Porto Rico General Teleph. Co. v. Registrar of Property, 18 P. R. R. 823.

The contract being void, specific performance could not be enforced.

Hedges v. Dixon County, 150 U. S. 182, 192, 37 L. ed. 1044, 1048, 14 Sup. Ct. Rep. 71.

Moreover, the wording of the Porto Rican statute prohibiting the disposal of conjugal real estate without joint consent makes such contract analogous to contracts for the conveyance of homesteads by one of the spouses under the laws of many states. We believe it is uniformly held that such contracts are void, and, by the weight of authority, that, being void, they do not even create an estoppel against the spouse who signs them.

Stevens v. Parish, 20 Ind. 260, 95 Am. Dec. 636; Crim v. Nelms, 78 Ala. 604; Law v. Butler, 44 Minn. 482, 9 L.R.A. 856, 47 N. W. 53; Bruner v. Bateman, 66 Iowa, 488, 24 N. W. 9; Meek v. Lange, 65 Neb. 786, 91 N. W. 695; Hodges v. Farnham, 49

NOTE.—On specific performance of contracts for conveyance where wife refuses to unite in the conveyance—see note to Barbour v. Hickey, 24 L.R.A. 763.

Kan. 777, 31 Pac. 606; Richards v. Greene, 73 Ill. 54.

Specific performance is never decreed against one not a party to the contract.

Baltzer v. Raleigh & A. Air Line R. Co. 115 U. S. 634, 648, 29 L. ed. 505, 510, 6 Sup. Ct. Rep. 216; Waterman, Specific Performance, § 511; Graybill v. Brugh, 89 Va. 899, 21 L.R.A. 133, 37 Am. St. Rep. 894, 17 S. E. 558; Bateman v. Riley, 72 N. J. Eq. 316, 73 Atl. 1006; Richmond v. Robinson, 12 Mich. 193.

Apart from all other considerations, appellees could not be entitled to specific performance in the absence of any allegation of fraud or mistake, which could serve as a basis for the reformation of the contract as precedent to its specific enforcement in the manner decreed.

Parish v. United States, 8 Wall. 489, 19 L. ed. 472; American Colortype Co. v. Continental Colortype Co. 188 U. S. 104, 107, 47 L. ed. 404, 405, 23 Sup. Ct. Rep. 265; Van Ness v. Washington, 4 Pet. 232, 282, 7 L. ed. 842, 859.

Messrs. Frederick S. Tyler and Frank Antonsanti submitted the cause for appellees.

Mr. Chief Justice White delivered the opinion of the court:

W. G. Henry, who had leased to Cornelius B. Parker, a married man, two farms, one Rio Hondo, containing 440 acres, and the other El Quinto, embracing 278 acres, gave him in writing an option to buy both for the sum of $37,000 in gold, payable on or before May 1, 1911. Shortly before that period Parker and the Successors of A. Monrdig, a sugar manufacturing corporation, agreed the one to sell and the other to buy a piece of land "composed of about 200 acres, a part of the farm known as El Quinto," for $125 per acre, and on the same day an agreement in writing was executed between the parties by which Parker created in favor of the corporation an [85] easement of way across the farms El Quinto and Rio Hondo for the operation of a private railway, conditioned on the carrying out by the corporation of the purchase of the portion of El Quinto as stated in the option contract. The option and the agreement to buy were both consummated. Parker acquired the two farms and the corporation bought from Parker 207 acres out of the farm El Quinto, about 70 acres, therefore, remaining in Parker. The formal deeds accomplishing this result are not in the record, but as found by the court below, and not disputed, the matter was so arranged that the $25,875 due for the part of El Quinto bought by the corporation was made available for Parker, so that he was enabled to use it as part of the $37,000 which, under the option, he was to pay for the purchase of the whole of El Quinto and Rio Hondo. It further appears from the opinion below that nothing was said in the deed to the corporation as to the right of way over the strip remaining of El Quinto, but at or about the time of the sale a deed was drawn by Parker and his wife, giving to the corporation the right of way over Rio Hondo as provided in the option contract.

A controversy grew up between Parker and the corporation as to whether the corporation had not lost the right to the easement of way over the portion of El Quinto retained by Parker, and an attempt of the corporation to exercise the right of servitude was interfered with. This suit was then brought by the corporation and this appeal is prosecuted to obtain the reversal of a decree rendered in favor of the corporation, directing the performance of the contract concerning the easement, and preventing the interference with the enjoyment of such right.

It is apparent that the substantial controversy is a very narrow one, concerning only the easement of way over the small strip of the farm El Quinto remaining after carving out the portion of that farm bought by the corporation. And the contention as to the nonexistence of [86] the right of way rests exclusively upon a challenge of the validity of the contract as to the right between Parker and the corporation. The contention is that by virtue of the purchase made from Henry of the two farms, they became *acquêts* of the community existing between Parker and his wife, and as, under the Porto Rican law, the assent of the wife to the disposal of real property of the community was essential, and such assent was not given by the wife, Parker alone having been a party to the contract giving the corporation the right of way, that contract was absolutely void and not susceptible of being enforced. But the error lies in assuming that the property was community property when the option contract was made in order to measure its legality by such erroneous assumption. On the contrary, when the contract made by Parker, giving the right of way, was entered into, the property belonged to Henry, and the only right possessed by the community was that which might arise from the exercise by Parker, the head and master of the community, of the option to buy from Henry which he, Parker, had procured. When, therefore, before the exercise of the option, Parker agreed to the establishment of the right of way to attach to the property when bought under his option, such contract modified to that extent the right to

buy conferred by the option; or, in other words, submitted the exercise of the option to a limitation which followed the property into the hands of the community and diminished the estate which it would otherwise have been entitled to under the option. Obviously from this it results that there was a legal obligation on the part of the community to respect and give effect to the right of way, and that its refusal to do so gave rise to the duty of exerting judicial power to compel performance. And the cogency of these conclusions becomes additionally convincing when it is considered that there is no contention as to wrong against the community resulting from the contract which gave to the [87] corporation a right to buy a part of the property covered by the option held by Parker, especially when, from the surrounding circumstances, it is clearly to be deduced that the agreement to give to the corporation the right of way was one of the considerations by which it was led to consent to become a purchaser of part of the property which the option embraced, thereby in part, at least, affording the means by which Parker was enabled to acquire under the option the property which remained. The claim now made thus reduces itself to the contention that the right of the community to purchase under the option must be by it enjoyed free from the obligations inseparably resulting from its exertion; or, in another aspect, that the community, having secured through its contract with the corporation the means to enable it to pay for the property which it acquired, can retain the property free from the obligation incurred in favor of the corporation.

There is a contention that the right to enforce the agreement to grant the servitude of way is barred by the limitation provided in § 4481 of the Porto Rican Code of 1913 (§ 1375 of the previous Code). But, on the face of the provision relied upon, it is plainly applicable only to actions for lesion in cases of sale embraced by § 4480 of the same Code, and has therefore no possible relation to the subject before us. So, also, there is a contention that the decree below was too broad since it enforced a perpetual easement instead of one depending upon the continued use of the property for the purposes for which the easement was created. But we think this contention is also wholly without merit, because the decree, when rightly interpreted, is not susceptible of the extreme construction placed upon it.

Affirmed.

[88] UNITED STATES OF AMERICA, Plff. in Err.,

v.

NEW YORK & PORTO RICO STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 88-93.)

United States — contracts — formal requisites — enforcement against private party.

The failure to reduce a contract made by the authority of the Secretary of the Navy on behalf of the government to writing "signed by the contracting parties, with their names at the end thereof," as required by U. S. Rev. Stat. § 3744, Comp. Stat. 1913, § 6895, does not preclude the enforcement of such contract by the government against the other party thereto, although such noncompliance with the statute renders the contract unenforceable against the government.

[For other cases, see United States, VI. b, in Digest Sup. Ct. 1908.]

[No. 44.]

Argued November 3, 1915. Decided November 15, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the District Court for the Southern District of New York in favor of defendant in an action by the United States upon a public contract. Reversed.

See same case below, on first writ of error, 124 C. C. A. 325, 206 Fed. 443; on second writ of error, 126 C. C. A. 668, 209 Fed. 1007.

The facts are stated in the opinion.

Solicitor General Davis argued the cause, and, with Mr. Robert Szold, filed a brief for plaintiff in error:

U. S. Rev. Stat. § 3744, Comp. Stat. 1913, § 6895, is no bar to a suit by the government on executory parol contracts.

1. The statute does not render the contract illegal, but only unenforceable. It affects not the validity of the contract, but the remedy thereon.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 48 L. ed. 130, 24 Sup. Ct. Rep. 47; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100; Browne, Stat. Fr. 5th ed. § 115a.

2. Section 3744, Revised Statutes, is solely for the protection of the government.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; United

States v. Verdier, 164 U. S. 213, 41 L. ed. 407, 17 Sup. Ct. Rep. 42.

3. The government may waive compliance with statutory forms required for its protection.

Bailey v. United States, 109 U. S. 432, 27 L. ed. 988, 3 Sup. Ct. Rep. 272; McGowan v. Parish, 237 U. S. 285, 294, 295, 59 L. ed. 955, 962, 963, 35 Sup. Ct. Rep. 543.

4. Since the government is not expressly named in the statutes, its remedy by suit on a valid common-law contract is not barred. The government may take the benefit of a statute, but it is not bound thereby unless expressly named.

Stanley v. Schwalby, 147 U. S. 508, 514, 515, 517, 37 L. ed. 259, 262, 263, 13 Sup. Ct. Rep. 418, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

The signed offer and acceptance in writing constitute compliance with the statute.

Adams v. United States, 1 Ct. Cl. 192; Johnston v. United States, 41 Ct. Cl. 76.

The statute does not apply to executed contracts, and is no bar to suit on a parol contract after performance by plaintiff.

St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 163, 48 L. ed. 130, 132, 24 Sup. Ct. Rep. 47; United States v. Andrews, 207 U. S. 229, 52 L. ed. 185, 28 Sup. Ct. Rep. 100.

Mr. James H. Hayden argued the cause, and, with Messrs. Ray Rood Allen and Norman B. Beecher, filed a brief for defendant in error:

Soon after the passage of the section in question it was held to be and was enforced as a statute of frauds, operating upon the transactions themselves rather than upon the parties to them, and rendering absolutely void and unenforceable all dealings in the nature of agreements made otherwise than in conformity with the procedure described in the statute. This interpretation has been adhered to consistently during the period of more than fifty years.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518; South Boston Iron Co. v. United States, 118 U. S. 37, 30 L. ed. 69, 6 Sup. Ct. Rep. 928; Monroe v. United States, 184 U. S. 524, 46 L. ed. 670, 22 Sup. Ct. Rep. 444; St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 48 L. ed. 130, 24 Sup. Ct. Rep. 47; Henderson v. United States, 4 Ct. Cl. 81; Danolds v. United States, 5 Ct. Cl. 65; McLaughlin v. United States, 37 Ct. Cl. 185; Johnston v. United States, 41 Ct. Cl. 76; Gillespie v. United States, 47 Ct. Cl. 310.

This is no more than an application of the principle stated long ago in the case of Russell v. De Grand, 15 Mass. 35. The rule of law is of universal operation that none shall, by aid of a court of justice, obtain the fruits of an unlawful bargain.

The effect that the courts have given to U. S. Rev. Stat. § 3744, Comp. Stat. 1913, § 6895, in this case, is in harmony with that given other statutes of the same nature.

Richmond Standard Steel Spike & Iron Co. v. Chesterfield Coal Co. 87 C. C. A. 636, 160 Fed. 832.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by the United States to recover the increased cost of transportation for coal, above a price that the defendant had agreed to accept for the service; the latter having notified the government that it would not furnish the steamers agreed. There is no dispute as to the facts. On November 9, 1909, the plaintiff requested in writing that the defendant make a tender for the transportation of not less than 8,000 tons of coal from certain Atlantic ports at the option of the plaintiff to Mare island or San Francisco, with stipulations as to [91] time. On November 13 the defendant submitted an offer which the plaintiff accepted by telegraph on the same day. On November 15 the defendant wrote, acknowledging the telegram, and saying that it could advise in due course what steamers it would tender. There was further correspondence on the footing of a mutual contract, but on December 14, the defendant's attorney wrote, stating that it believed that a combination had been made with intent "to cause it to make default under its engagement to your Department or else to suffer heavy loss," and requesting the plaintiff to procure the transportation if it could be done at reasonable cost, letting the writer know the terms of any contract before it was closed. The plaintiff thereupon got the transportation elsewhere. The declaration is in three counts; two upon the contract and a third for money paid at the defendant's request. At the first trial the plaintiff had judgment. 197 Fed. 995. This judgment was reversed by the circuit court of appeals. 124 C. C. A. 325, 206 Fed. 443. At a second trial on this same record both parties moved that a verdict be directed, and a verdict was directed for the defendant. The judgment was affirmed by the circuit court of appeals. 126 C. C. A. 668, 209 Fed. 1007.

The only matter for our consideration is whether the court below was right in ruling as matter of law that there was no binding contract, and therefore we may lay on one side some details that were dwelt upon by the defendant, but that do not affect this

question. The ground of the defense is Rev. Stat. § 3744, Comp. Stat. 1913, § 6895. By this section it is made the duty of the Secretaries of War, the Navy, and the Interior to cause every contract made by their authority on behalf of the government "to be reduced to writing, and signed by the contracting parties with their names at the end thereof;" all the copies and papers in relation to the same to be attached together by a ribbon and seal, etc. A formal proposal, varying, the defendant says, from that [92] which was accepted in the letters, was sent to the defendant, and received by it on December 11, but never was signed, and the defendant contends that, however it might be otherwise, the statute makes the informal agreement by correspondence void.

The statute does not address itself in terms to the effect of the form upon the liability of the parties, like the statute of frauds. Whatever effect it has in that way is not a matter of interpretation in a strict sense, but is implied. The extent of the implication is to be gathered from the purpose of the section and such other considerations as may give us light. The section originally was part of the act of June 2, 1862, chap. 93, 12 Stat. at L. 411, Comp. Stat. 1913, § 6895, and its purpose is manifested by the scope of the act and its title. It is called "An act to Prevent and Punish Fraud on the Part of Officers Intrusted with Making of Contracts for the Government," and this was recognized as the purpose in Clark v. United States, 95 U. S. 539, 24 L. ed. 518. In that case some of the justices thought that the decision went too far in treating the section as a statute of frauds even in favor of the United States; and while it is established that a contract not complying with the statute cannot be enforced against the government, it never has been decided that such a contract cannot be enforced against the other party. The prevailing opinion cannot be taken to signify that the informal contract is illegal, since it went on to permit a recovery upon a *quantum valebat* when the undertaking had been performed by a claimant against the United States. United States v. Andrews, 207 U. S. 229, 243, 52 L. ed. 185, 191, 28 Sup. Ct. Rep. 100. Of course the statute does not mean that its maker, the government, one of the ostensible parties, is guilty of unlawful conduct, or that the other party is committing a wrong in making preliminary arrangements, if later the Secretary of the Navy does not do what the act makes it his duty to do.

There is no principle of mutuality applicable to a case [93] like this, any more than there necessarily is in a statute requiring a writing signed by the party sought to be charged. The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat. §§ 3709, 3718–3724, 3745–3747, Comp. Stat. 1913, §§ 6832, 6862, 6863, 6865, 6869, 6872–6874, 6897–6899) in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. We see no reason for extending the implication of the act beyond the evil that it seeks to prevent. Even when a statute in so many words declares a transaction void for want of certain forms, the party for whose protection the requirement is made often may waive it, "void" being held to mean only voidable at the party's choice.

Judgment reversed.

CARLOS GSELL, Plff. in Err.,
v.
INSULAR COLLECTOR OF CUSTOMS.

(See S. C. Reporter's ed. 93–98.)

Error to Philippine supreme court — case involving Federal statute.

1. A decision as to the proper classification under the Philippine tariff act of August 5, 1909 (36 Stat. at L. 130, chap. 8), of a commodity imported into the Philippine Islands, involves a statute of the United States, within the meaning of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 1225), defining the appellate jurisdiction of the Supreme Court of the United States over the Philippine Islands.

[For other cases, see Appeal and Error, III. d, 5, in Digest Sup. Ct. 1908.]

Appeal — mode of review — revenue cases.

2. A judgment of the supreme court of the Philippine Islands which affirmed a judgment of the court of first instance reversing a decision of the insular collector as to the proper classification, under the Philippine tariff act of August 5, 1909 (36 Stat. at L. 130, chap. 8), of a certain commodity imported into the Philippine Islands, can be reviewed in the Federal Supreme Court only by appeal, under the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 1225), providing that the judgments and decrees of the former court may be reviewed "in the same manner, under the same regulations, and by the

NOTE.—On appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Banking Corp. 55 L. ed. U. S. 438.

On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

[No. 31.]

Submitted May 14, 1915. Decided November 15, 1915.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance of Manila, reversing a decision of the insular collector as to the proper classification under the Philippine tariff act of a commodity imported into the Philippine Islands. Dismissed for want of jurisdiction.

See same case below, 24 Philippine, 369.

The facts are stated in the opinion.

Mr. Harry W. Van Dyke submitted the cause for plaintiff in error.

Mr. S. T. Ansell submitted the cause for defendant in error. Mr. L. W. Call was on the brief.

Mr. Justice Day delivered the opinion of the court:

This case comes to this court on a writ of error to the supreme court of the Philippine Islands, the purpose of which is to review a judgment of that court, affirming a judgment of the court of first instance of Manila, which reversed a decision of the insular collector as to the proper classification under the tariff act of a certain commodity, known as wool noils, imported into the Philippine Islands. The contention of importer is that the material is admissible under the free list. The decision was that such material properly classified was subject to a duty of 10 per cent ad valorem. At the last term of this court, this case was submitted for consideration, and an order was [95] entered, requesting that briefs be filed before the present term on the question of the jurisdiction of this court to review the decision of the supreme court of the Philippine Islands, and, if reviewable, whether by writ of error or appeal.

The manner of review in this court of the judgments of the supreme court of the Philippine Islands is regulated by act of Congress of July 1st, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 1225), which provides:

"That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

This section gives this court jurisdiction to review, revise, reverse, modify, and affirm the final judgments or decrees of the supreme court of the Philippine Islands, among others, in actions in which a statute of the United States is involved. The Philippine tariff act (36 Stat. at L. 130, chap. 8), which is under consideration in this case, is a statute of the United States, and the decision [96] as to the classification of the merchandise in question involves a statute of the United States, and the case is properly brought for review into this court.

As to the manner of review, this statute is distinct, and provides that such final judgments and decrees of the supreme court of the Philippine Islands can be reviewed, revised, reversed, modified, or affirmed by this court on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States. This provision as to the manner of review is an essential part of the act, and in considering it, this court held, in Fisher v. Baker, 203 U. S. 174, 51 L. ed. 142, 27 Sup. Ct. Rep. 135, 7 Ann. Cas. 1018,—where an attempt was made to review an order in a proceeding in habeas corpus by writ of error,—that, inasmuch as the final order in such cases in the circuit and district courts of the United States can only be reviewed by appeal, the same rule governs procedure to review a final order of the supreme court of the Philippine Islands, and the writ of error was accordingly dismissed. See, in this connection, De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

We therefore proceed to inquire as to the manner of review of orders of this char-

acter, in revenue cases in the United States, under the statutes and regulations governing such proceedings, when taken from the final judgments and decrees of the circuit courts of the United States. Before the act of June 10, 1890 (26 Stat. at L. 131, chap. 407), there was a right of review of revenue cases by appeal from the circuit courts of the United States to this court (Rev. Stat. § 699). By the act of June 10, 1890, an appeal was given from the decision of the board of appraisers as to the construction of the law and the facts, respecting the classification of merchandise, and the rate of duty imposed, to the circuit courts of the United States. The decision of the circuit court was [97] final unless the court should be of opinion that the question involved was of sufficient importance to require a review by this court, in which case an appeal was allowed from the circuit court to this court. In this state of the law, the court of appeals act was passed March 3, 1891 (26 Stat. at L. 826, chap. 517), in which the judgment of the court of appeals was made final, among other instances, in revenue cases. It was held that that act, read in connection with former legislation, gave the circuit court of appeals jurisdiction to review judgments of the circuit court in revenue cases. Louisville Public Warehouse Co. v. Collector of Customs, 1 C. C. A. 371, 6 U. S. App. 53, 49 Fed. 561, circuit court of appeals, sixth circuit, opinion by Judge, afterwards Mr. Justice, Jackson. The remedy must be sought by appeal, and not by writ of error. United States v. Diamond Match Co. 53 C. C. A. 90, 115 Fed. 288, sixth circuit. In 1908, the revenue act was amended (35 Stat. at L. 403, chap. 205), so that the decision of the circuit court was made final in such revenue cases, unless the court certified that the question was of enough importance to go to the court of appeals, in which case there was a right to review the judgment of the court of appeals by writ of certiorari in this court. The customs court act gives jurisdiction to review the decisions of the board of general appraisers by appeal. This act has no application to the Philippine Islands. From this it may be seen that the procedure for review in the circuit courts of the United States, as well as in the circuit courts of appeal and in this court, has at all times been by way of appeal, and not by writ of error. United States v. Klingenberg, 153 U. S. 93, 103, 104, 38 L. ed. 647, 651, 14 Sup. Ct. Rep. 790.

Turning now to the procedure in the Philippine Islands (Acts of Philippine Commission, No. 864), we find that the decision of the insular collector may be reviewed in a court of first instance, and afterwards in the supreme court of the Philippine Islands, as was done in the present case. In the supreme court, while that court has the [98] case upon so-called bills of exception, the whole record is certified and the case is considered, as the opinion shows, upon the facts and the law applicable thereto. Thus the proceeding in the supreme court is practically an appeal. In the opinion and judgment in that court it is styled an appeal. The right to review the judgment in this court is, as we have said, controlled by the Federal act of 1902, and is in the same manner, *i. e.*, by appeal or writ of error, and with the same procedure, so far as applicable, as is applied to final judgments and decrees of the circuit courts of the United States. From what has been said, it is apparent that such review from the orders of the circuit courts of the United States was uniformly by appeal, and not by writ of error. Nor is the different method of review a mere difference in form and procedure only. Upon appeal, as the statutes already referred to and the decisions of this court show, it was intended to take before the reviewing court the questions of law and fact involved, upon all competent evidence taken and heard before the board of general appraisers and before the circuit court. Such was the uniform method and purpose of review, under all the statutes and procedure, which, so far as applicable, are to be read into the Philippine act, and such is still the policy of the Federal statutes in permitting review of the decisions of the boards of general appraisers in the United States by appeal to the court of customs appeal. By writ of error the review is limited to questions of law,—a method of procedure inapplicable to customs cases, where the facts must be considered in order to determine the proper classification of the merchandise and the duty to which it is subject.

We reach the conclusion that the writt of error, by which it is sought to review the judgment of the Supreme Court of the Philippine Islands in this case, should be dismissed for want of jurisdiction, and it is so ordered.

Dismissed.

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[99] SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
SAMUEL J. CAMPBELL.

(See S. C. Reporter's ed. 99-103.)

Carriers — mileage books — condition — forfeiture.

The presentation of a mileage book or

mileage exchange ticket by the original purchaser for the transportation of another person who is accompanying him on the journey does not justify a forfeiture of the mileage book under a tariff rule which provides for such forfeiture if a mileage book or ticket "be presented to an agent or conductor by any other than the original purchaser."

[For other cases, see Carriers, II. a, 8, in Digest Sup. Ct. 1908.]

[No. 53.]

Argued November 4, 1915. Decided November 15, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas for Greenville County, in that state, in favor of plaintiff in an action to recover damages from a carrier for the alleged wrongful forfeiture of plaintiff's mileage book. Affirmed.

See same case below, 94 S. C. 95, 77 S. E. 745.

The facts are stated in the opinion.

Mr. John K. Graves argued the cause, and, with Mr. L. E. Jeffries filed a brief for plaintiff in error.

Mr. John G. Capers argued the cause, and, with Mr. William G. Sirrine, filed a brief for defendant in error.

[101] Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by Samuel J. Campbell against the Southern Railway Company to recover damages for the wrongful forfeiture of the plaintiff's mileage book. The company sought to justify the forfeiture under its tariff regulations, which had been duly filed with the Interstate Commerce Commission. The defense was overruled by the state court. 94 S. C. 95, 77 S. E. 745.

The admitted facts are these: On November 20, 1910, Mr. Campbell, being the owner of a thousand-mile coupon book, or mileage book, purchased another mileage book of the same sort from the agent of the Southern Railway Company at Greensboro, North Carolina, and thereupon presented both books to the agent of the company and obtained, in exchange for coupons, two "mileage exchange tickets" to Greenville, South Carolina. With these tickets he and his wife traveled to Greenville, the tickets being accepted by one of the company's collectors. A few days later he presented his mileage books to the agent of the company at Greenville and obtained, for the proper number of coupons, two exchange tickets to Greensboro. When he presented these tickets for the transportation of himself and his wife, the ticket collector asked if he had mileage books, and required him to produce them. Upon looking at the books, the ticket collector returned one of them to Mr. Campbell, but forfeited the other, which contained unused coupons for 600 miles. The exchange ticket, which had been issued for the coupons taken from the book, was also forfeited, and the ticket collector demanded and received payment in cash of the fare for the plaintiff's wife.

The tariff regulations and conditions which related to mileage books, or mileage tickets, and were filed with the Interstate Commerce Commission, were as follows:

"Exchange requirement.—Mileage coupons (except as [102] noted below) will not be honored for passage on trains or steamers or in checking baggage (except from nonagency stations and agency stations not open for the sale of tickets), but must be presented at ticket office and there exchanged for continuous passage ticket, which continuous passage ticket will be honored in checking baggage and for passage when presented in connection with the mileage ticket.

"Non-transferable.—If a mileage ticket or ticket issued in exchange for coupons therefrom be presented to an agent or conductor by any other than the original purchaser, it will not be honored, but will be forfeited, and any agent or conductor of any line over which it reads shall have the right to take up and cancel such ticket or tickets."

A jury was waived, and the case was submitted to the trial judge upon a stipulation that if judgment went for the plaintiff he should recover the value of the mileage book ($12) and $25 damages. Judgment was entered accordingly.

We are not concerned with the reasonableness of the rule; that, if challenged, would be a question for the Interstate Commerce Commission. The question now is as to the application of the rule. Nor need we consider the right of the ticket collector to demand payment for the transportation of the plaintiff's wife. The case, as the state court said, turns upon the right to forfeit the mileage book with its unused coupons.

The condition expressed in the rule is that the mileage book, or mileage ticket, as it is termed, shall be presented by the original purchaser. The plaintiff was the original purchaser and presented it. The company seeks to construe the rule as if it read that the mileage book should be forfeited if presented by the original purchaser for the transportation of a person other than himself. The rule does not so read. It was not made a ground of forfeiture [103] that the original purchaser asked for

more than he was entitled to get. For example, when the plaintiff presented his books at the station to procure tickets for himself and wife in exchange for coupons, it could not be said that he forfeited either of the books, or both, because he asked too much. He was in no different position when he produced the books before the conductor, with the tickets which the company's agent had given him in exchange for coupons. He was still the original purchaser, and the provision for forfeiture when the mileage book is presented by someone else does not hit the case.

We cannot say that the state court denied a Federal right when it held that railway company strictly to its own terms.

Judgment affirmed.

PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY, by H. M. Bosworth, Auditor.

(See S. C. Reporter's ed. 103–116.)

Error to state court — Federal question — taxation of foreign corporation — doing business.

1. The question whether or not a foreign corporation was doing business within the state at the time to which a privilege tax imposed upon it relates is open for review in the Federal Supreme Court on writ of error to the state court in a case in which the enforcement of such tax was unsuccessfully resisted on the ground that its imposition was contrary to the due process of law clause of U. S. Const., 14th Amend., because the corporation had previously withdrawn from the state.

[For other cases, see Appeal and Error, 2070–2256, in Digest Sup. Ct. 1908.]

Taxes — foreign life insurance company — doing business.

2. The mere continuance of the obligation of existing policies in a foreign life insurance company, held by resident policy holders, together with the receipt of the renewal premiums upon these policies at the company's home office, may not be treated by the state as constituting in itself the transaction of a local business, justifying the imposition under Ky. Stat. 1906, § 4226, of an annual privilege tax upon the amount of the premiums so received.

[For other cases, see Taxes, I. c, 3, a; Constitutional Law, IV. b, 6, a, in Digest Sup. Ct. 1908.]

[No. 328.]

Argued October 20 and 21, 1915. Decided November 15, 1915.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Franklin County, in that state, enforcing a privilege tax upon a nonresident life insurance company. Reversed and remanded for further proceedings.

See same case below, on first appeal, 155 Ky. 197, 159 S. W. 698; on second appeal, 160 Ky. 16, 169 S. W. 551.

The facts are stated in the opinion.

Mr. William Marshall Bullitt argued the cause, and, with Messrs. Charles C. Lockwood, Keith L. Bullitt, and Clarence C. Smith, filed a brief for plaintiff in error:

The tax levied by Ky. Stat. § 4226, is a license tax imposed on foreign insurance companies for the privilege of doing business within Kentucky.

Northwestern Mut. L. Ins. Co. v. James, 138 Ky. 52, 127 S. W. 505; Southern Bldg. & L. Asso. v. Norman, 98 Ky. 298, 31 L.R.A. 41, 56 Am. St. Rep. 367, 32 S. W. 952; Fidelity & C. Co. v. Louisville, 106 Ky. 207, 50 S. W. 35; Equitable Life Assur. Soc. v. Pennsylvania, 238 U. S. 143, 146, 59 L. ed. 1239, 1241, 35 Sup. Ct. Rep. 829.

The state of Kentucky cannot tax a license or privilege which it does not grant.

Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; New York v. Roberts, 171 U. S. 658, 664, 43 L. ed. 323, 326, 19 Sup. Ct. Rep. 58; Flint v. Stone Tracy Co. 220 U. S. 107, 164, 167, 55 L. ed. 389, 418, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 398, 47 L. ed. 513, 518, 519, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 360, 49 L. ed. 1077, 1083, 1084, 25 Sup. Ct. Rep. 669; Union Re-

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to validity of license tax imposed on foreign corporation as a condition of permission to do business within the state—see note to Reymann Brewing Co. v. Brister, 45 L. ed. U. S. 269.

On taxation of corporate franchises in the United States—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 33.

As to restrictions on business of foreign insurance companies—see note to State ex rel. Richards v. Ackerman, 24 L.R.A. 298.

frigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 209, 211, 50 L. ed. 150, 153, 155, 156, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Buck v. Beach, 206 U. S. 392, 400, 51 L. ed. 1106, 1111, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

The Provident Savings has done nothing, since its withdrawal, which can be construed as "doing business" in Kentucky so as to justify the exaction by that state of a privilege or license tax.

Hunter v. Mutual Reserve L. Ins. Co. 218 U. S. 573, 54 L. ed. 1155, 30 L.R.A.(N.S.) 686, 31 Sup. Ct. Rep. 127; State v. Connecticut Mut. L. Ins. Co. 106 Tenn. 282, 61 S. W. 75.

The receipt by the Provident Savings of premiums in New York, after its withdrawal from Kentucky, was not by virtue of any privilege or license of Kentucky; and hence neither the premiums so received nor the privilege of receiving them are taxable by Kentucky.

1. The company cannot be taxed for the act of the policy holders.

Almy v. California, 24 How. 169, 16 L. ed. 644; Fairbank v. United States, 181 U. S. 283, 292, 293, 45 L. ed. 862, 866, 867, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; Allgeyer v. Louisiana, 165 U. S. 578, 591, 593, 41 L. ed. 832, 836, 837, 17 Sup. Ct. Rep. 427.

2. The company's act was in New York, not Kentucky.

Prewitt v. Security Mut. L. Ins. Co. 119 Ky. 321, 1 L.R.A.(N.S.) 1019, 115 Am. St. Rep. 264, 83 S. W. 611, 84 S. W. 527; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; People ex rel. Provident Sav. Life Assur. Soc. v. Miller, 179 N. Y. 227, 71 N. E. 930; State v. Connecticut Mut. L. Ins. Co. 106 Tenn. 282, 61 S. W. 75.

3. The bare legal liability to Kentucky policy holders is not taxable by that state.

New York L. Ins. Co. v. Deer Lodge County, 231 U. S. 495, 508, 58 L. ed. 332, 337, 34 Sup. Ct. Rep. 167; Allgeyer v. Louisiana, 165 U. S. 578, 588, 591, 592, 41 L. ed. 832, 835, 836, 837, 17 Sup. Ct. Rep. 427; New York L. Ins. Co. v. Head, 234 U. S. 149, 161, 58 L. ed. 1259, 1264, 34 Sup. Ct. Rep. 879.

Mr. John A. Judy argued the cause, and, with Mr. James Garnett, Attorney General of Kentucky, filed a brief for defendant in error:

A state has the absolute right to prescribe the terms upon which a foreign corporation shall engage in business in that state.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; New York v. Roberts, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

After an insurance company has applied for and been granted permission to insure the lives of citizens of a state, and has agreed to pay the tax for such privilege, it cannot avoid that tax by attempting to withdraw from the state and cease writing new business.

Equitable Life Assur. Soc. v. Pennsylvania, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829.

So far as the state of Kentucky is concerned, the Provident Savings Life Assurance Society is doing business in Kentucky as long as it has insured the lives of citizens of Kentucky under policies written while it was authorized to do business in Kentucky.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 157, 47 L. ed. 994, 23 Sup. Ct. Rep. 707.

Mr. Justice Hughes delivered the opinion of the court:

The Provident Savings Life Assurance Society, a New York corporation, transacted business in Kentucky prior [**107**] to January 1, 1907, and paid the annual license tax of 2 per cent on premiums. Ky. Stat. § 4226. This suit was brought by the commonwealth to recover the tax on premiums received in the years 1907 to 1911, inclusive. The company answered, denying liability upon the ground that on January 1, 1907, it had entirely ceased to do business in Kentucky, and that all premiums received after that date on policies previously issued in Kentucky were received in New York.

Prior to the amendments made in the year 1906, § 4226 of the Kentucky Statutes provided as follows:

"Sec. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this state, but doing business therein, shall on the first day of July in each year, or within thirty days thereafter, return to the auditor of public accounts for deposit in the insurance department, a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this state, or out of this state, on business done in this state during the year ending the 30th day of June last preceding, or since the last returns were made and shall at the same time pay into the state Treasury a tax of $2 upon each $100 of said

premiums as ascertained." Ky. Stat. 1903 ed.

This section was amended in 1906 by making the fiscal year to end on December 31st instead of June 30th, by prohibiting deductions for dividends, and by amplifying the description of premium receipts. (See Mutual Ben. L. Ins. Co. v. Com. 128 Ky. 174, 107 S. W. 802; Northwestern Mut. L. Ins. Co. v. James, 138 Ky. 48, 127 S. W. 505.) The amended section was as follows:

"Sec. 4226. Every life insurance company, other than fraternal assessment life insurance companies, not organized [108] under the laws of this state, but doing business therein, shall, on the first day of January in each year, or within thirty days thereafter, return to the auditor of public accounts for deposit in the insurance department a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this state, or out of this state, or business done in this state during the year ending the 31st day of December, and no deduction shall be made for dividends, or since the last returns were made, on all premium receipts, which shall include single premiums, annuity premiums, and premiums received for renewal, revival or reinstatement of policies, annual and periodical premiums, dividends applied for premiums and additions, and all other premium payments received during the preceding year on all policies which have been written in, or on, the lives of residents of this state, or out of this state on business done in this state, and shall at the same time pay into the state treasury a tax of $2 upon each $100 of said premiums as ascertained."

In 1906, the legislature added the following provision, which is found in § 4230a of the Kentucky Statutes:

"Sec. 4230a. (2) Any insurance company that has been authorized to transact business in this state shall continue to make the reports required herein as long as it collects any premiums as provided for herein, and shall pay taxes thereon, even after it has voluntarily ceased to write insurance in the state or has withdrawn therefrom, or its license suspended or revoked by the insurance commissioner, and for failure to make report of the premiums collected and pay the taxes due thereon, shall be fined $500 for such offense."

It does not appear that the changes in § 4226 were involved in the present controversy, as there was no dispute as to the amount of the premiums received in the years [109] in question, or as to deductions. But the company insisted that § 4230a was invalid under the contract clause of the Federal Constitution (art. I. § 10), and also that the imposition of the tax on premiums received after the company had withdrawn from the state was contrary to the due process clause of the 14th Amendment. Demurrer to the answer was overruled, the motion of the defendant that the demurrer relate back to the petition was sustained, and the petition was dismissed. Judgment to this effect was reversed by the court of appeals of Kentucky and the cause was remanded with direction to sustain the demurrer to the answer and for further proceedings consistent with the opinion of the appellate court. 155 Ky. 197, 159 S. W. 698.

The company then amended its answer, renewing its constitutional objections. Enlarging the statement of facts, it averred that on January 1, 1907, it had withdrawn all its agents from Kentucky, had closed all its offices, and had ceased to solicit or write insurance, or maintain any agent, or collect any premiums, within that jurisdiction. On January 1, 1911, the Postal Life Insurance Company, a New York corporation, had reinsured all the business of the defendant. Between January 1, 1907, and January 1, 1911, all premiums paid to the defendant upon policies theretofore issued in Kentucky were paid to it at its home office in New York city through the mail.

The Postal Life Insurance Company did not have at any time an office or agents in Kentucky, or transact any business in that state, and all premiums that it received were paid to it in New York through the mail.

Demurrer to the amended answer was sustained and judgment was entered in favor of the commonwealth. The court of appeals affirmed the judgment (160 Ky. 16, 169 S. W. 551) and this writ of error has been sued out.

[110] The court of appeals did not put its decision upon the provision of § 4230a. This provision, it was said, was declaratory of the existing law, and the company's obligation was taken to be defined by § 4226. The tax was a license tax (Northwestern Mut. L. Ins. Co. v. James, 138 Ky. 48, 52, 127 S. W. 505), payable annually, and by the express terms of the act was payable by the foreign life insurance corporation "doing business" within the state. Both parties agree that it was imposed "for the privilege of doing business in Kentucky." The state contends that it is seeking to enforce an agreement which, by implication from the statutory provision, the company must be deemed to have made when it entered the state. But there is no suggestion that it had ever been decided prior to this

litigation that the described companies were bound under § 4226 to pay the annual tax irrespective of the continued transaction of business within the jurisdiction during the years to which the tax related. Nor, as we understand it, was the statute so construed in the present case. It is true that the court stated in its opinion that the company, on being admitted to the state, agreed to pay the tax imposed by § 4226, and that the company did not have "the right and power to revoke this agreement as it attempted to do the 1st of January, 1907." But, immediately following this statement, the court proceeded to hold with an explicitness which does not permit us to doubt the basis of its decision that the company was liable to the tax because it continued, despite the asserted withdrawal, to do business within the state during the period for which the tax was sought to be collected. If the tax in controversy was demanded by the state and was enforced upon the ground that it was payable for a privilege which the company admittedly enjoyed in prior years, it was manifestly immaterial to inquire whether or not the company was continuing to transact a local business during the succeeding period. In [111] that aspect, the question would be whether, with respect to the alleged agreement, the decision could be deemed to be one which in reality gave effect to the subsequent legislation (of 1906) and involved the application of the contract clause. If, however, the tax now sought to be imposed was for a privilege exercised during the years to which the tax related, it would be necessary to find that the company was doing business within the state at that time. Evidently in view of this necessity, the court of appeals said upon the first appeal:

"Counsel for appellee mainly rests its case upon the definition of 'what is doing business?' Is a life insurance company doing business in a state only so long as it is writing new business? If this is true, then the appellant has no case. However, counsel for appellant insists that an insurance company is doing business in this state in the meaning of the statute so long as it is insuring the lives of residents of this state and furnishing protection to the beneficiaries named in the policies against loss from death of the insured, this being the chief business for which insurance companies are organized, and we are unable to see how the court [referring to the court of first instance] held, that a company collecting premiums on policies issued in this state, when it was authorized to do business in this state, can be said 'not to be doing business,' when it was still insuring those same lives and collecting the premiums upon the policies." 155 Ky. 201.

Upon the second appeal the court merely referred to its ruling on the first appeal and to other cases (Com. v. Illinois L. Ins. Co. 159 Ky. 589, 167 S. W. 909; Com. v. Washington L. Ins. Co. 159 Ky. 581, 167 S. W. 872) in which that decision had been followed without further discussion of grounds. We do not, therefore, find it necessary to consider the applicability of the contract clause of the Federal Constitution, inasmuch as it [112] appears that the decision turned upon the conclusion that the company continued after January 1, 1907, to transact business within the jurisdiction. Otherwise, according to the final ruling, the state would have had "no case."

The present case thus differs from that of Equitable L. Assur. Soc. v. Pennsylvania, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829. It was not disputed that the Equitable Company was actually doing business in Pennsylvania. See Com. v. Equitable Life Assur. Soc. 239 Pa. 288, 293, 86 Atl. 787. The question was as to the permissible measure of a tax exacted for a privilege admittedly exercised. As this court said: "The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax." 238 U. S. 147. In the present case it is not the measure of the tax for doing business, but the very basis of the tax—that is, whether the company was doing business within the state—that is in controversy.

Assuming this to be the point in dispute, the question at once arises whether the matter is reviewable in this court. And we cannot doubt that the question whether the state is taxing a foreign corporation for a privilege not granted—that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority—must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the 14th Amendment (Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 398, 47 L. ed. 513, 519, 23 Sup. Ct. Rep. 463; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 358, 49 L. ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 209, 50 L. ed. 150, 155, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493); and the principle involved applies to the assertion of authority on the part of the state to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the state exercises the taxing [113] power must be considered when the

constitutional protection against the transgression of jurisdictional limits is invoked.

It is not controverted that the company, at the time in question, was not soliciting insurance or collecting moneys in that state. Further, it had no offices or agents in Kentucky. Upon the averments which stand admitted in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the state. The conclusion that it continued to do business within the state, notwithstanding this withdrawal, appears to be based solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that state, and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the state's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the state. It is true that acts might be done within the state in connection with such policies (as, for example, in maintaining an office or agents, although new insurance was not written or solicited) which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the state cannot destroy [114] them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the state's control. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 241, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597; New York L. Ins. Co. v. Head, 234 U. S. 149, 163, 58 L. ed. 1259, 1265, 34 Sup. Ct. Rep. 879.

The defendant in error relies upon expressions contained in the opinions in Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 610, 43 L. ed. 569, 571, 19 Sup. Ct. Rep. 308, and Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 157, 47 L. ed. 987, 994, 23 Sup. Ct. Rep. 707,—expressions which (in a full review of these cases and others) were explained and limited in Hunter v. Mutual Reserve L. Ins. Co. 218 U. S. 573, 54 L. ed. 1155, 30 L.R.A. (N.S.) 686, 31 Sup. Ct. Rep. 127. The cases cited related to the validity of the service of process upon foreign corporations. And it was held that a foreign insurance corporation which had transacted business within the jurisdiction of a state continued, notwithstanding its withdrawal from the state, to be subject to service of process within the state, in actions arising out of the business so transacted, where the service was made in accordance with the conditions upon which the business was permitted to be done. Thus, in the Phelps Case, service was made in Kentucky under § 631 of the Kentucky Statutes providing for service of process upon the commissioner of insurance. The court of appeals of Kentucky had decided that the withdrawal of the company from the state did not terminate the statutory agency for the acceptance of service which had been created as a condition of the company's admission; the granted authority continued with respect to the business transacted. Home Ben. Soc. v. Muehl, 109 Ky. 479, 484, 59 S. W. 520; Germania Ins. Co. v. Ashby, 112 Ky. 303, 307, 308, 99 Am. St. Rep. 295, 65 S. W. 611. But a distinction obtains when the question is whether the mere continuance of the obligation to resident [115] policy holders under the existing policies can be regarded as constituting in itself the transaction of a local business. This distinction was made clear in the Hunter Case. There, the action was brought in New York against an insurance company upon judgments which had been obtained against the company in North Carolina. The question turned upon the validity of the service of process in the North Carolina actions. The insurance company, a New York corporation, had been admitted to do business in North Carolina, and had actually transacted business in that state prior to the year 1899. The legislature of North Carolina enacted a statute providing that any corporation desiring to do business in the state after June 1, 1899, must become a domestic corporation. Severe penalties were prescribed for violation. Thereupon, the board of directors of the company passed a resolution "to withdraw from the state and to dispense with and

terminate the services of all its agents." The agents were withdrawn accordingly and the premiums on policies theretofore issued were subsequently "remitted by mail to the home office of the company in New York, where the policies and premiums were payable." There were in that case, outside of this course of business, four transactions within the state after the withdrawal, which were of minor importance and of isolated character. The actions in question, in the North Carolina court, were not brought upon policies issued in North Carolina, and consequently it was sought to sustain the jurisdiction of the court upon the ground that, despite the withdrawal of the company, it was still doing business within the state. The court expressly overruled this contention. The court said: "It" (the company) "was given the choice to become a domestic corporation or go out of the state. It chose to go out of the state, and adopted the only way it could to do so. We think such course was open to it and we see no reason to question its good faith." Id. p. 583. [116] It was recognized that the authority which the company had given with respect to service of process continued in force as to actions growing out of business which had been transacted within the state. But the continuance of the authority to accept service of process resulted from the nature and construction of that authority, and the view that the mere continuance of the obligation of contracts previously made within the state constituted a continuance of "doing business" within the state so as to give the company a "domicil of business," and thus subject it to the state's jurisdiction, was distinctly disapproved.

In the present case, the question is not, as in the Phelps Case, one as to the right to revoke the agency created under § 631 of the Kentucky Statutes with respect to the service of process in actions arising out of transactions which had taken place within the state. It is as to the power of the state to treat the mere continuance of the obligation of the existing policies held by resident policy holders as the transaction of a local business justifying the imposition of an annual privilege tax in the absence of the actual conduct of business within the limits of the state.

We cannot conclude that the state has this power, and in this view the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[117] UNITED STATES, Plff. in Err.,
v.
JOE FREEMAN.

(See S. C. Reporter's ed. 117–121.)

Federal courts — proper district for suit — continuing act — shipping intoxicating liquors.

The offense denounced by the Federal Criminal Code, § 240, as the shipping of intoxicating liquors or causing them to be shipped from one state to another, or from a foreign country into any state, in packages not labeled with the name of the consignee and the nature and quality of the contents, is cognizable in the Federal district in which the place of destination is situated, as well as in the district in which the packages were delivered to the carrier, the offense being one which was begun in the one district and completed in the other, within the meaning of the Judicial Code, § 42, providing for the punishment of such offenses in either district.

[For other cases, see Courts, 987–992, in Digest Sup. Ct. 1908.]

[No. 481.]

Argued October 21, 1915. Decided November 15, 1915.

IN ERROR to the District Court of the United States for the District of Kansas to review a judgment quashing an indictment charging the shipping of intoxicating liquor in interstate commerce in unlabeled packages. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Warren argued the cause and filed a brief for plaintiff in error:

While the words "ship" and "shipment" may in some statutes be confined in definition to "delivery for shipment," in the particular statute in question the intent of Congress was to make the crime of shipping unlabeled liquor from one state into another a continuing crime, and hence indictable both in the district where delivery of the unlabeled liquor is made and in the district into which the unlabeled liquor is introduced.

American Steel & Wire Co. v. Speed, 192 U. S. 500, 520, 48 L. ed. 538, 546, 24 Sup. Ct. Rep. 365; Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; United States v. Smith, 115 Fed. 423; West Vir-

NOTE.—On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

ginia v. Adams Exp. Co. L.R.A.1916C, 291, 135 C. C. A. 464, 219 Fed. 794.

It is not denied, of course, that in statutes unconnected with interstate commerce the word "ship" or "shipment" ordinarily denotes a single completed act of delivery to the carrier.

See Mora y Ledon v. Havemeyer, 121 N. Y. 185, 8 L.R.A. 245, 24 N. E. 297; Harrison v. Fortlage, 161 U. S. 57, 63, 64, 40 L. ed. 616, 618, 619, 16 Sup. Ct. Rep. 488; Southern Steel & I. Co. v. Hickman, 100 Fed. 890; Garfield & P. Coal Co. v. Pennsylvania Coal & Coke Co. 199 Mass. 38, 84 N. E. 1020; Fechteler v. Whittemore, 205 Mass. 6, 91 N. E. 155.

But these decisions almost invariably are concerned with the significance of the word when used in the law of sales and kindred subjects.

Any construction which would result in paralyzing the operation of a considerable portion of a Federal statute is to be avoided.

Rhodes v. Iowa, 170 U. S. 412, 421, 422, 42 L. ed. 1088, 1094, 1095, 18 Sup. Ct. Rep. 664; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Harris, 177 U. S. 305, 310, 44 L. ed. 780, 782, 20 Sup. Ct. Rep. 609; United States v. Hartwell, 6 Wall. 385, 18 L. ed. 830; United States v. Union Supply Co. 215 U. S. 50, 55, 54 L. ed. 87, 88, 30 Sup. Ct. Rep. 15.

Even if the offense of shipping began in Missouri, it was not necessarily wholly completed there, but continued into Kansas, and might be prosecuted in either jurisdiction.

Re Palliser, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034; Putnam v. United States, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923.

That causing an act to be done may be a crime begun in one place and completed in another, and hence indictable in both, is made clear by the decisions which define what form or degree of causation constitutes the crime.

Burton v. United States, 73 C. C. A. 243, 142 Fed. 62, affirmed in 202 U. S. 344, 389, 50 L. ed. 1057, 1074, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; Demolli v. United States, 6 L.R.A.(N.S.) 424, 75 C. C. A. 365, 144 Fed. 365, 7 Ann. Cas. 121; Bates v. United States, 11 Biss. 70, 10 Fed. 95; United States v. Bebout, 28 Fed. 522; United States v. Bickford, 4 Blatchf. 337, Fed. Cas. No. 14,591; United States v. White, 25 Fed. 716.

It is well settled in general that an offense against the laws of the United States may be prosecuted in the district in which it was initiated, as well as in that in which it was completed, where, as in this case, no venue is specially fixed by the statute creating the offense.

1 Whart. Crim. Law, 11th ed. §§ 324, 334, pp. 404, 405, 423; Bridgeman v. United States, 72 C. C. A. 145, 140 Fed. 591. See also Re Palliser, 136 U. S. 257, 267, 34 L. ed. 514, 518, 10 Sup. Ct. Rep. 1034; Putnam v. United States, 162 U. S. 687, 40 L. ed. 1118, 16 Sup. Ct. Rep. 923; Stillman v. White Rock Mfg. Co. 3 Woodb. & M. 538, Fed. Cas. No. 13,446; Dealy v. United States, 152 U. S. 539, 547, 38 L. ed. 545, 548, 14 Sup. Ct. Rep. 680, 9 Am. Crim. Rep. 161; Benson v. Henkel, 198 U. S. 1, 15, 49 L. ed. 919, 924, 25 Sup. Ct. Rep. 569; Hyde v. Shine, 199 U. S. 62, 77, 50 L. ed. 90, 94, 25 Sup. Ct. Rep. 760; United States v. Thayer, 209 U. S. 39, 44, 52 L. ed. 673, 675, 28 Sup. Ct. Rep. 426; Haas v. Henkel, 216 U. S. 462, 475, 476, 54 L. ed. 569, 575, 576, 30 Sup. Ct. Rep. 249, 17 Ann. Cas. 1112; Perara v. United States, 136 C. C. A. 623, 221 Fed. 217; Simpson v. State, 44 Am. St. Rep. 75, and note, 92 Ga. 41, 22 L.R.A. 248, 17 S. E. 984; United States v. Murphy, 91 Fed. 121.

No appearance for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This is an indictment under § 240 of the Criminal Code making it a punishable offense knowingly to "ship or cause to be shipped from one state, . . . into any other state, . . . or from any foreign country into any state, . . ." any package of or containing intoxicating liquor of any kind, "unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." [35 Stat. at L. 1137, chap. 321, Comp. Stat. 1913, § 10,410.] The indictment was returned in the district of Kansas and charges the defendant with violating the statute by knowingly shipping and causing to be shipped from Joplin, Missouri, into Cherokee county, Kansas, six unlabeled trunks severally containing from 12 to 15 gallons of intoxicating liquor. By a motion to quash and a demurrer it was objected that the offense denounced by the statute is complete when the package is delivered to the carrier for shipment, and therefore that the offense charged was not cognizable in the district of Kansas, but only in the western district of Missouri. Acceding to this construction of the statute, the district

court sustained the motion to quash and the demurrer, and entered a judgment discharging the defendant. The government brings the case here under the [120] criminal appeals act, chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704.

As usually understood, to ship a package *from* one state *into* another, or *from* a foreign country *into* a state, is to accomplish its transportation from the one into the other by a common carrier, and is essentially a continuing act whose performance is begun when the package is delivered to the carrier, and is completed when it reaches its destination. We think it is to such an act that the statute refers. To reach a different conclusion the word "ship" must be read as if it were "deliver for shipment." No doubt it sometimes has that meaning, but it plainly is not so used in this instance. The statute deals with shipping liquor from a foreign country into a state, as well as with shipping it from one state into another state. It puts both upon the same plane and makes them equally criminal. Whatever marks the completion of the offense in one likewise marks it in the other. If it be the delivery to the carrier in the case of interstate shipments, it equally is this delivery in the case of shipments from a foreign country. And yet all will concede that Congress did not intend to do anything so obviously futile as to denounce as criminal an act wholly done in a foreign country, such as is the delivery to the carrier where the shipment is from a foreign country into a state. So, if its words permit, as we think they do, the statute must be given a construction which will cause it to reach both classes of shipments, and thereby to accomplish the purpose of its enactment. United States v. Chavez, 228 U. S. 525, 57 L. ed. 950, 33 Sup. Ct. Rep. 595. This, we think, requires that it be construed as referring to the continuing act before indicated whereby the transportation *into* a state is accomplished, whether the package comes from another state or from a foreign country. In this view the completion of the offense will always be within a jurisdiction where the statute can be enforced.

[121] The district court rightly recognized that, under Judicial Code, § 42 [36 Stat. at L. 1100, chap. 231, Comp. Stat. 1913, § 1024], formerly Rev. Stat. § 731, the offense charged was cognizable in the district of Kansas, as well as in the western district of Missouri, if the place to which the packages were transported was the place of the completion of the offense. Therefore nothing need be said upon that point.

Judgment reversed.

GLENWOOD LIGHT & WATER COMPANY, Appt.,
v.
MUTUAL LIGHT, HEAT, & POWER COMPANY.

(See S. C. Reporter's ed. 121-126.)

Federal courts — amount in dispute — nuisance.

The value of complainant's asserted right to maintain and operate its electric light and power plant, and to conduct its business free from wrongful interference by defendant, a rival company, rather than the cost of the removal of defendant's poles and wires where they conflict or interfere with those of complainant, and their replacement in such position as to avoid the interference, is the test by which to determine whether the amount in dispute is sufficient to support the jurisdiction of a Federal district court of a suit in which the complainant prays for an injunction to restrain defendant from maintaining its poles and wires on the same side of the streets as that occupied by complainant's poles and wires, and in such proximity as to injure or endanger the property of complainant and its customers, and the safety and lives of complainant's customers and employees, and also asks for general relief.

[For other cases, see Courts, V. c, 6, in Digest Sup. Ct. 1908.]

[No. 38.]

Submitted October 29, 1915. Decided November 15, 1915.

APPEAL from the District Court of the United States for the District of Colorado to review a decree dismissing, for want of jurisdiction, the bill in a suit by an electric light and power company to restrain a rival company from interfering with the former's business. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Messrs. **Charles S. Thomas, George L. Nye, and William P. Malburn** submitted the cause for appellant:

In suits seeking injunctive relief, where the value of the property or right to be protected is greater than the value of the property about which the dispute originated, and the value of the property or right to be protected, or the extent of the injury to be prevented, is in excess of the jurisdictional amount, jurisdiction exists.

Larabee v. Dolley, 175 Fed. 365; American Smelting & Ref. Co. v. Godfrey, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. 8; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Evenson v. Spaulding, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Board of Trade v.

Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Riverside & A. R. Co. v. Riverside, 118 Fed. 743; Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399; Draper v. Skerrett, 116 Fed. 206; Humes v. Ft. Smith, 93 Fed. 857; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65; Rainey v. Herbert, 5 C. C. A. 183, 3 U. S. App. 592, 55 Fed. 443; Texas & P. R. Co. v. Kuteman, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547; Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; Berryman v. Whitman College, 222 U. S. 334, 56 L. ed. 225, 32 Sup. Ct. Rep. 147.

Mr. **John T. Barnett** submitted the cause for appellee:

The "matter in dispute," as used in the statute, means the matter or purpose for which the suit is, in good faith, brought.

Smith v. Adams, 130 U. S. 167, 175, 32 L. ed. 895, 898, 9 Sup. Ct. Rep. 566.

The "matter in dispute" in the case at bar is the removal of the alleged dangerous contact of the defendant's wires with those of plaintiff And the amount or value of the matter in dispute is the cost to appellee of the removal of the alleged dangerous contact.

Mississippi & M. R. Co. v. Ward, 2 Black, 485, 17 L. ed. 311; American Smelting & Ref. Co. v. Godfrey, 89 C. C. A. 139, 158 Fed. 225, 14 Ann. Cas. 8; Von Schroeder v. Brittan, 93 Fed. 9; Jessup v. Chicago & N. W. R. Co. 188 Fed. 931.

The "matter in dispute," the amount of which determines the jurisdiction of the Federal courts, must be money or some property or other right that can be estimated and ascertained in money.

South Carolina v. Seymour, 153 U. S. 357, 38 L. ed. 744, 14 Sup. Ct. Rep. 871; Kurtz v. Moffitt, 115 U. S. 487, 498, 29 L. ed. 458, 460, 6 Sup. Ct. Rep. 148; United States ex rel. Holzendorf v. Hay, 194 U. S. 373, 376, 48 L. ed. 1025, 1026, 24 Sup. Ct. Rep. 681.

The allegation in the bill that the amount in controversy exceeds the sum of $3,000 is but a conclusion, and is not a sufficient allegation of the value of the matter in controversy.

Fishback v. Western U. Teleg. Co. 161 U. S. 100, 40 L. ed. 631, 16 Sup. Ct. Rep. 506.

Mr. Justice **Pitney** delivered the opinion of the court:

This is an appeal from a decree of the district court, dismissing a bill of complaint for want of jurisdiction; the jurisdiction having been invoked upon the ground that the suit was between citizens of different states, and that the matter in controversy exceeded the sum or value of $3,000 (Judicial Code, § 24, act of March 3, 1911, 36 Stat. at L. 1087, 1091, chap. 231, Comp. Stat. 1913, §§ 968, 991). The bill, besides the requisite averments as to the citizenship of the parties, alleges in substance that complainant is the owner by assignment of a franchise granted in the year 1887 by the town of Glenwood Springs, in the state of Colorado, and subsequently renewed, entitling complainant to erect and maintain a plant for the purpose of supplying the town and its inhabitants with electric light and power; that complainant and its predecessors, prior to 1911, constructed an electric light and power system, and erected poles and wires in the alleys of the town, in the manner provided for in the ordinance, and complainant has continued to carry on its business and supply electric current to the town and its inhabitants, and still continues to maintain its poles and wires in the streets and alleys of the town; that in April, 1911, the town attempted to grant to defendant the right to erect a plant and construct [123] a system for furnishing the town and its inhabitants with electric current, and defendant commenced the construction of a plant, and began to furnish light to the town on or about October 1st, 1912, since which date its wires have been used for carrying electric current for the purpose of lighting the town and furnishing light to some of its inhabitants; that complainant's poles were erected, so far as practicable, in the alleys of the town, as was provided in its ordinance, and its wires were strung on those poles and connected with the premises of its customers in accordance with the terms of the franchise and the regulations of the town; that defendant has erected its poles and strung its wires principally in the alleys of the town, and particularly in the alleys occupied by the poles and wires of complainant, and for the most part upon the same side of the alleys used and occupied by the poles and wires of complainant, for the purpose and with the intent of interfering with and harassing complainant; that complainant's poles are of the size usually employed in towns and cities approximating the size of Glenwood Springs, but that defendant's poles are about six feet shorter, and on account of the narrowness of the alleys have been set on practically the same line

as complainant's poles, so that defendant's cross-arms and wires are brought immediately below and in close proximity to complainant's wires, so as to make the maintenance and operation of its wires by complainant exceedingly difficult, as well as dangerous to the property of complainant and its customers, owing to the probability of damage by fire caused by short circuits, and dangerous to the safety and lives of complainant's customers and of its linemen and other employees who, in the discharge of their duties, are required to climb its poles; that, because of this, complainant is and constantly will the threatened, so long as defendant maintains its poles and wires as aforesaid, with liability in case of injuries to persons and property caused by the maintenance of defendant's wires [124] and electric current in close proximity to the wires and current of complainant; that complainant's business is increasing, and more wires are being constantly required to supply the wants of its customers, and this will require the setting of cross bars on the poles of complainant below the cross bars now in use, whereby the wires of complainant will be brought closer to defendant's wires than they are at present, and thereby the danger and expense and the probability of injuries to complainant and its employees and customers will be greatly increased; and that by reason of the premises complainant is and will be subjected to numerous liabilities and actions at law for damages arising out of the conditions created by defendant's acts; that the value of complainant's plant is $150,000, and the damage caused to complainant and its business and property and to its right to maintain its poles and wires without interference or injury in the alleys and streets of the town of Glenwood Springs, where the poles and wires of defendant have been placed in close proximity to complainant's poles and wires, is largely in excess of the sum of $3,000.

The prayer is for an injunction to restrain defendant from maintaining its poles and wires on the same side of the alleys and streets as those occupied by complainant's poles and wires, or in such proximity as to injure or endanger the property of complainant and its customers and the safety and lives of complainant's customers and employees, and for general relief.

The answer denies, generally and specifically, the essential facts set up in the bill; denies that the matter in controversy exceeds in value the sum of $3,000; denies that the value of complainant's plant is as much as $150,000; alleges that its value does not exceed $25,000; denies that the damage caused by defendant to complainant or its business or property is in excess of $3,000; and alleges that the cost of the removal of all the poles and wires of defendant [125] claimed to be in dangerous or objectionable proximity to complainant's poles and wires would not exceed $500.

Upon the final hearing, the court, after argument, held that the jurisdictional amount was fixed by the cost to defendant of removing its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of complainant, and replacing defendant's poles and wires in such position as to avoid conflict and interference. Thereupon testimony was introduced for the purpose of determining whether such cost would exceed the sum of $3,000, and the court, having determined that under the evidence it would not exceed that amount (which complainant conceded), dismissed the bill for want of jurisdiction, although complainant contended that such method was not the proper method of determining the jurisdictional amount.

The case comes here under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, U. S. Comp. Stat. 1913, § 1215], the question of jurisdiction being certified.

We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, *viz.*, that the jurisdictional amount is to be tested by the value of the object to be gained by complainant. The object of the present suit is not only the abatement of the nuisance, but (under the prayer for general relief) the prevention of any recurrence of the like nuisance in the future. In Mississippi & M. R. Co. v. Ward, 2 Black, 492, 17 L. ed. 311, 314, it was said: "The want of a sufficient amount of damage having been sustained to give the Federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." The same rule has been applied in numerous cases, and under varying circumstances. Scott v. Donald, 165 U. S. 107, 115, 41 L. ed. 648, 654, 17 Sup. Ct. Rep. 262; McNeill v. Southern R. Co. 202 U. S. 543, 558, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; [126] Hunt v. New York Cotton Exch. 205 U. S. 322, 336, 51 L. ed. 821, 826, 27 Sup. Ct. Rep. 529; Bitterman v. Louisville & N. R. Co. 207 U. S. 205, 225, 52 L. ed. 171, 183, 28 Sup. Ct. Rep. 91, 12 Ann. Cas. 693; Berryman v. Whitman College, 222 U. S. 334, 345, 56 L. ed. 225, 228, 32 Sup. Ct. Rep. 147.

The district court erred in testing the jurisdiction by the amount that it would

cost defendant to remove its poles and wires where they conflict or interfere with those of complainant, and replacing them in such a position as to avoid the interference. Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction.

Decree reversed, and the cause remanded for further proceedings in accordance with this opinion.

MORRIS CANAL & BANKING COMPANY and Lehigh Valley Railroad Company, Plffs. in Err.,

v.

DAVID BAIRD, Stephen J. Meeker, Theodore Strong, and Eckard P. Budd, State Board of Assessors of the State of New Jersey, and J. Willard Morgan, Comptroller of Said State.

(See S. C. Reporter's ed. 126–133.)

Taxes — exemption — transfer of immunity.

Any contract exemption from taxation which may have been created by a provision in the charter of a canal and banking company which limits the exemption thereby granted to such property "as is possessed, occupied, and used by the said company for the actual and necessary purposes of said canal navigation" did not pass to its grantee and lessee in favor of which the canal company exercised the right given to it by New Jersey act of March 14, 1871, to lease "the canal of said company or any part thereof, with all or any of its boats, property, works, appurtenances, and franchises."

[For other cases, see Taxes, I. c, 8, e, in Digest Sup. Ct. 1908.]

[No. 1.]

Argued October 21, 1915. Decided November 15, 1915.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that state, sustaining on certiorari a tax levied by the state board of assessors on canal property and appurtenances. Affirmed.

See same case below, 76 N. J. L. 627, 71 Atl. 328.

The facts are stated in the opinion.

Mr. Gilbert Collins argued the cause and filed a brief for plaintiffs in error:

The contract of exemption of the Morris Canal from taxation was not a bounty conferred on any particular company, nor an agreement made merely in view of presumptive benefits to the people. It was a contract of exemption of certain specific property, for an adequate consideration, to wit, the conveyance of the property itself to the state, possession to be taken at the end of a term of years, the owner meantime to devote the property to public use on terms controlled by the state, and for other substantial considerations.

Barnett v. Johnson, 15 N. J. Eq. 485.

The courts of New Jersey, in repeatedly construing the charter, have uniformly narrowed the exemption to the lands occupied by this public highway.

State, Morris Canal & Bkg. Co., Prosecutors, v. Betts, 24 N. J. L. 555; State, Morris Canal & Bkg. Co., Prosecutors, v. Haight, 35 N. J. L. 178; Morris Canal & Bkg. Co. v. Jersey City, 12 N. J. Eq. 227; State, Morris Canal & Bkg. Co., Prosecutors, v. Love, 37 N. J. L. 60; State, Lehigh Valley R. Co., Prosecutors, v. Newark, 44 N. J. L. 323; State, Morris Canal & Bkg. Co., Prosecutors, v. Cleaver, 46 N. J. L. 467.

In New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303, a case was presented to this court very similar to the present case, in that an actual consideration passed to the state in return for the exemption of certain lands from taxation. And this exemption was held to pass to the grantee of such lands, the grant being made by authority of a legislative act which made no mention of the exemption.

Even in cases where much weaker considerations are presented, these contracts have been sustained.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 654, 29 L. ed. 518, 6 Sup. Ct. Rep. 252; Central R. & Bkg. Co. v. Georgia, 92 U. S. 670, 23 L. ed. 760; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; Humphrey v. Pegues, 16 Wall. 244, 21 L. ed. 326; Philadelphia, W. & B. R. Co. v. Maryland, 10 How. 377, 13 L. ed. 462; Green County v. Conness, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69.

There are numerous other cases where the

NOTE.—As to exemption from taxation, whether a contract or not—see note to Tucker v. Ferguson, 22 L. ed. U. S. 805.

On corporate taxation as affected by the contract clause in the Federal Constitution —see note to Adams v. Yazoo & M. Valley R. Co. 60 L.R.A. 33.

exemption was denied in the hands of the assignee company. These will be found to fall within four classes, to wit:

(a) Where the mortgage, lease, or transfer was made without express statutory authority.

Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Mercantile Bank v. Tennessee, 161 U. S. 161, 40 L. ed 656, 16 Sup. Ct. Rep. 461; East Tennessee, V. & G. R. Co. v. Hamblen County, 102 U. S. 273, 26 L. ed. 152; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

(b) Where the corporation claiming the exemption was not created until a constitutional bar to exemption had been interposed.

Trask v. Maguire, 18 Wall. 391, 21 L. ed. 938; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Atlantic & G. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; St. Louis, I. M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; Minneapolis & St. L. R. Co. v. Gardner, 177 U. S. 332, 44 L. ed. 793, 20 Sup. Ct. Rep. 656; Shields v. Ohio, 95 U. S. 321, 24 L. ed. 358; Maine C. R. Co. v. Maine, 96 U. S. 509, 24 L. ed. 840; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 18, 45 L. ed. 395, 405, 21 Sup. Ct. Rep. 240; New York ex rel. Schurz v. Cook, 148 U. S. 406, 37 L. ed. 501, 13 Sup. Ct. Rep. 645.

(c) Where from surrounding words and circumstances it is apparent that the legislature did not intend the exemption to pass to the successor.

Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; Chicago, B. & K. C. R. Co. v. Guffey (Chicago, B. & K. C. R. Co. v. Missouri) 122 U. S. 561, 30 L. ed. 1135, 7 Sup. Ct. Rep. 1300; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; East Tennessee, V. & G. R. Co. v. Hamblen County, 102 U. S. 273, 26 L. ed. 152; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Citizens' Street R. Co. v. Memphis, 53 Fed. 715; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 888; Bancroft v. Wicomico County, 121 Fed. 874, affirmed in 70 C. C. A. 287, 135 Fed. 977.

(d) Where the intent to pass the immunity was not expressed with sufficient clearness.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 673, 39 L. ed. 575, 15 Sup. Ct. Rep. 413; People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 656, 39 L. ed. 569, 15 Sup. Ct. Rep. 484; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860.

The reluctance of the courts to enforce contracts of exemption because relieving property from the common burden which public policy requires shall be equally borne has no just application to the case now before the court.

Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 225, 226, 21 L. ed. 888, 894, 895; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860.

Two recent cases are indistinguishable from that at bar.

Wright v. Central of Georgia R. Co. 236 U. S. 674, 59 L. ed. 781, 35 Sup. Ct. Rep. 471; Wright v. Louisville & N. R. Co. 236 U. S. 687, 59 L. ed. 788, 35 Sup. Ct. Rep. 475.

The decision of the state court is, of course, open to review by this court, for the point involved is that the New Jersey tax law impairs the obligation of the contract made between the state of New Jersey and the Morris Canal & Banking Company, on which the Lehigh Valley Railroad Company, a corporation of the state of Pennsylvania, on taking a lease, by express authority of the state, had a right to rely. In such a case this court must exercise its independent judgment.

Douglas v. Kentucky, 168 U. S. 489, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

Even if it had been adjudged by a line of previous decisions of the state court of last resort that such a taxing act did not impair the obligation of like contracts, the point would be open in this court. *A fortiori* must this be so when the writ of error reviews a decision rendered for the first time in the very case brought up by the writ.

New York ex rel. Interborough Rapid Transit Co. v. Sohmer, 237 U. S. 276, 59 L. ed. 951, 35 Sup. Ct. Rep. 549.

Mr. Robert H. McCarter argued the cause, and, with Mr. Edmund Wilson, Attorney General of New Jersey, filed a brief for defendants in error:

The estate enjoyed by the Canal Company

in lands acquired by authority of the charter, whether by grant or condemnation or prescription, was of the whole present interest, and was, notwithstanding the right of the state to take at the end of one hundred and fifty years, equivalent while it lasted to an estate in fee simple.

Barnett v. Johnson, 15 N. J. Eq. 481; State, Morris Canal & Bkg. Co., Prosecutors, v. Brown, 27 N. J. L. 13; United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759; Currie v. New York Transit Co. 66 N. J. Eq. 313, 105 Am. St. Rep. 647, 58 Atl. 308.

And the property of the Canal Company would have been taxable if the legislature had not exempted it.

Bridge Proprietors v. State, 21 N. J. L. 384, affirmed in 22 N. J. L. 593.

This was in effect held as to the grant of the 1867 basin to the Canal Company, although such basin was always subject to be taken over by the state at the end of the period of one hundred and fifty years from the date of the charter.

State, Morris Canal & Bkg. Co., Prosecutors, v. Haight, 36 N. J. L. 471.

Under binding authorities, both state and Federal, this charter immunity from taxation, found in the act of incorporation of the Morris Canal & Banking Company, constituted an irrepealable contract between the state and the corporation.

State Assessors v. Morris & E. R. Co. 49 N. J. L. 193, 7 Atl. 826; State Singer Mfg. Co., Prosecutor, v. Heppenheimer, 58 N. J. L. 633, 32 L.R.A.643, 34 Atl. 1061; Hancock v. Singer Mfg. Co. 62 N. J. L. 289, 42 L.R.A. 852, 41 Atl. 846; Cooper Hospital v. Camden, 68 N. J. L. 691, 54 Atl. 419.

"Courts are astute," says Mr. Justice Brown of this court, in a recent case involving the effect of corporate changes on charter contracts for immunity from taxation, "to seize upon evidence tending to show either that such exemptions [from taxation] were not originally intended, or that they have become inoperative by changes in the original constitution of the companies."

Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 22, 45 L. ed. 407, 21 Sup. Ct. Rep. 240. See also Sisters of Charity v. Cory, 73 N. J. L. 690, 65 Atl. 500.

An exemption from taxation is a privilege of a personal character entirely distinct from the franchises of a corporation, and will not pass by a transfer under legislative authority empowering the corporation to assign and transfer its franchises and property.

State Assessors v. Morris & E. R. Co. 49 N. J. L. 193, 7 Atl. 826; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Memphis & L. R. R. Co. v. Railroad Comrs. (Memphis & L. R. R. Co. v. Berry) 112 U. S. 609, 617, 28 L. ed. 837, 840, 5 Sup. Ct. Rep. 299.

The legislative intent to pass an exemption from taxation to a lessee or grantee cannot be inferred from the use in the enabling act of the word "privilege," and unless the authorized grant includes "immunity" or "immunities," no right to pass the exemption results.

Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

The absence of the word "immunity" in the enabling legislation is fatal to any claim that an immunity from taxation possessed by a lessor, assignor, or grantor company passes to a lessee, assignee, or grantee.

Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

The capacity of the Lehigh Valley Railroad Company, a Pennsylvania corporation, to take as lessee, has been recognized by the court of errors in Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505.

The effect of this lease in perpetuity is a conveyance in fee.

Black v. Delaware & R. Canal Co. 24 N. J. Eq. 465.

By the lease the title to the property described therein, so far as its transfer was authorized by the enabling statute, became vested in the lessee company.

United States Pipe Line Co. v. Delaware, L. & W. R. Co. 62 N. J. L. 261, 42 L.R.A. 572, 41 Atl. 759.

Property under perpetual lease is to be regarded, for purposes of taxation, at least, as the property of the lessee.

Ocean Grove Camp Meeting Asso. v. Reeves, 79 N. J. L. 334, 75 Atl. 783, affirmed in 80 N. J. L. 464, 79 Atl. 1119; Huck v. Chicago & A. R. Co. 86 Ill. 352; Com. v. Nashville, C. & St. L. R. Co. 93 Ky. 430, 20 S. W. 383; Appeal Tax Ct. v. Western Maryland R. Co. 50 Md. 274.

The lease of May 4th, 1871, must be limited, whatever its language, by the legislative authority under which it was made; and as such legislative authority is extended only to property and franchises, no use by the parties themselves of the additional words "rights and privileges" can broaden the grant so as to include the immunity from taxation enjoyed by the lessor com-

pany, even if those words be conceded to include this immunity.

Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505.

The inclusion in the leased property of "rights and privileges" not authorized by the enabling statute did not invalidate the lease. It was good so far as authorized.

Hendee v. Pinkerton, 14 Allen, 381; Gloninger v. Pittsburgh & C. R. Co. 139 Pa. 13, 21 Atl. 211; Butler v. Rahm, 46 Md. 541.

Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953, the failure of the charter to include the words "successors and assigns" in a general exemption was held sufficient to prevent the transferee of the property from claiming the exemption. The same reasoning was adopted by the supreme court of Texas in International & G. N. R. Co. v. State, 75 Tex. 356, 12 S. W. 685. See also Lake Drummond Canal & Water Co. v. Com. 103 Va. 337, 68 L.R.A. 92, 49 S. E. 506.

Mr. Robert H. McCarter also filed a separate brief for defendants in error:

The real question in this litigation is not whether the Canal Company had a contract of exemption, as that is conceded; but the point is, did that exemption pass to the Lehigh Valley Railroad Company when it leased the property? The highest court of New Jersey has held it did not. That adjudication is conclusive upon this court.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Douglas v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

Mr. Justice **McReynolds** delivered the opinion of the court:

The court of errors and appeals of New Jersey sustained a tax for the year 1906, levied by the state board of assessors, under the railroad and canal tax act of 1884 and supplements thereto, upon the canal and appurtenances leased by the Morris Canal & Banking Company [130] to the Lehigh Valley Railroad, 76 N. J. L. 627, 71 Atl. 328. Plaintiffs in error claim the charter of the lessor company exempts the assessed property from taxation, and to subject it to the charge in question would impair the obligation of that contract contrary to the provisions of article I., § 10, Federal Constitution.

The Morris Canal & Banking Company was incorporated by a special act of the New Jersey legislature, passed in December 31, 1824, for the purpose of constructing a canal across the state. This statute expressly declared that "said canal when completed shall forever thereafter be esteemed a public highway," gave the state the right to purchase it after ninety-nine years at a fair valuation, and specified that it should become the sole property of the state after one hundred and forty-nine years; but no power was granted the corporation either to sell or lease its works. Section 4 provides:

"No state, county, township, or other public assessments, taxes or charges whatsoever shall at any time be laid or imposed upon the said canal company, or upon the stocks and estates which may become vested in them under this act; but this exemption shall not extend to any other estate or property of the company than such as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation under this act, according to the true intent and meaning thereof; . . ."

An act approved March 14, 1871, amended the original charter as follows:

"It shall and may be lawful for the Morris Canal & Banking Company, by and with the consent of a majority in interest of the stockholders of the said company, expressed in writing and duly authenticated by affidavit, [131] and filed in the office of the secretary of state, to lease the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises, to any person or persons, or corporation, either perpetually or for such shorter time, and upon such rents and agreements, as may be agreed upon between the said contracting parties, and it shall be lawful for the lessee or lessees in said lease to use and enjoy the said property and franchises so demised, for the term in said lease mentioned."

By indenture dated May 4, 1871, the canal company undertook to let and demise to the Lehigh Valley Railroad its entire canal and navigation works, together with all corporate franchises, *rights and privileges*, other than that of being a corporation, to have and to hold unto the lessee, its successors and assigns, perpetually. (The words "rights and privileges" are not contained in the amendment to the charter.) Likewise it bargained and sold to the railroad all of its cars, trucks, boats, etc., and movable property of every kind and description except certain records and specified articles.

Admitting that the provision in the charter of 1824, granting exemption from taxation, constituted a valid contract which subsequent legislation could not impair, the state maintains that it ceased to apply after the lease and sale to the railroad, and the property in question then became subject to assessment.

The doctrine essential to the solution of the question in issue was lucidly stated and the pertinent authorities cited in Rochester

R. Co. v. Rochester, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469, Mr. Justice Moody delivering the opinion. Speaking in respect of the transfer of an immunity from the exercise of governmental power granted by contract, he declared (p. 247):

"Although the obligations of such a contract are protected by the Federal Constitution from impairment by [132] the state, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. . . . But the state, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the state in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required."

And, after a review of former opinions, the conclusion was reached that a transfer, under legislative authority, of "the estate, property, rights, privileges, and franchises" of one corporation to another, did not vest in the latter the freedom from exercise of governmental power which the former enjoyed under its charter.

The results in Wright v. Central of Georgia R. Co. 236 U. S. 674, 59 L. ed. 781, 35 Sup. Ct. Rep. 471, and Wright v. Louisville & N. R. Co. 236 U. S. 687, 690, 59 L. ed. 788, 792, 35 Sup. Ct. Rep. 475, were based upon the original charters, which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation. Neither of these cases modifies the principles announced and applied in the opinion quoted from above; it is referred to with approval in the latter of them.

By express terms the charter of the Morris Canal & [133] Banking Company limited the exemption from taxation to such property "as is possessed, occupied and used by the said company for the actual and necessary purposes of said canal navigation." This language must be strictly construed under the settled rule, notwithstanding the rights of purchase and ownership secured by the state, the supposed value of which, it is claimed, was so unusual that a more liberal interpretation should be adopted. After transfer to the railroad the assessed property was not possessed, occupied, or used by the canal company; and the exemption, therefore, no longer applied, unless some legislation plainly authorized or directed its transfer.

Only the act of March 14, 1871, can be relied upon to show such authorization or direction. But this merely permitted the lease of "the canal of said company, or any part thereof, with all or any of its boats, property, works, appurtenances and franchises;" and, as clearly pointed out in the Rochester Case, an exemption from taxation does not pass under a valid lease or sale of corporate property together with appurtenances and franchises.

We find no error in the judgment of the court below, and it is accordingly affirmed.

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[134] MELLON COMPANY, Plff. in Err.,
v.
CHARLES McCAFFERTY, as County Treasurer, et al.

(See S. C. Reporter's ed. 134–139.)

Error to state court — decision on non-Federal ground.

A decree of the highest court of a state which affirmed a decree below, dismissing on demurrer the bill in a suit to enjoin the collection of taxes, rests upon an independent state ground broad enough to sustain it wholly irrespective of the Federal rights asserted under U. S. Const., 14th Amend., and therefore is not within the appellate jurisdiction of the Federal Supreme Court, where both the state courts held that the bill stated no equity because it failed to allege that resort had been had to adequate administrative remedies provided by the state laws for the collection of the assessment, although some of such

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

remedies may have been wrongfully decided to be available.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

[No. 27.]

Submitted October 22, 1915. Decided November 29, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Oklahoma County, in that state, dismissing on demurrer the bill in a suit to enjoin the collection of taxes. Dismissed for want of jurisdiction.

See same case below, 38 Okla. 534, 135 Pac. 278.

The facts are stated in the opinion.

Mr. W. A. Ledbetter submitted the cause for plaintiff in error. Messrs. H. L. Stuart and R. R. Bell were on the brief.

Mr. Charles J. Kappler submitted the cause for defendants in error. Messrs. John Embry and Sam Hooker were on the brief.

[136] Mr. Chief Justice White delivered the opinion of the court:

The court below affirmed a decree of the trial court, dismissing a bill filed by the plaintiff in error to enjoin the collection of state, county, and city taxes assessed against it for the year 1910. 38 Okla. 534, 135 Pac. 278. The ground for relief alleged was that the assessment had been unlawfully made as the result of an agreement between the city assessor and the county board of equalization, with the approval of the state auditor, that the property of all corporations should be assessed at its true cash value while that of all individuals should be assessed at only 60 per cent of its cash value. The bill alleged that the result of the assessments so made was to give rise to such inequality and discrimination as to make the assessment illegal under the state Constitution and laws, and also to cause it to be repugnant to the equal protection and due process clauses of the 14th Amendment. The action of both the courts was taken in disposing of a general demurrer to the bill, and both held that the bill stated no equity because it failed to allege that adequate administrative remedies which were provided by the state law for the correction of the wrongful valuation complained of had been resorted to.

As it is not disputed, and, indeed, is, from a twofold view, indisputable, that the action of the court below was right if the premise upon which its ruling was based be accepted, that is, the existence of ample and efficient administrative remedies under the state law and the failure to resort to them (Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67; Johnson v. Wells, F. & Co. this day decided [239 U. S. 234, post, 243, 36 Sup. Ct. Rep. 62]), it follows that we are without jurisdiction, since, under that hypothesis, the decree below would rest upon an independent state ground broad enough to sustain it, irrespective of the questions of Federal right asserted. [137] But it is urged that plain error was committed by the court below in its ruling as to the state law, since some of the remedies under that law which it was held should have been resorted to for the purpose of correcting the assessment complained of were not so available. Although the error thus complained of manifestly concerns a state question, the argument insists that we have jurisdiction to consider and correct it, since the right to do so is inseparable from the duty to give effect to the Constitution. We are of opinion, however, that if, for the sake of the argument, the proposition be conceded, and every remedy which it insists was wrongfully decided to be available be, upon the hypothesis stated, put out of view and treated as not existing, nevertheless there remain remedies provided by the state law embraced by the ruling below which would cause that ruling to rest upon independent state grounds broad enough to sustain it irrespective of the Federal rights relied upon. The merest outline of the assessment laws of the state will make the grounds of this conclusion clear.

Situated in a municipality, the city assessor was the officer primarily charged with the duty of assessing the property in question, and that officer, in conjunction with the mayor or president of the board of trustees and the city clerk, composed a city board of equalization with ample powers to redress all individual wrong complained of concerning an assessment, and with authority to take steps generally to equalize assessments. Comp. Laws 1909, § 7616. From the adverse action of this board upon complaint made a right of appeal existed to the county board of equalization, composed of a majority of the county commissioners. The powers of such board were also ample to redress any grievance complained of. Comp. Laws 1909, § 7617. In addition there was a state board of equalization having general authority to correct inequalities between counties; in other words, [138] to redress wrongs which were more extensive in character than those arising from the complaint of individuals as to their particular assessments. Comp. Laws

1909, § 7620. From the action of neither of these administrative bodies was there any method of review given prior to 1910. In that year the statutes were re-enacted, the principal change being a right given to review the action of the county board by the county court, and that of the state board by the supreme court. Chap. 73, Session Laws of 1910, p. 148, and chap. 87, id. p. 173. The error of state law which it is insisted was committed by the court was the ruling that the law of 1910 was in effect for the purpose of the prosecution of an appeal as to the assessment in question from the county board of equalization to the county court, when in fact such remedy could not have been pursued, because, when the law of 1910 went into effect, the county board had completed its work under the assessment for 1910 and had adjourned sine die. But conceding this to be true, the court below ruled that under the act of 1910, in view of the character of the wrong complained of as to the particular assessment in question, there was power vested in the state board of equalization to hear complaint concerning it, and hence the duty to invoke its action, and, if it was adverse, to appeal from that body to the supreme court of the state,—a right which could have been availed of, as there is no contention that there was not ample opportunity to so do after the act of 1910 was enacted and went into effect. Moreover, a like situation arises from the ruling below to the effect that it was the duty, irrespective of the re-enacting act of 1910, under the original law, to have complained of the assessment to the city board, and to have appealed from its adverse action to the county board of equalization. To avoid this difficulty in the argument it is insisted that a resort to these remedies was not required because they would have been unavailing, in view of the nature [139] of the wrong complained of. But the duty to resort to the adequate remedies provided could not be escaped by assuming that if they had been resorted to, the wrong complained of would not have been rectified.

As it follows that, under any possible view of the case, the judgment below rested upon propositions of state law adequate to sustain it, wholly irrespective of the Federal right relied upon, it results that we have no power to review, and the writ of error must be dismissed for want of jurisdiction.

And it is so ordered.

60 L. ed.

CHIENG AH SUI, Appt.,
v.
HENRY B. McCOY, Insular Collector of Customs of the Philippine Islands.

(See S. C. Reporter's ed. 139–144.)

Aliens — Chinese exclusion — power of insular collector.

1. The general supervisory authority of the insular collector of customs over the enforcement in the Philippine Islands of the Federal immigration and Chinese exclusion acts was not exceeded by his action in giving to the board of special inquiry provided for by the immigration acts the power primarily to determine, subject to his review, the right of persons to enter the Philippine Islands under the Chinese exclusion acts.

[For other cases, see Aliens, VI. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing — Chinese exclusion.

2. A Chinaman refused entry into the Philippine Islands has no ground for claiming that he was not given the hearing which is essential to afford the due process of law secured in those islands by the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369, Comp. Stat. 1913, § 3804), where the board of special inquiry reached its decision adverse to his right to land after a hearing, and twice reheard the case with the same result, and its last decision was affirmed by the insular collector, and was upheld by the Philippine supreme court on habeas corpus.

[For other cases, see Constitutional Law, 764–773, in Digest Sup. Ct. 1908.]

[No. 54.]

Submitted November 1, 1915. Decided November 29, 1915.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which reversed an order of the Court of First Instance of the City of Manila, releasing on habeas corpus a Chinaman held in custody subject to deportation. Affirmed.

See same case below, 22 Philippine, 361.

The facts are stated in the opinion.

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

Mr. Clement L. Bouvé submitted the cause for appellant:

If there was no evidence to support the finding that the petitioner is not the son of Ah Soon, a fair hearing has been denied.

Uy Kai Hu v. McCoy, 24 Philippine, 152; Ang Eng Chong v. Collector of Customs, 23 Philippine, 614; Ex parte Long Lock, 173 Fed. 208; United States ex rel. Klein v. Williams, 189 Fed. 915, 124 C. C. A. 366, 206 Fed. 460; United States ex rel. Reinmann v. Martin, 193 Fed. 795; United States ex rel. Freeman v. Williams, 175 Fed. 274; United States v. Chin Len, 109 C. C. A. 310, 187 Fed. 544; United States ex rel. Goldberg v. Williams, 204 Fed. 828; N. Jim Quan v. United States, 127 C. C. A. 253, 210 Fed. 617.

The failure to confront Ah Soon with an alleged contradictory statement, or to give him any opportunity to explain it, is not compatible with the ordinary principles of fair play.

Ex parte Keisuki Sata, 215 Fed. 173; Ex parte Lew Lin Shew, 217 Fed. 317; Ex parte Lam Pui, 217 Fed. 456; Hanges v. Whitfield, 209 Fed. 675.

The remark of an inspector, injected into a record dealing with certain points covered by the matter in controversy, constitutes no evidence whatsoever of the facts to which it purports to relate.

Ex parte Lam Fuk Tak, 217 Fed. 468.

This holding would seem to be somewhat analogous to decisions to the effect that a so-called certificate of discharge issued by a United States commissioner in Chinese deportation proceedings is not evidence of such adjudication (Ah How v. United States, 193 U. S. 65, 48 L. ed. 619, 24 Sup. Ct. Rep. 357; Ex parte Lung Foot, 174 Fed. 70), or of the facts on which the commissioner's alleged finding is based (Ex parte Lung Wing Wun, 161 Fed. 211; Ex parte Mac Fock, 207 Fed. 696).

Mr. S. T. Ansell submitted the cause for appellee:

The burden of proof is upon the applicant to show admissibility.

Re Moy Quong Shing, 125 Fed. 641; United States v. Too Toy, 185 Fed. 838; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Ah How v. United States, 193 U. S. 65, 76, 48 L. ed. 619, 622, 24 Sup. Ct. Rep. 357.

No presumption of unfairness, arbitrariness, or abuse of discretion and authority can arise from the fact alone that the immigration officials did not accept the testimony of applicant's witnesses, even though it was uncontradicted.

Quock Ting v. United States, 140 U. S. 417, 420, 35 L. ed. 501, 502, 11 Sup. Ct. Rep. 733, 851; Lee Lung v. Patterson, 186 U. S. 168, 46 L. ed. 1108, 22 Sup. Ct. Rep. 795; Re Jew Wong Loy, 91 Fed. 240; Lee Sing Far v. United States, 35 C. C. A. 327, 94 Fed. 834; Re Louie You, 97 Fed. 580; Woey Ho v. United States, 48 C. C. A. 705, 109 Fed. 888; Quong Sue v. United States, 54 C. C. A. 652, 116 Fed. 316; United States v. Lee Huen, 118 Fed. 442; Ex parte Long Lock, 173 Fed. 214; Kum Sue v. United States, 102 C. C. A. 648, 179 Fed. 370; Re Yim Quock Leong, 1 Haw. Dist. Ct. 66; Tan Beko v. Collector of Customs, 26 Philippine, 254.

If it does not affirmatively appear that the executive officers have acted in some unlawful way and abused their authority and discretion, their finding upon the question of relationship, upon the establishment of which by the applicant his admissibility depends, must be deemed to be conclusive, and is not subject to review by the courts.

United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Chin Yow v. United States, 208 U. S. 8, 52 L. ed. 369, 28 Sup. Ct. Rep. 201; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359.

This was not a judicial but an administrative proceeding, which technical criminal procedure does not govern.

United States ex rel. Buccino v. Williams, 190 Fed. 897; Re Jem Yuen, 188 Fed. 350; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359.

Mr. Chief Justice White delivered the opinion of the court:

Chieng Ah Soon, a Chinese merchant residing in Manila, proposing to go to China, took a certificate which was susceptible of being used to identify him for the purpose of re-entry in case of his return. About a year afterward, July 19, 1910, Ah Soon returned, accompanied by two persons asserted to be his minor sons, one Ah Luy, said to be twenty, and the other, Ah Sui, to be sixteen years of age. His right to land was at once conceded, but the right of the two others being questioned, the insular collector referred the matter for inquiry and report to a board which was charged with the duty of considering such question. At once this board heard the testimony offered to prove the right to admission and concluded that Ah Luy had established such right, but that Ah Sui had not. An

appeal was prosecuted to the collector, but before the matter was decided by him on the merits a rehearing was granted, presumably by the board, and it again heard the matter on July 23, 1910. At the rehearing additional testimony was offered by Ah Sui, but after re-examination of the matter and considering such testimony, the board adhered to its former conclusion. An appeal was taken [141] to the collector, and once more before it was decided a second rehearing was allowed, and on the 10th of August, 1910, after hearing additional testimony, the original order was again reaffirmed. This last decision was on September 3d, 1910, affirmed on appeal by the insular collector, and on September 15th an application for rehearing was refused and Ah Sui remained, therefore, in the custody of the collector for deportation.

At once he applied for habeas corpus to the court of first instance of the city of Manila, asserting the illegality of his detention for deportation and his right to land as a minor son of Ah Soon, on the following grounds: (a) An entire want of power in the insular collector to have referred the right to land to the board of inquiry, and the resulting absolutely void character of the proceedings, whether appellate or otherwise, taken thereunder; (b) Even upon the assumption of existence of power, the absolutely void character of the action of the board and the collector because of the entire disregard by both of the testimony establishing the paternity of Ah Soon and the resulting right of Ah Sui to land. Although ruling against the assertion of want of power, the trial court yet granted the writ of habeas corpus and directed the release of the applicant on the ground of a gross abuse of discretion by the board and the collector in refusing to give effect to the testimony showing the right to enter, although there was nothing in the proof tending to the contrary. On appeal, the court below, after reviewing the testimony, held that there was no ground to support the conclusion reached by the trial court of arbitrary action and abuse of discretion by the board and the collector in passing upon the right to land, and therefore reversed the order releasing Ah Sui, thus leaving him in custody, subject to deportation. 22 Philippine, 361.

Our jurisdiction is invoked, first, upon the theory that the construction of statutes of the United States is necessarily [142] involved in the assertion of the want of all authority of the insular collector of customs to have appointed the board which primarily determined the right to admission, and second, an assumed violation of the due process of law secured in the Philippine Islands by act of Congress, arising from the action taken below because of its asserted arbitrary character, caused by the alleged absolute disregard of the testimony establishing the right to enter, and the absence of any testimony to the contrary. We come to dispose of these contentions separately.

1. That the immigration and Chinese exclusion laws of the United States have been by act of Congress carried to the Philippine Islands and authorized to be there put into effect under appropriate legislation by the insular government is not disputed. That such government has put such laws into effect, and in doing so has in express terms conferred the general supervisory authority required for that purpose to be exerted upon the insular collector of customs, is also not disputed. And that such officer, under that authority, has provided for a board of examiners primarily to determine, subject to his review, questions arising under the immigration and Chinese exclusion laws, is also not disputed. The contention is based upon the supposed repugnancy to the act of Congress caused by the action of the collector in giving to such board primary authority to examine under the Chinese exclusion acts. The argument is that although, under the immigration acts, provision is made for a board of examiners, no such provision is found in the Chinese exclusion acts, since under the latter, although an examination is provided for, it is left to be conducted under rules and regulations adopted by the appropriate authority, and in the exercise of that power in the United States, examining agents, and not an examining board or boards, are provided for by the regulations. Upon this, and this alone, is the conclusion rested that the making of a primary [143] examination under the exclusion acts by a board was in conflict with the United States statutes.

The extremity of the argument is well illustrated by considering the extent of the administrative power conferred by the insular government upon the collector in delegating to him the authority to enforce the Chinese exclusion acts, since by § 1 of act No. 702 of the Philippine Commission, enacted March 17, 1903, it is provided that "the collector of customs for the Philippine Archipelago is hereby authorized and directed . . . to employ for that purpose the personnel of the Philippine customs service, the provincial and military officers hereinafter provided, and such other persons as may be necessary." But, aside from

this, we are of the opinion that the mere statement of the supposed conflict answers itself, since there is no room for real contention that there was a want of power in the collector to appoint the board instead of an agent to aid him in the discharge of the duties devolving upon him. And we are also of the opinion that there was no ground whatever for the contention that a conflict arose between the act of Congress and the action of the collector because the board selected was one in whom the power had been already lodged to act under the supervision of the collector concerning matters of immigration.

2. So far as concerns the assertion that there was a violation of the due process of law secured in the Philippine Islands by act of Congress both because of the want of a hearing and the disregard of the testimony, we are of the opinion that the first, on the face of the record, is completely answered by the statement we have made of the abundant opportunity which was afforded for a hearing, of the rehearings granted, and of the reiterated considerations which resulted by the board and the collector; especially in view of the judicial consideration of the subject of the complaint made in the proceedings which culminated [144] in the decree which is before us for review. As to the charge of the total disregard of all the testimony, we might well content ourselves with referring to the opinion of the court below; but, in view of the character of the case, we say that, from an examination of the record, we think such contention is devoid of all merit.

Affirmed.

GEORGE W. NORTON, as Executor and Trustee of the Estate of George W. Norton, Deceased, Appt.,
v.
ROBERT B. WHITESIDE and Andrew J. Tallas.

(See S. C. Reporter's ed. 144–155.)

Appeal — from circuit court of appeals — diverse citizenship case.

The jurisdiction of a Federal district court over a suit by an owner of land on the Minnesota side of a stretch of water near the upper end of Lake Superior against the owners of land on the Wisconsin side to enforce complainant's asserted riparian rights from the shore out to a new navigable channel constructed in the improvement of navigation by the United States cannot be said to have rested upon any assertion of Federal right irrespective of diverse citizenship, so as to justify an appeal to the Federal Supreme Court from a decree of the circuit court of appeals, despite allegations in the bill that both parties acquired title from the United States, and references to the organization of the Northwest Territory, and the general intent of Congress to preserve free navigation.

[For other cases, see Appeal and Error, 768–784, in Digest Sup. Ct. 1908.]

[No. 55.]

Argued November 4 and 5, 1915. Decided November 29, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed, with directions to dismiss the bill, a decree of the Circuit Court for the District of Minnesota in favor of complainant in a suit to enforce asserted riparian rights. Dismissed for want of jurisdiction.

See same case below, 45 L.R.A.(N.S.) 112, 123 C. C. A. 313, 205 Fed. 5.

The facts are stated in the opinion.

Mr. Jed L. Washburn argued the cause, and, with Messrs. William D. Bailey, Oscar Mitchell, and Albert C. Gillette, filed a brief for appellant.

Messrs. Luther C. Harris and Alfred Jaques argued the cause, and, with Mr. Theodore T. Hudson, filed a brief for appellee Robert B. Whiteside:

Some right, title, privilege, or immunity, dependent upon the construction of the Constitution, or some law or treaty, must be relied on, in order to raise a purely Federal question.

Muse v. Arlington Hotel Co. 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109.

Mere general allegations that the construction of some law or the Constitution are involved are not sufficient. They must be based upon facts clearly alleged in the complaint.

Budzisz v. Illinois Steel Co. 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503.

The question as to whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be de-

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NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605; and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

Generally, as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; McDonald v. Smalley, 7 L. ed. U. S. 287; and Roberts v. Lewis, 36 L. ed. U. S. 579.

termined from the plaintiff's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by answer, or in the course of the subsequent proceedings.

Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Devine v. Los Angeles, 202 U. S. 313, 333, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652.

It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.

Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; Mountain View Min. & Mill Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Shulthis v. McDougal, 225 U. S. 565, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a controversy respecting the validity, effect, or construction of such laws, upon the determination of which the result depends.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; Florida C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

Messrs. Daniel G. Cash and John B. Richards, Jr., filed a brief for appellee Andrew J. Tallas.

Mr. Chief Justice White delivered the opinion of the court:

The appellant, who was complainant below, as the owner of certain shore land abutting on a stretch of water [146] in or near the upper end or far corner of Lake Superior, from one point of view sued to quiet his title to the whole or a part of a certain island which had emerged from the waters in front of his land, or, considered from the same point of view in a broader aspect, to protect his asserted riparian rights in the submerged land in front of his shore property. The defendants, who are appellees, were owners or possessors either of property on the opposite shore or of the whole or part of the emerged island, and the controversy resulted from a difference between the parties as to the character and extent of their riparian rights and as to the ownership of the island which had emerged in the stretch of water between the two shores. The district court upheld the theory of the existence in the complainant of the riparian rights asserted by him, and therefore awarded relief upon that basis except as to a portion of the emerged island, as to which it gave no relief because, in consequence of adverse possession by one of the defendants, it was considered there was an adequate remedy at law and consequently no right to equitable relief. 188 Fed. 356. On appeal the court below, not approving the full character or extent of the riparian rights asserted by the complainant and recognized by the trial court, reversed, with directions to dismiss the bill (45 L.R.A.(N.S.) 112, 123 C. C. A. 313, 205 Fed. 5), and it is in consequence of an appeal from that decree that the case is now before us.

A motion to dismiss upon the ground that the decree appealed from is beyond our competency to review because made final under § 128 of the Judicial Code (36 Stat. at L. 1133, chap. 231, Comp. Stat. 1913, § 1120) requires to be disposed of. To test its merits we must first ascertain whether the jurisdiction of the district court was invoked solely on the ground of diverse citizenship. St. Anthony's Church v. Pennsylvania R. Co. 237 U. S. 575, 577, 59 L. ed. 1119, 1122, 35 Sup. Ct. Rep. 729, and cases cited. That, taking the face of the bill from the point of view of mere form of statement, diverse citizenship was not the only ground [147] of jurisdiction relied upon, is apparent, since the bill, besides diversity of citizenship, alleged that the cause of action was one arising under the Constitution and the laws of the United States. This, however, does not suffice to solve the question, since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States, but that it must appear that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading." Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892, and authorities there cited. Before coming to the text of the complaint, to understandingly test whether it fulfils these requirements we give the merest outline of the condition out of which the controversy grew and to which the complaint related.

The boundary line of Wisconsin under its enabling act, starting from a designated

point, ran "through the center of Lake Superior to the mouth of the St. Louis river; thence up the main channel of said river to the first rapids in the same," etc. And the boundary line in one respect of Minnesota from the point where it intersected with the St. Louis river followed the main channel of that river "to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British Possessions." From the point of intersection where it first becomes the boundary of the states of Wisconsin and Minnesota, in its flow towards Lake Superior, the St. Louis river approaches Lake Superior in the direction of a large bay or indentation therein. From one point of view the river, at once leaving the fast land, empties into and is immediately absorbed in this bay. From another, [148] the river, before it empties into the lake, expands into a stretch of shallow water contained within the north or Minnesota shore, upon which is Duluth, and the south or Wisconsin shore, upon which is the city of Superior, through which shallow stretch a tortuous but navigable channel curvingly continues to flow until, by a passage through an intervening bar, the river, emptying into the bay, merges its existence with that of the lake. We say tortuous channel because the banks on either side of the flange-like stretch of water are not symmetrical, but are indented with various bays of divergent shape and expanse, and the water itself is irregularly interspersed with islands or flats which deflect the channel we have described and cause it greatly to meander as it proceeds to its ultimate destination in the bay through the bar in question. It will thus be seen that the difference between the two points of view is this: that one treats the lake as embracing the expanded though shallow stretch of water in question, and the other considers the shallow stretch of water as a part of the river until the point is reached where, traversing the bar, the lake and river are completely, and beyond room for any possible question, united.

On the Minnesota or north shore of this shallow stretch of water the complainant owned land. The channel flowing through the stretch of water as it approached the complainant's land curved towards the Minnesota shore, and therefore, in passing in front of that land, was nearer the north, or Minnesota, shore. In the stretch of water nearly opposite the complainant's land, but over towards the south, or Wisconsin, shore, there was a large island known as Big island, admittedly in the state of Wisconsin, owned by Whiteside, one of the defendants, and about 2,000 feet lay between the outer shore of this island and the complainant's land on the northern shore. In the intervening space between the channel and this [149] island, and therefore on the south, or Wisconsin, side of the channel, there gradually emerged a smaller island.

It having been determined to improve the navigation in the channel through the stretch of water in question, the plans to accomplish that purpose were approved by the Secretary of War in 1899, and in virtue of an appropriation by Congress the work under the plans was carried out by the United States between the years 1899 and 1902. It is not necessary for the elucidation of the averments of the bill to do more than say that the carrying out of this work resulted in the creation of a new navigable channel which, in passing through the stretch of water, instead of swinging towards the north, or Minnesota, shore in front of the complainant's land, curved in the other direction, and therefore approached nearer the Wisconsin shore than did the old channel. In doing so it consequently reached or struck the emerged island of which we have spoken near its Wisconsin, or south, side, and, cutting through it, virtually put the new and enlarged channel on the Wisconsin side of such emerged island. What remained of the island thereafter hence lay between the newly created channel and the lands of the complainant on the north, or Minnesota, shore. In other words, as the result of the creation of the new channel the lands of the complainant, to the extent that the emerged island accomplished that result, were separated from the new channel. In the performance of the work it may be conceded that in cutting through the emerged or small island the excavated earth was largely dumped on the surface of the island towards the Minnesota shore, and that, either because of the washing of this earth into the old channel, or the sedimentary deposit caused by the slackening of the velocity of the water flowing through it, the old channel opposite the land of the complainant became not suitable for, or more difficult of, navigation.

In view of this situation we come to consider the bill, [150] its averments, and the light thrown on them by the relief prayed, in order to determine whether, in any substantial manner whatever, it involved the construction or application of the Constitution or laws of the United States within the criteria embraced by the established rule which we at the outset stated. Instead of following the order of the twenty-four paragraphs which the bill contains, we rearrange and group them under five headings,

omitting many redundancies of statement, but leaving out nothing which can throw light upon the cause of action relied upon.

(a) The parties.—The complainant was alleged to be a citizen of Kentucky, and the defendants, Whiteside, Alexander, and Tallas, were alleged to be citizens of the state of Minnesota and inhabitants of the district in which the suit was brought.

(b) The grievances complained of.—It was alleged that the complainant owned land under patents from the United States on the Minnesota side of the stretch of water at the point to which we have referred, that the defendant, Whiteside, under title acquired also from the United States, owned land on the Wisconsin side, Big island, that Alexander, either in his own right or in connection with Whiteside, claimed some land on the Wisconsin side and resulting riparian rights, and that Tallas had taken possession of a part of the small or emerging island, erected a small structure thereon, and, without right in law, was asserting ownership therein, the land never having been disposed of by public authority. It was averred that both Whiteside and Alexander, by virtue of their shore ownership, were asserting riparian rights crossing the new or government channel to the old or original channel, embracing what remained of the emerged island, and that Tallas, by virtue of his possession of the island which remained, was asserting the right to hold it as owner.

(c) The rights asserted.—Averring that the stretch of water was a part of Lake Superior, in substance it was [151] asserted that as the complainant owned shore land on the Minnesota side, there existed riparian rights extending out to the center of the channel flowing through the stretch of water, securing to the shore owner the consequent right of direct access to such channel, and this right, it was in substance alleged, embraced the power not only to extend to the old channel, but to the new navigable channel constructed in improvement of navigation by the United States, and to enjoy riparian rights coterminous therewith, and that therefore the asserted rights by Whiteside, Alexander, and Tallas were in conflict with such right upon the part of the complainant, and cast a cloud upon his title, giving him the right to equitable relief.

(d) The legal grounds asserted as the basis of the relief prayed.—The bill alleged the historical fact of the original ownership by Virginia of the territory in which the lands in controversy were embraced, of its passing to the Confederation as a part of the vast domain ceded by Virginia, of the adoption of the Northwest Territory ordinance in 1787, the stipulation contained in that ordinance that "the navigable waters leading into the Mississippi and St. Lawrence [rivers], . . . shall be common highways and forever free as well to the inhabitants of the said Territory as to the citizens of the United States and those of other states that may be admitted into the Confederacy, without any tax, impost or duty therefor." [1 Stat. at L. 52, note.] The bill further referred to the act of Congress of May, 1796, providing for the sale of lands within the Northwest Territory, including the lands in question, reciting the provision therein "that all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both." [1 Stat. at L. 468, chap. 29, § 9, Comp. Stat. 1913, § 4918.] It alleged the subsequent carving out of said territory of the states of Ohio, Indiana, Michigan, [152] Wisconsin, and part of Minnesota, and the reservation in the enabling acts preserving the navigable waters bordering upon the same as common highways, and extending concurrent jurisdiction to the states bordering thereon. Proceeding, the bill alleged the boundaries of the two states of Wisconsin and Minnesota, as stated in the enabling acts to which we have referred, including the line of the main channel of the St. Louis river and the center of Lake Superior at the points and as described in the statement which we have previously made. It alleged that, under the laws of Minnesota, the riparian rights extending to the center of the main navigable channel were valid as asserted by the complainant, and in practice had been recognized by the exercise of taxing and other powers. So far as the United States was concerned, growing out of the averments as to the formation of the Northwest Territory and of the states just referred to, it was alleged:

"That in the preservation of public rights on such navigable waters, where the same constitute state boundaries, it was the intent of the Federal government and of the states to forever maintain and preserve the rights of the respective states and the citizens thereof, to have access to the navigable and navigated channels of such boundary waters, and among the most ancient and important rights of private owners, incidental to the ownership of the shore lands abutting upon such boundary waters, is the right to wharf out to and have access to the navigable and navigated channel of such waters from such shore lands, and to have

connection from such shore lands, throughout the extent thereof, with commerce upon such navigable and navigated part or channel of such waters, subject always to the paramount control over the whole of such waters by the United States."

It was charged that the emerging of the small island opposite the land of the complainant had occurred after [153] the survey, sale, and patent of complainant's land by the United States. In addition the bill charged that, under the power of the United States to regulate commerce, harbor lines had at various times been established which extended from the respective shores to the old channel before the new one was constructed, and that under the plans approved by the Secretary of War for the new work it was contemplated that harbor lines should extend from the respective shores to that channel.

(e) The relief prayed.—The prayer was that the riparian rights of the complainant be recognized and enforced from the shore out to the new navigable channel created by the work done by the United States, and that all rights of the defendants as riparian owners which they asserted to extend across the new channel over to the old channel be declared to be invalid, and that they be restrained from asserting or enforcing them.

Coming to test these averments, we fail to perceive any ground for holding that the rights asserted rested in any degree whatever upon a substantial claim under the Constitution or laws of the United States, or by any possibility involved the construction or application of any law of the United States, for the following reasons: First, because as to the claim of riparian rights on the navigable waters in question, it was long since affirmatively settled that such claim solely involves a question of state law, and therefore at the time the bill was filed it was not open to contend to the contrary. Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Devine v. Los Angeles, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652. Second, because the mere fact that both parties, the one holding on the Wisconsin shore and the other on the Minnesota shore, had acquired the property by them held from the United States, it is also affirmatively settled, in no way changes the situation. Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; Florida C. & P. R. Co. v. [154] Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704. Third, because, so far as the references in the bill to the organization of the Northwest Territory and to the various provisions relating to navigable waters are concerned, however interesting they may be historically, we can see not the slightest ground for the contention that they were controlling or in any way could influence the question of the nature and character of the riparian rights enjoyed under the state law by the complainants. Fourth, because we can discover in the averments of the bill no substantive statement indicating that it was contended to the contrary, unless it be that such purpose could be implied as the result of the general averments of the bill which we have quoted concerning the general intent of Congress to preserve free navigation. But if we were to indulge in such assumption the result would not be different, as the averments in question make no reference to any specific legislation of Congress which would have the slightest influence upon the determination of the existence of the riparian rights which the bill asserted. Fifth, because we are clearly of the opinion that the mere fact that Congress, in the exercise of its power to improve navigation, directed the construction of the new channel, affords no basis whatever for the assumption that thereby, as a matter of Federal law, rights of property, if secured by the state law, were destroyed, and new rights of property under the assumption indulged in, incompatible with that law, were bestowed by Congress. And especially are we constrained to this view by the fact that there is no question here of any interference with work done by the United States under its paramount authority to improve navigation, or any attempt to render the result of that work inefficacious. This will be lucidly illustrated by considering for a moment the action of both the courts below, since neither questioned the paramount authority [155] and right of the United States in aid of navigation to construct the new channel, or concerned themselves with any real or imaginary impediment to navigation. This is at once demonstrated by considering that the only difference between the two was the conclusion in the trial court that the effect of constructing the new channel was to extend the riparian rights over and across the old channel to the new, irrespective of the rights of property changed or destroyed thereby, because the new channel was to be treated, not as a new work, but as the gradual and natural modification of the old,

while the court below reached a directly contrary conclusion.

Finally, we are of opinion that the question whether the stretch of water and the channel through it be treated as a part of Lake Superior, as asserted by the complainant, or be considered at the point in issue as a mere continuation of the St. Louis river, as asserted by the defendants (a view held by both the courts below), is wholly negligible for the purpose of determining whether a substantial Federal question was alleged, justifying our taking jurisdiction of the cause.

As from what we have said it results that our opinion is that there is no substantial ground for concluding that the jurisdiction of the district court rested upon any assertion of Federal right, irrespective of diverse citizenship, justifying our review of the court below, it follows that the appeal must be and it is dismissed for want of jurisdiction.

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[156] FIREBALL GAS TANK & ILLUMINATING COMPANY and David Leon Soloman, Petitioners,

v.

COMMERCIAL ACETYLENE COMPANY and the Prest-O-Lite Company.

(See S. C. Reporter's ed. 156–169.)

Patents — expiration with foreign patent — identity.

1. There is no such identity between the Claude & Hess patent, No. 664,383, for an improved apparatus for the storage and distribution of acetylene gas, designed to make use of the property of that and other gases of solubility in a liquid, and prior foreign patents for methods of storing acetylene gas, based upon such solubility, the devices described in which were not a result of the operation of the methods, that the expiration of the foreign patents will terminate the United States patent.

[For other cases, see Patents, 28–37, in Digest Sup. Ct. 1908.]

Certiorari — in patent case — discretionary matters.

2. The discretion of the trial court in granting an interlocutory injunction upon the pleadings and affidavits against the infringement of certain letters patent should not be disturbed by the Federal Supreme Court on a writ of certiorari to review a decree of a circuit court of appeals which affirmed the injunction order, where the questions involved of invention and infringement are seriously disputable.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

[No. 13.]

Argued October 22, 1915. Decided November 29, 1915.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the Eastern Division of the Eastern District of Missouri, granting an interlocutory injunction against the infringement of letters patent. Affirmed.

See same case below, 117 C. C. A. 354, 198 Fed. 650.

The facts are stated in the opinion.

NOTE.—Expiration of domestic patent with foreign patent.

Under the act of July 8, 1870, § 25, substantially re-enacted in U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, a United States patent for an invention "previously patented in a foreign country" expires at the same time with the foreign patent; or, if there be more than one, at the same time with the one having the shortest term, in no case running for more than seventeen years.

This section was not retroactive and did not affect the term of United States patents theretofore granted. Goff v. Stafford, 3 Bann. & Ard. 610, Fed. Cas. No. 5,504; De Florez v. Raynolds, 17 Blatchf. 436, 8 Fed. 434. Nor did it apply to subsequent reissues of such patents. Badische Anilin & Soda Fabrik v. Hamilton Mfg. Co. 3 Bann. & Ard. 235, Fed. Cas. No. 721.

A United States patent was not void, under the act of July 8, 1870, because it was not limited on its face to expire at the date when the foreign patent previously granted for the same invention is to expire. Canan v. Pound Mfg. Co. 23 Blatchf. 173, 23 Fed. 185.

And the change of phraseology in U. S. Rev. Stat. § 4887, by which the words "shall be so limited as to expire" are substituted in place of the words in the act of July 8, 1870, § 25, "shall expire at the same time," does not render the United States patent void because not limited on its face to expire at the date when the foreign patent previously granted for the same invention shall expire. Canan v. Pound Mfg. Co. supra. To the same effect are: Bate Refrigerating Co. v. George H. Hammond & Co. 129 U. S. 151, 32 L. ed. 645, 9 Sup. Ct. Rep. 225, reversing 35 Fed. 151; American Paper Barrel Co. v. Laraway, 28 Fed. 141; Edison Electric Light Co. v. United States Electric Lighting Co. 3 C. C. A. 83, 11 U. S. App. 1, 52 Fed. 300.

The United States patent, though it may on its face run for seventeen years, is, under U. S. Rev. Stat. § 4887, in the case provided for by it, to be so limited by the courts, as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent, not running

Mr. John H. Bruninga argued the cause and filed a brief for petitioners:

The rules for determining whether a United States patent is limited by a foreign patent may be stated as follows:

1. The invention protected by the United States patent must be protected by the foreign patent; in other words, they must both be for the same invention.

2. Where a process and product are for the same invention, a patent for one will limit the other.

3. Where a process and apparatus are for the same invention, a patent for one will limit the patent for the other.

4. It is not necessary that the patents be identical in every respect, but it is sufficient if the principal invention is in both. Mere differences in detail are therefore immaterial.

Siemens v. Sellers (Guarantee Ins. Trust & S. D. Co. v. Sellers) 123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117; Commercial Mfg. Co. v. Fairbanks Canning Co. 135 U. S. 176, 34 L. ed. 88, 10 Sup. Ct. Rep. 718; Bate Refrigerating Co. v. Sulzeberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

Even considering the British patent as a method patent, it is for the same invention as the United States patent.

Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745; Westinghouse v. Boyden Pow-

in any case more than the seventeen years. Bate Refrigerating Co. v. George H. Hammond & Co. supra.

The time of expiration of the United States patent is to be determined by the court on evidence *in pais*, where the bill alleges that the foreign patent, previously granted for the same invention, has not expired, but is in full force and effect, and defendant's plea avers that it had expired before the suit was brought. Edison Electric Light Co. v. Westinghouse, 40 Fed. 666.

The application of U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, is not prevented because the inventor who makes the application for the United States patent is an American citizen, because, since the act of July 4, 1836, which repealed all former patent laws and established a comprehensive code covering the whole subject, the Federal laws have made no distinction between American citizens and foreigners with respect to the privilege of obtaining patents, or the conditions and restrictions of the privilege granted, except as to the amount of the fee to be paid and the protection of inventions by caveat. Edison Electric Light Co. v. United States Electric Lighting Co. 35 Fed. 134.

The statutory provision for a seventeen years' patent to the first inventor of any new and useful article does not override the provision that where the invention has been previously patented in a foreign country the United States patent shall be so limited as to expire when the foreign patent expires. United States ex rel. Koechlin v. Marble, 2 Mackey, 12.

"Previously patented."

The provisions of U. S. Rev. Stat. § 4887, presuppose that at the date of the United States patent there was in force a foreign patent for the invention. Huber v. N. O. Nelson Mfg. Co. 148 U. S. 270, 37 L. ed. 447, 13 Sup. Ct. Rep. 603, affirming 38 Fed. 830.

Hence, a foreign patent antedating the United States patent, but thereafter declared void *ab initio* by a foreign court, never having had in fact any existence, can have no effect under U. S. Rev. Stat. § 4887, in shortening the term of the United States patent. Bate Refrigerating Co. v. Gillett, 20 Fed. 192.

And the term of a United States patent is not limited by the term of a certificate of addition to a prior French patent for the same invention, where the original French patent has been adjudged null and void by the French courts for lack of invention, the effect of such adjudication under the French law being to render the certificate of addition equally null and void as never having existed. Hennebique Constr. Co. v. Myers, 97 C. C. A. 289, 172 Fed. 869.

An invention was not "previously patented in a foreign country," within the meaning of U. S. Rev. Stat. § 4887, although an English patent for the same invention bears a date prior to the grant of the United States patent, where the English patent was not sealed until after the date of the United States patent, and was therefore not in existence on that date. Holmes Burglar Alarm Teleg. Co. v. Domestic Teleg. & Teleph. Co. 42 Fed. 220; Edison Electric Light Co. v. Waring Electric Co. 59 Fed. 358, affirmed in 15 C. C. A. 700, 20 U. S. App. 701, 69 Fed. 645.

The term "patented," as used in U. S. Rev. Stat. § 4887, means the actual granting of the patent by the foreign government, although the patent may have been antedated, conformably to 15 & 16 Vict. chap. 83, § 24, to the date of filing the provisional application. American Bell Teleph. Co. v. Cushman, 57 Fed. 842.

Before the actual sealing of an English patent, the patentee has none of the powers, rights, and privileges of a patentee; and when the sealing is subsequent to the issuance of the United States patent, the life of the latter is not to be abridged under the act of July 8, 1870, § 25, by the antedating of the English patent. Emerson Smith & Co. v. Lippert, 31 Fed. 911.

The relation back of an English patent by reason of its date and of the provisions of 15 & 16 Vict. chap. 83, § 24, does not

er Brake Co. 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707; Re Creveling, 1905 C. D. 685; Mosler Safe & Lock Co. v. Mosler, B. & Co. 127 U. S. 354, 32 L. ed. 182, 8 Sup. Ct. Rep. 1148; Miller v. Eagle Mfg. Co. 151 U. S. 186, 38 L. ed. 121, 14 Sup. Ct. Rep. 310.

This court can dismiss the bill at this hearing.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708.

Mr. John P. Bartlett argued the cause and filed a brief for respondents:

The term of the United States patent is limited only by the thing patented by the foreign patent, not by the things disclosed therein.

Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 22 Fed. 341; Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 71 C. C. A. 189, 138 Fed. 823; Robinson, Patents, § 623; McMillan v. Reese, 1 Fed. 722; Lehigh Valley R. Co. v. Mellon, 104 U. S. 112, 26 L. ed. 639; White v. Dunbar, 119 U. S. 47, 30 L. ed. 303, 7 Sup. Ct. Rep. 72; Burns v. Meyer, 100 U. S. 671, 25 L. ed. 738; Keystone Bridge Co. v. Phœnix Iron Co. 95 U. S. 274, 24 L. ed. 344; Toohey v. Harding, 4 Hughes, 263, 1 Fed. 174; Yale Lock Mfg.

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make applicable the provisions of U. S. Rev. Stat. § 4887, where the American patent was issued before the English patent was sealed, since up to that time there was no English patent, although its antedating gave it the same validity as if sealed on the day it bore date, to make liable as an infringer anyone who after that manufactured, used, or sold the invention, and limited the duration of the grant to the period of fourteen years from that date. Seibert Cylinder Oil Co. v. William Powell Co. 35 Fed. 591.

An invention was patented in Canada within the meaning of U. S. Rev. Stat. § 4887, when the patent was signed and issued as a patent, ready for delivery, although such delivery was delayed by the patentee's neglect to file a model, which he had the power to do at any time. Bate Refrigerating Co. v. Gillett, 13 Fed. 553, 31 Fed. 809.

If there was in force at the date of the United States patent a foreign patent for the same invention, it is of no importance that the United States patent may have been applied for before the foreign patent was granted (Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Bate Refrigerating Co. v. Gillett, supra; Accumulator Co. v. Julian Electric Co. 57 Fed. 605), or that the application for the foreign patent was not made until after the application for the United States patent was filed (Gramme Electrical Co. v. Arnoux & H. Electric Co. 21 Blatchf. 450, 17 Fed. 838; Edison Electric Light Co. v. United States Electric Lighting Co. 35 Fed. 134).

The exclusive privilege to make and permit others to make the thing invented for a specified term, granted by the Danish Sovereign prior to the enactment of patent legislation in Denmark, is the equivalent of a patent, within the meaning of U. S. Rev. Stat. § 4887, although such grant may not forbid the sale and use of the patented article imported from another country. Atlas Glass Co. v. Simonds Mfg. Co. 42 C. C. A. 554, 102 Fed. 643, affirming 102 Fed. 338. The court said that the exclusive privilege granted by the foreign country need not be coextensive with the privilege granted under the laws of the United States; that the true meaning and purpose of the section are accomplished by applying the word "patent" to the having received the grant of an exclusive privilege from a foreign Sovereign, if such privilege amounts to a substantial monopoly, and that the words "previously patented in a foreign country" must be taken to mean "patented according to the laws and usages of such foreign country," provided a substantial monopoly is thereby granted.

A Swiss provisional patent which conveys no monopoly or right to proceed against infringers, but merely gives the provisional patentee the right to obtain a definitive patent within three years upon making the required proofs, securing him during that period against the effects of publicity, is not the patent meant by U. S. Rev. Stat. § 4887, and the cancelation of such provisional patent for failure to furnish proof of a model, before the United States patent was granted, or before an application for such patent was filed, does not destroy or affect the United States patent. Société Anonyme v. General Electric Co. 97 Fed. 604.

Patentees from the United States are not estopped from showing the provisional character of a Swiss patent, the lapse of which is relied upon under U. S. Rev. Stat. § 4887, to destroy the United States patent, because of the formal statement in the specification that a patent had been granted them from Switzerland. Société Anonyme v. General Electric Co. supra.

The secrecy of an Austrian patent granted prior to the granting of the United States patent for the same invention cannot affect, under the act of July 8, 1870, § 25, the question of the duration of the United States patent, if the Austrian patent, though secret, conferred upon the patentees on exclusive privilege. Gramme Electrical Co. v. Arnoux & H. Electric Co. supra.

When does foreign patent expire.

The words "expire at the same time with the foreign patent," as used in U. S. Rev.

Co. v. Greenleaf, 117 U. S. 554, 29 L. ed. 952, 6 Sup. Ct. Rep. 846.

The thing patented must be the same in both patents.

Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

One who discovers an art, and invents a machine to practise it, does not deprive himself of a right to patents on both the process and apparatus.

Century Electric Co. v. Westinghouse Electric & Mfg. Co. 112 C. C. A. 8, 191 Fed. 350.

As the British, German, and French Claude & Hess patents cover a process, or method, they do not limit the term of the United States patent, which covers an apparatus, of which the product of said process or method is an element.

Leeds & C. Co. v. Victor Talking Mach. Co. supra.

Mr. Justice McKenna delivered the opinion of the court:

By this writ there is brought here for review a decree of the circuit court of appeals affirming an order for an [157] interlocutory injunction against the infringement of certain letters patent.

The circuit court of appeals considered the question in the case to be the narrow one whether the injunction was properly granted.

Petitioners, who were defendants in the district court, attack not only that conclu-

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Stat. § 4887, Comp. Stat. 1913, § 9431, refer to the legal term of the foreign patent in force at the time of the issuing of the United States patent, and do not mean the lapse or forfeiture of any portion of such term by reason of the nonobservance of a condition subsequent prescribed by the foreign statute, such as the nonpayment of annuities, or failure to work the invention. Pohl v. Anchor Brewing Co. 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577, reversing 39 Fed. 782. The court said that the question involved was not the same as that decided in Bate Refrigerating Co. v. George H. Hammond & Co. 129 U. S. 151, 32 L. ed. 645, 9 Sup. Ct. Rep. 225, infra, on which the circuit court relied, and was not controlled by the decision in that case.

A United States patent runs for the term for which the foreign patent was granted, notwithstanding the lapse or forfeiture of the foreign patent by the nonobservance of a condition subsequent prescribed by the foreign patent law. Consolidated Roller-Mill Co. v. Walker, 43 Fed. 575, affirmed in 138 U. S. 124, 34 L. ed. 920, 11 Sup. Ct. Rep. 292.

An American patent issued after an English patent for the same invention had been granted for a term of fourteen years, subject to be defeated by the nonperformance of a condition subsequent, is not subject to the same condition. The term of the English patent fixed the term of the American patent, and the subsequent fate of the English patent could have no effect upon the American one, the life of each after its inception proceeding independently of the life of the other. Bate Refrigerating Co. v. Gillett, 31 Fed. 809.

The lapsing of a foreign patent for nonpayment of an annuity during the pendency of an application for a United States patent for the same invention does not render the latter patent void under U. S. Rev. Stat. § 4887, but it expires at the end of the term prescribed in such foreign patent. Welsbach Light Co. v. Apollo Incandescent Gaslight Co. 37 C. C. A. 508, 96 Fed. 332, reversing 94 Fed. 1005. The court distinguished Huber v. N. O. Nelson Mfg. Co. 148 U. S. 270, 37 L. ed. 447, 13 Sup. Ct. Rep. 603, where it was held that a patent could not be granted in the United States on an application which was not made until seven months after an English patent for the same invention had expired because of the patentee's failure to pay a stamp duty. This decision the circuit court of appeals interpreted as resting upon the ground that the delay in applying for a United States patent amounted to an abandonment.

The term of a United States patent is not affected under U. S. Rev. Stat. § 4887, by the lapsing of a prior foreign patent for the same invention because of the nonpayment of a tax. The term of the United States patent is to be as long as the remainder of the term for which the foreign patent was granted, without reference to incidents occurring after the grant. Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 21 Fed. 458.

The United States patent does not expire at the same time with the original term of the foreign patent for the same invention, where the latter patent has been extended under a statute in force when the United States patent was issued and applied for, which made such extension a matter entirely of right at the option of the patentee, the original extended term having been continuous and uninterrupted. In such case the United States patent, subject to the limitation of seventeen years, continues in force until the expiration of the extended term of the foreign patent. Bate Refrigerating Co. v. George H. Hammond & Co. 129 U. S. 151, 32 L. ed. 645, 9 Sup. Ct. Rep. 225, reversing 35 Fed. 151.

A result exactly contrary had been reached in Reissner v. Sharp, 16 Blatchf. 383, Fed. Cas. No. 11,689, where a United States patent granted October 20, 1874, for seventeen years, was held to have expired on May 15, 1878, because a patent was granted in Canada under the authority of the patentee for the same invention on May 15, 1873, for five year from that date, although in March, 1878, the Canadian patent was extended for five years from May 15, 1878, and also for five years from May 15, 1883.

sion, but contend for the larger relief of a dismissal of the bill.

The Acetylene Company is the owner of letters patent No. 664,383, granted December 25, 1900, for "apparatus for storing and distributing acetylene gas." The Prest-O-Lite Company is the exclusive licensee as to the use of the invention on automobiles, carriages, and other movable vehicles. Defendants manufacture and sell what is known as the "Fireball Gas Tank;" Soloman is the president of the defendant.

The bill was filed August 17, 1911, and a motion for a preliminary injunction was made. It was heard upon the bill, exhibits, answer, replication, and affidavits. The circuit court granted the injunction, and the order was affirmed, as we have said, by the circuit court of appeals. The court considered that the question before it was whether the trial court had exercised a sound judicial discretion in granting the injunction, and deciding that the trial court had done so, affirmed its action and refused to dismiss the bill, as it was urged to do. Opinion was reserved upon all of the questions which the record presented except the question of the abuse by the trial court of its discretion in the issue of the injunction, as the court said, "until the affidavit stage of this proceeding shall have been passed, until the rights of these parties shall have been tested by the production, hearing, and cross-examination of their witnesses according to the salutary and searching practice of the common law, and until the court below, at the final hearing, has investigated and decided the issues these

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And that the same patent involved in Bate Refrigerating Co. v. George H. Hammond & Co. supra, expired with the original term of the Canadian patent, had been held in Bate Refrigerating Co. v. Gillett, 13 Fed. 553, and 31 Fed. 809.

And it had also been held in Henry v. Providence Tool Co. 3 Bann. & Ard. 501, Fed. Cas. No. 6,384, that the United States patent expires at the same time with the original term of a foreign patent for the same invention, without regard to any subsequent prolongation or extension of such term which the patentee may be able to procure from the foreign government as a royal favor. Disapproved in Bate Refrigerating Co. v. George H. Hammond & Co. 129 U. S. 151, 32 L. ed. 645, 9 Sup. Ct. Rep. 225.

The rule laid down in Bate Refrigerating Co. v. George H. Hammond & Co. supra, was extended in Edison Electric Light Co. v. Perkins Electric Lamp Co. 42 Fed. 327, to cover a case where the foreign (Canadian) patent had lapsed or become forfeited before the original term had expired and before the extension was granted. The court said: "If the Canadian government has in fact accepted the renewal fee and renewed the patent for a continuous and uninterrupted period of fifteen years as though the subsequent conditions had been complied with, the United States patent has not expired before the expiration of said fifteen years."

A United States patent did not expire with the original term of a Canadian patent previously granted for the same invention, where the Canadian patentee exercised his option, under the Canadian statutes, to have the patent extended upon payment of the required fee, although a Swedish patent for the same invention, granted subsequent to both American and Canadian patents, expired during the original term of the Canadian patent, and under the Canadian statutes "when a foreign patent exists" the Canadian patent shall expire at the earliest date at which any foreign patent for the same invention expires, since this provision covers only foreign patents which exist before the relevant Canadian patent is issued. Edison Electric Light Co. v. United States Electric Lighting Co. 3 C. C. A. 83, 11 U. S. App. 1, 52 Fed. 300.

If, by the foreign law under which a patent was granted, the patentee, by virtue of the original grant, is invested with the right at his mere option to have the patent extended or prolonged for a fixed term, it is this term which limits the United States patent under U. S. Rev. Stat. § 4887, whether or not the patentee exercises his option. Consolidated Roller-Mill Co. v. Walker, 43 Fed. 575, affirmed in 138 U. S. 124, 34 L. ed. 920, 11 Sup. Ct. Rep. 292.

An Austrian patent for one year, which will be continued for fifteen years if the annual tax is paid, must be considered as running for fifteen years for the purpose of applying the provisions of U. S. Rev. Stat. § 4887, although it may have lapsed before the full term because of the failure to pay such tax. Pohl v. Heyman, 58 Fed. 568.

An Austrian patent granted for one year, and four times extended from year to year, did not expire, within the meaning of U. S. Rev. Stat. § 4887, upon a failure to secure a fifth extension, where, under the Austrian law, the patentee is really invested with the term of fifteen years, the purported grant of but one year referring only to the payment of the annuity in advance for that year. Consolidated Roller-Mill Co. v. Walker, supra.

The termination of a foreign patent which is granted for fourteen years, because of the failure of the foreign patentee to pay the stamp duty, which he is required to pay in order to continue the patent in force beyond the term of three years, is not the expiration of such patent, within the meaning of this section. Paillard v. Bruno, 29 Fed. 864.

The expiration of a Canadian patent by reason of the failure to pay the fee required to keep such patent alive for the second six years of the eighteen-year term for which it was granted does not affect the duration of a domestic patent, under U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9427

parties raise in [158] the light of that testimony and of the argument of counsel." [117 C. C. A. 362, 198 Fed. 658.]

Whether this prudence should be imitated or a broader scope of decision be made we will determine upon a consideration of the case.

The bill is in the usual form and set forth the respective rights in the patent of complainants, respondents here (we shall refer to them as complainants and to petitioners as defendants), and its infringement by defendants.

The defendants answered separately and each denied infringement and averred that by reason of the proceedings in the Patent Office the patent is limited in its scope to the subject-matter precisely as claimed and defined by the claims of the patent; that the prior art was such that the patent is devoid of novelty and patentable invention; that it is destitute of utility; that it does not comply with the statutes in precise difference from what preceded it, nor sufficiently describe the method of operating it and the process of making, constructing, and using it; that complainants have a remedy at law and the court has no jurisdiction; and that the alleged inventors of the patent were not the first and true inventors of it. Certain United States, British, and German patents are alleged as antedating the invention, and certain publications are represented as having disclosed it.

Public uses of the patent are also circumstantially alleged and profits are denied.

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making such patents expire with foreign patents for the same invention. Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

The failure of a Canadian patentee, who paid only a partial fee for a partial term, to exercise his option to prolong his patent for the full term of fifteen years by the payment of the full fee, does not limit the United States patent for the same invention, issued while the Canadian patent was still in force, to the partial term of the latter patent, but the United States patent continues in force for the full fifteen-year term of the Canadian patent. Diamond Match Co. v. Adirondack Match Co. 65 Fed. 803.

But a Canadian patent granted for five years, conformably to a statute which gave the patentee the privilege of an extension for two periods of five years each upon the payment of a further fee, expired at the end of ten years so as to terminate at that time, under U. S. Rev. Stat. § 4887, a United States patent for the same invention, granted subsequently to the Canadian patent, where the latter patent was renewed for one term, but not for a third term. And a different conclusion is not demanded by an amendment to the Canadian statute under which the terms of all Canadian patents are fixed at fifteen years, where such amendment, though retroactive, was passed after the United States patent was granted. Bonsack Mach. Co. v. Smith, 70 Fed. 383.

A foreign patent issued for one year, but extended year by year for nine additional years, expires at the end of the tenth year, where no further extension is made, although such patent under the foreign law might have been prolonged for five years more. Gramme Electric Co. v. Arnoux & H. Electric Co. 21 Blatchf. 450, 17 Fed. 838.

A Spanish patent granted for ten years expires at the end of that term, within the meaning of U. S. Rev. Stat. § 4887, although by an international convention held after the patent was issued, to which both Spain and the United States were parties, such patent could have been, but was not, extended for a further term. Accumulator Co. v. Julien Electric Co. 57 Fed. 605.

A foreign patent for a definite term of years will, for the purpose of applying the provisions of U. S. Rev. Stat. § 4887, be presumed to have expired at the termination of that period, in the absence of any proof either of the fact of extension or of a foreign law permitting extension. Edison Electric Light Co. v. Electric Engineering & Supply Co. 60 Fed. 401, affirmed in 13 C. C. A. 487, 26 U. S. App. 737, 66 Fed. 309.

A patentee seeking to avoid the application of U. S. Rev. Stat. § 4887, is charged with the burden of proving that his foreign patent granted for five years, with the privilege of an extension upon the payment of further fees, did not expire at the end of the five years. Bonsack Mach. Co. v. Smith, 70 Fed. 383.

Identity of patentees.

A patent for an invention does not expire at the same time with a foreign patent for the same invention, by force of U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, unless the foreign patent was obtained by the American patentee or with his consent. Hobbs v. Beach, 180 U. S. 383, 45 L. ed. 586, 21 Sup. Ct. Rep. 409, affirming 34 C. C. A. 248, 63 U. S. App. 626, 92 Fed. 146. "It is true," said Mr. Justice Brown, "that by Rev. Stat. § 4887, 'every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent;' but this obviously presupposes that the foreign patent shall have been obtained by the American patentee, or with his consent. This is evident from the somewhat awkward phraseology of the first clause of the section, which declares that 'no person shall be debarred from receiving a patent for his invention, . . . by reason of its having been first patented or caused to be patented in a foreign country,' which evidently means that the patentee shall not

It is further alleged that the invention of the Claude & Hess United States patent No. 664,383, which is in suit, was patented to George Claude and Albert Hess by British patent No. 29,750, and that the latter had expired or ceased before the issue of patent No. 664,383; that the term of the latter expired not later than June 30, 1910; that a French patent to the same patentees expired June 30, 1911; and that therefore patent No. 664,383 also expired not later than said date; and so with the German patent and other patents.

[159] The first consideration which presents itself is the identity of the United States patent with the foreign patents which, by their expiration, if they have expired, have terminated the United States patent.

The letters patent in suit describe the invention as "An Improvement in Apparatus for the Storage and Distribution of Acetylene Gas." Drawings illustrate the patent, and it is stated that it "is designed to carry out a process of storage and distribution involving the employment of a chamber charged with a solvent of the gas to be stored and into which the gas is forced under suitable pressure," and that the apparatus is to be charged at a central station and transported to the place of use as a complete article or package. The ap-

be debarred from his patent by reason of his having first patented, or caused his invention to be patented, in a foreign country. Indeed, it would be so manifestly unjust that a patentee should lose the full fruits of his patent by the fact that some intermeddler had caused the invention to be patented abroad, that we could not give that construction to the section, unless its phraseology imperatively demanded it. This construction would suggest an excellent device to an enemy to bring about the termination of an inconvenient patent."

The provisions of U. S. Rev. Stat. § 4887, do not apply where the foreign patent was taken out by another than the patentee of the patent whose term is sought to be shortened, and without his acquiescence or consent. Willcox & G. Sewing Mach. Co. v. Industrial Mfg. Co. 110 Fed. 210, reversed on other grounds in 50 C. C. A. 387, 112 Fed. 535.

But U. S. Rev. Stat. § 4887, applies whether the foreign patent is granted to the inventor who makes the application in this country, or to some other person to whom he has caused the invention to be patented. Edison Electric Light Co. v. United States Electric Lighting Co. 35 Fed. 134.

And the assignment by an applicant for a domestic patent of all his right thereto before applying for and receiving a foreign patent for the same invention does not prevent the application of the provisions of U. S. Rev. Stat. § 4887, limiting the term of a United States patent to that of a foreign patent for the same invention, previously obtained. John R. Williams Co. v. Miller, D. & P. Mfg. Co. 115 Fed. 526.

The burden rests upon the party claiming that a United States patent expired, under U. S. Rev. Stat. § 4887, by reason of the termination of a prior foreign patent for the same invention, to show that the foreign patent was obtained by the American patentee or with his consent. Sawyer Spindle Co. v. Carpenter, 133 Fed. 238, affirmed in 75 C. C. A. 162, 143 Fed. 976.

A British patent for the same invention as a later patent in the United States cannot be said to have been taken out by an intermeddler, so as to avoid the application of U. S. Rev. Stat. § 4887, because there is no direct evidence to show the authority of the persons under whose instructions the British patent was procured, where the inventor or whoever controlled the invention knew that there was to be an application for a British patent, and that there was a purpose to take it out, and there is no evidence that he ever repudiated, or attempted to repudiate, the British patent until after suit was commenced. United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 842, affirming 148 Fed. 31.

Identity of invention.

The test of identity for the purpose of determining whether the invention has previously been patented in a foreign country, within the meaning of U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, depends upon these propositions: "Is the principal invention of the domestic patent found in the foreign patent? Is the subject-matter of the one the same in all essential particulars as that of the other? In other words, will a structure made pursuant to the foreign patent infringe the domestic patent? Could both the patents have been granted in this country?" Accumulator Co. v. Julien Electric Co. 57 Fed. 605.

Formal identity of claims is not necessary to constitute identity of patent, within the purview of U. S. Rev. Stat. § 4887. Substantial identity of invention, as covered by the claims, is sufficient. United Shoe Machinery Co. v. Duplessis Shoe Machinery Co. 148 Fed. 31, affirmed in 84 C. C. A. 76, 155 Fed. 842.

The identity of invention required by U. S. Rev. Stat. § 4887, is of material substance, and does not extend to mere details. J. L. Mott Iron Works v. Henry McShane Mfg. Co. 80 Fed. 516.

Mere changes in detail which do not affect the essence of the invention as covered by the respective patents, *i. e.*, differences which do not involve patentable invention, cannot be set up to defeat the application of the provisions of U. S. Rev. Stat. § 4887, that domestic patents shall expire with the ex-

paratus is described and illustrated, and it is said that it, embodying the invention, consists esse..tially in a closed receptacle containing acetylene gas in solution, and having an outlet for the gas so positioned as to be normally above the level of the solution, and adapted to be provided with a burner or connected with a pipe system for the final use or distribution of the gas which escapes from the solution owing to the diminution of pressure when the outlet is opened. It is constructed and arranged "for the charging process as well as for the discharging process." Inlet and outlet passages are provided with suitable valves or cocks to close the same, and it is desirable, it is said, for the proper operation of the burners supplied in this way that the gas should be delivered thereto under a substantially uniform pressure only slightly above the atmospheric pressure, and for this purpose means are provided. A reducing valve is shown as the means interposed between the interior of the receptacle which contains the dissolved gas and the outlet from which the gas is allowed to escape.

Claims 1, 2, and 5 are those with which we are concerned, and are as follows:

"1. A closed vessel containing a supersaturated solution [160] of acetylene produced by forcing acetylene into a solvent under pressure, said vessel having an outlet for the acetylene gas which escapes from the solvent when the pressure is released or reduced, and means for controlling said outlet whereby the gas may escape there-

piration of a prior foreign patent for the same invention. Thomson-Houston Electric Co. v. McLean, 82 C. C. A. 629, 153 Fed. 883.

It is only a patent for an invention that has been previously actually patented in a foreign country that is limited by the foreign patent. The description of the invention may affect the validity of the domestic one, and may not, but will not limit it. Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 22 Fed. 341.

The provisions of U. S. Rev. Stat. § 4887, apply only when the foreign patent covers what is patented in the United States, not when the foreign patent merely describes or discloses, instead of claiming, the invention of the later United States patent. Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 71 C. C. A. 189, 138 Fed. 823.

The comparison between the foreign and the United States patents for the purpose of determining whether the invention was previously patented in the foreign country, within the meaning of U. S. Rev. Stat. § 4887, should be instituted between the patents as they were issued, and not between the foreign patent and the United States patent as the latter exists after being cut down by a disclaimer, and limited by an art existing in the United States of which the inventor knew nothing. If a patent when granted covers an invention which has been previously covered by a foreign patent, it expires with the foreign patent, notwithstanding the fact that it has subsequently been pared down to cover only one method of practising the invention, or restricted to a single claim. Accumulator Co. v. Julien Electric Co. supra.

The amendment of a foreign patent several years after it was issued cannot affect the question of the identity of such patent under U. S. Rev. Stat. § 4887, with a subsequent domestic patent. Thomson-Houston Electric Co. v. McLean, supra.

The generic claim in a United States patent which, by disclaimer, is limited to the specific claim of a prior British patent, expires, under U. S. Rev. Stat. § 4887, when the British patent expires. Sawyer Spindle Co. v. Carpenter, 75 C. C. A. 162, 143 Fed. 976, affirming 133 Fed. 238.

The English and American patents for the application to corrugated metal rolling shutters of one or more deadening strips or lengths of soft and pliant material, disposed in such manner as to act as a cushion between the coils of the shutters, are for the same invention, within the meaning of U. S. Rev. Stat. § 4887, where the only thing added in the American patent is the fastening of the strips theretofore fastened at the ends, at such intermediate points as should be required. Clark v. Wilson, 28 Fed. 95.

There is such identity between the Canadian patent No. 7,128, for a balanced float valve in combination with other parts in an open tank for intermittent supply, and U. S. patent No. 245,358, for the same thing in various combinations with other parts in such tank, that, by the expiration of the former patent, which was first granted, the United States patent also expired. J. L. Mott Iron Works v. Henry McShane Mfg. Co. 80 Fed. 516.

In Commercial Mfg. Co. v. Fairbank Canning Co. 135 U. S. 176, 34 L. ed. 88, 10 Sup. Ct. Rep. 718, it was held, affirming 27 Fed. 78, that the Bavarian patent of April 8, 1873, expiring April 8, 1876, and the Austrian patent of October 31, 1869, expiring May 26, 1876, were for the same invention as the United States patent No. 146,012, granted December 30, 1873, for an improvement in treating animal fats, and that therefore the latter patent expired by reason of the expiration of the foreign patents.

There is not such identity between a claim of a British and later United States patents as causes the latter patents to expire under U. S. Rev. Stat. § 4887, when the British patent expires, where the claim in question in the latter patent, although necessarily including all the elements of the United States patents, also includes other elements establishing a new combination which is an essential, novel, and patentable

through at substantially uniform pressure, substantially as described.

"2. A prepared package consisting of a tight shell or vessel; a solvent of acetylene contained within said vessel; and acetylene dissolved in and held by said solvent under pressure and constituting therewith a supersaturated solution, the package being provided at a point above the solvent with a reducing valve, substantially as and for the purpose set forth.

. . . . . .

"5. As a new article of manufacture, a gas package comprising a holder or tight vessel; a contained charge of acetone; a volume or body of gas dissolved by and compressed and contained within the solvent; and a reducing valve applied to an opening extending to the interior of the holder above the level of the solvent, substantially as set forth."

It is manifest, therefore, that the invention is of an apparatus designed to make use of the property of acetylene and other gases of solubility in a liquid in accordance with the law of solution (Henry's law), which is that the amount of gas absorbed by any liquid is proportioned to the pressure exercised upon the gas. Acetone is mentioned in claim 5 as a solvent.

We may now turn to the various patents whose expiration, it is contended, terminates the United States patent.

The law is (§ 4887, Revised Statutes, Comp. Stat. 1913, § 9431) that "every patent granted for an invention which has bee

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improvement on what was claimed in the United States patents. Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 71 C. C. A. 189, 138 Fed. 823.

So much of U. S. patent No. 448,072, for improvements in the construction of canals, as involves the new and valuable conceptions not disclosed in the prior British patent No. 10,519, of extending the longitudinal wall partition or mid-feather throughout the whole length of the canal, thus closing the gap at each end of the partition wall, contemplated by the British patent, did not expire with the expiration of the latter patent, although, broadly speaking, the two patents are the same. Aquarama Co. v. Old Mill Co. 124 Fed. 229.

In accord with the decision in FIREBALL GAS TANK & ILLUMINATING CO. v. COMMERCIAL ACETYLENE CO., that there was a lack of identity between the Claude & Hess domestic patent No. 664,383, for an improved apparatus for the storage and distribution of acetylene gas, designed to make use of the property of that and other gases of solubility in a liquid, and prior foreign patents for methods of storing acetylene gas, based upon such solubility, the devices described in which were not a result of the operation of the methods, is Acme Acetylene Appliance Co. v. Commercial Acetylene Co. 112 C. C. A. 573, 192 Fed. 321, affirming 188 Fed. 89. An opposite conclusion had been reached in Commercial Acetylene Co. v. Searchlight Gas Co. 188 Fed. 85, and in Commercial Acetylene Co. v. Schroeder, 121 C. C. A. 474, 203 Fed. 276, affirming 197 Fed. 908.

Lack of identity between the foreign and domestic patents is not shown because the claim of the domestic patent is for a product, and that of the foreign patent is for a process, where the process makes the product, and the product can be made only by the process. Accumulator Co. v. Julien Electric Co. 57 Fed. 605.

Partial expiration.

All the claims of a domestic patent do not necessarily expire with a foreign patent because of the provisions of U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," but only such claims expire as are embodied in the foreign patent. Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 53 L. ed. 805, 29 Sup. Ct. Rep. 495.

The expiration of foreign patents for sound reproducers or recorders does not, under U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, making domestic patents expire with foreign patents for the same invention, affect the duration of the Berliner patent No. 534,543, for sound-producing apparatus, so far as claim 5, for a method, and claim 35, for a combination, are concerned, even though such recorder or reproducer is made the subject of one of the claims of such patents. Leeds & C. Co. v. Victor Talking Mach. Co. supra. The court elaborately distinguished Siemen v. Sellers (Guarantee Ins. Trust & S. D. Co. v. Sellers) 123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117. Referring to the following passage in the earlier case ("It is contended by the counsel of the complainants that the American patent contains improvements which are not exhibited in the English patent. But if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempt from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion"), the court said: "This passage must be construed by what precedes it. It was said that there was no essential difference between the patents. 'They described the same functions in all essential particulars,' is the language used. 'The principal invention,' therefore, was 'the same in both,' and the improvements, which it was asserted the American patent contained, did not destroy its essence or its identity with the English

previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be [161] more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The question then is one of identity between the United States patent and the foreign patents. The first of the latter relied upon is the British patent to Claude and Hess of 1896. The title is, "An Improved Method of Storing Acetylene for Lighting and Other Purposes." The specification states:

"This invention relates to an improved method of storing acetylene, for lighting and other purposes, in a small volume in order that it may be supplied in portable form to the customer, and it consists in dis-

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patent; necessarily, therefore, did not save it 'from the operation of the law.' And the court meant no more than that. It was not said that a patentable improvement could not be made which could be secured by a patent which would endure beyond the expiration of a prior foreign patent for that which was improved. Such a ruling would contravene the right given by the statute."

Following Siemen v. Sellers, supra, the court in Western Electric Co. v. Citizens' Teleph. Co. 106 Fed. 215, held that the expiration of a prior foreign patent embodying in its description of the invention the essence of the later United States patent contained in one of its claims terminates the United States patent, even though there are differences in some details between the foreign and domestic patents, upon which independent claims might be based.

Recent legislation.

By the act of March 3, 1897, U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, was so amended as not to limit the life of a domestic patent granted on an application filed on or after January 1, 1898, to the life of the prior foreign patent, the only requirement being that the domestic application be filed within seven months from the filing of the application of the foreign patent. This section was further amended by the act of March 3, 1903, which did not purport to affect the term of patents in any respect, but dealt only with their validity.

Patents granted before January 1, 1898, or upon applications filed prior to that date, are, by the express provisions of the act of March 3, 1897, §§ 3, 8, left unaffected as to their validity or term, governed as to the latter, where the invention was previously patented in a foreign country, by U. S. Rev. Stat. § 4887, in its original form. Sawyer Spindle Co. v. Carpenter, 75 C. C. A. 162, 143 Fed. 976, affirming 133 Fed. 238.

A United States patent which, by reason of the saving clause in the amendatory act of March 3, 1897, expired under U. S. Rev. Stat. § 4887, as that section originally stood, when the prior foreign patent for the same invention expired, was not revived by the further amendment of March 3, 1903, which did not purport to affect the term of patents in any respect, but only the requisites of their validity. Sawyer Spindle Co. v. Carpenter, supra.

The term of a United States patent which, under U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, would expire with the expiration of the term of a foreign patent previously granted for the same invention, was not extended by the provisions of the treaty of Brussels of December 14, 1900, art. 4 *bis*, that patents applied for in the different contracting states by persons admitted to the benefit of the convention shall be independent of the patent obtained for the same invention in other states, and that this provision shall apply to existing patents, but such provisions, if construed as they must be, in accordance with the declaration of the Brussels Convention at the instance of the American delegates, affect only those existing patents whose terms might otherwise be shortened by the lapsing of foreign patents. Cameron Septic Tank Co. v. Knoxville, 227 U. S. 39, 57 L. ed. 407, 33 Sup. Ct. Rep. 209.

The omission from the act of March 3, 1903 (32 Stat. at L. 1225, chap. 1019, Comp. Stat. 1913, § 9431), enacted to make effective the Brussels treaty of December 14, 1900, for the protection of industrial property, of any provision to carry out art. 4 *bis*, which declares that patents applied for in the different contracting states by persons admitted to the benefit of the convention shall be independent of the patent obtained for the same invention in other states, and that this provision shall apply to existing patents, which article, in the light of subsequent congressional action and of legislative action of some of the other contracting nations, cannot well be deemed self-executing, leaves in force as to existing United States patents the provisions of U. S. Rev. Stat. § 4887, Comp. Stat. 1913, § 9431, under which such patents will expire with the expiration of the term of a foreign patent previously granted for the same invention. Cameron Septic Tank Co. v. Knoxville, supra.

To the same effect are United Shoe Machinery Co. v. Duplessius Shoe Machinery Co. 84 C. C. A. 76, 155 Fed. 842, affirming 148 Fed. 31; Malignani v. Hill-Wright Electric Co. 177 Fed. 430; Malignani v. Jasper Marsh Consol. Electric Lamp Co. 180 Fed. 442; Commercial Acetylene Co. v. Searchlight Gas Co. 197 Fed. 908, affirmed in 121 C. C. A. 474, 203 Fed. 276.

A contrary view was expressed in Hennebique Constr. Co. v. Myers, 97 C. C. A. 289, 172 Fed. 869, but the judge announcing such view remarked in Union Typewriter Co. v. Smith, 173 Fed. 288, that his opinion was not the opinion of the court.

solving the acetylene under pressure in certain liquids, the effect of pressure being to increase the solubility of the acetylene and so enable a considerable quantity of acetylene to be stored in a small volume in readiness to be supplied for any purpose for which it may be required.

"Liquified acetylene occupies the least volume, but the pressure is very high and may become excessive should the critical temperature (37°.5) of acetylene be accidentally exceeded. On the other hand, simple compression of the gas enables dangerous pressures to be avoided, but the quantity which can be stored in this way is too small. For these reasons we avail ourselves of the great solubility of acetylene in certain liquids, and increase this solubility by pressure, and this method of storing acetylene gas is the invention which we hereby broadly claim as our invention, whatever may be the liquid employed, the kind of apparatus used, or mode of operation."

Examples of liquids which may be employed as solvents are given. Among these are mentioned "alcohols" and "particularly acetones." It is stated that mixtures and combinations of these bodies vary their solvent power, and of this property the patentees said they availed themselves. And further, that the solvent power increases with [162] pressure, and the solution of the gas in a liquid is the principle of the invention.

The process described as carried on, though subject to modifications, is as follows: The gas is dissolved in the liquid chosen, and the "solution under pressure, however obtained, is filled into a receiver of metal or of glass (such as used for soda water) capable of resisting the pressure employed. The receiver has a cock and the necessary adjuncts for connection, directly or through an expansion chamber, with the appliances in which the gas is used by the consumer, the substitution of charged for empty receivers being readily effected. The storage receivers may vary in dimensions from a small portable, to a large fixed, gas holder."

The claims describe the method and invention to be the utilization for the purpose of storage, in a small volume, of large quantities of acetylene gas, of the solubility of the gas in certain liquids by the application of pressure, and the novel application as a solvent of acetylene under pressure for the purpose of storage, transportation, and utilization for industrial purposes; and the employment (claim 6) of a receiver containing a liquid charged with acetylene under pressure, and from which the acetylene is evolved when required for use.

Defendants have fixed on claim 6 as establishing identity, and the British law of patents is relied on. British United Shoe Machinery Co. v. Fussell & Sons, 45 R. P. C. 631. The argument is that not only a receiver is claimed, but a receiver of the exact or equivalent kind described in the United States patent. Counsel say: "Evolving gas from a receiver in which the gas is under pressure necessarily implies an outlet, an outlet necessarily implies a valve, and a valve necessarily implies a control of the escaping gas." They say further, quoting the cited case: "'A man must distinguish what is old from what is new *by* his claim, but he has not got to distinguish what [163] is old from what is *new* in his claim.'" Applying the principle and asserting that the devices described in the United States patent were old, it is contended that they would be implied as necessary elements of the claim.

Taken at its full import the argument would seem to establish that there could be no patent for an apparatus to execute a process if it (apparatus) were a combination of old elements. In many cases, therefore, the argument would confound process and apparatus, but it is established that a process may be independent of the instruments employed or designed to perform it. They may be independent or they may be related. "They may approach each other so nearly that it will be difficult to distinguish the process from the function of the apparatus. In such case the apparatus would be the dominant thing. But the dominance may be reversed and the process carry an exclusive right, no matter what apparatus may be devised to perform it." United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 559, 48 L. ed. 555, 561, 24 Sup. Ct. Rep. 416. However related they may be, to which may be assigned dominance may be important in considering the patentable novelty of either, or, it may be, the infringement of either, but not whether one has expired because the other has. Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 318, 53 L. ed. 805, 812, 29 Sup. Ct. Rep. 495. The various questions thus arising may indeed have complexity (Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745), but they must not be confounded.

A great deal of what we have said applies to the German patent. Its claim is for "the employment of liquids charged with acetylene under pressure for the purpose of utilizing acetylene for illumination, motive power, heating, and the like, characterized by acetylene being absorbed under pressure by a suitable liquid, and the liquid saturated with acetylene being preserved or contained in suitable vessels, from which the

acetylene gas can be supplied for use, a pressure regulator being preferably interposed."

[164] This claim is preceded by a lengthy explanation (too lengthly to quote) setting forth the properties of acetylene and its absorption by certain liquids, and the dependence of the amount of absorption upon pressure, and the use of such properties and pressure for storing and utilizing the gas. It is said: "The vessels for holding the liquid saturated with acetylene must be provided with a cock or valve from which the gas escapes according to the diminution of pressure which occurs, and can then be used for the customary purposes." And an apparatus is described, "with whose aid the storing process can be carried into practice." Care is taken to mention "that th process is in no way limited to the apparatus described and shown." It is clear, therefore, that the process and the described vessel of storage are separate, and that the invention is for the former. An apparatus was mentioned in display of the utility of the process. See Tilghman v. Proctor, 102 U. S. 707, 26 L. ed. 279. It was not the intention to claim a particular form of device and secure a patent for it.

The title of the French patent is "A System of Storing Acetylene." And it is said that the object of the "invention is a system of storing acetylene whereby acetylene to be used for any purpose whatsoever, especially for lighting, may be inclosed in a restricted space and easily transported."

A description of the process is given and the properties of the gas and its solvent which make the law of the process. And it is said the solution under pressure obtained by the means described, "or by any other means, is placed in a metal recipient (or a glass recipient, like seltzer water siphons) susceptible of resisting the pressure employed. The recipient is provided with a faucet and the necessary fittings to enable it to be connected, either directly or by means of an expander, with the apparatus of consumption at the house of the consumer."

[165] The claims were:

"1. For the storage of large quantities of acetylene in a small space, the application of the solubility of this gas in certain liquids, using pressure for the purpose of increasing the amount of gas dissolved per unit of volume of the liquid, as described above;

"2. For the purpose of effecting the solution under pressure of large quantities of acetylene in a small volume of liquid, the use of methods and apparatus employed to cause the solution under pressure of other gases in other liquids, especially of carbonic acid in water."

There were certificates of addition to the patent, the first of which sets forth the advantage of mixing the liquid with a porous body capable of absorbing it. "An expedient and practical form of accomplishing this" is set forth in the second certificate. The third certificate of addition connects the patent "with a safety appliance to be adapted especially on recipients where the acteylene is dissolved in an appropriated liquid, such as acetone, according to the process described in" the patent.

The contention is that the patent is for a "system," not for a "process or method," and that, besides, the "'résumé'" or claims of the first patent especially refer to both "'method and apparatus,'" and that "the certificates of addition, especially the last two, unquestionably are for the apparatus, namely, the gas tank."

We think the contentions are untenable. The distinction between system and method is too subtle, and, besides, it is clear that the patentee considered the words as meaning the same thing, and the apparatus referred to was one, it was said, "employed to cause the solution under pressure of other gases in other liquids." It was not the apparatus of the United States patent, though having some features the same.

But it is contended that even if considered as a "method" patent, "it is merely for the method of operating the [166] apparatus, constituting the function of the apparatus, and, therefore, under the decision of this court, is for the same invention." And this is contended to be established by Mosler Safe & Lock Co. v. Mosler, B. & Co. 127 U. S. 354, 3 L. ed. 182, 8 Sup. Ct. Rep. 1148, and by a ruling of the Patent Office upon the application of Claude and Hess for an "Improvement in a Method of Storing Acetylene Gas for Distribution," and the acceptance of that ruling by the applicants.

The Mosler Case, it was said in Miller v. Eagle Mfg. Co. 151 U. S. 186, 197, 38 L. ed. 121, 127, 14 Sup. Ct. Rep. 310, held "that a patent having issued for a product, as made by a certain process, a later patent could not be granted for the process which results in the product." The process was a purely mechanical process, and the ruling, it would seem, must be confined to the exact facts of the case, for in Miller v. Eagle Mfg. Co. it was said that "a single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separable, the inventor may be entitled to a monopoly of each." And Sewall v. Jones, 91 U. S. 171, 23 L. ed. 275, was cited for the purpose of showing that there might be a patent for

the process and one for the product. Merrill v. Yeomans, 94 U. S. 568, 24 L. ed. 235, was also cited as holding that "where a patent described an apparatus, a process, and a product, and the claims covered only the apparatus and the process, the law provided a remedy by a surrender of the patent and a reissue, for the purpose of embracing the product."

The ruling of the Commissioner of Patents referred to above is as follows:

"It was common long prior to the appellants' invention to force under pressure into a liquid solvent thereof in a closed vessel and was also common to draw off gas from a holder where it was contained under pressure, though an opening, the effective size of which was directly controlled by and proportionate to the pressure of the gas [167] within the holder; or, in other words, through a pressure regulator. The appellants were therefore not the inventors of the step of storing gas, as set forth, nor of the step of permitting gas to escape from a place of storage in the manner set forth. Neither of these steps modifies in any manner the old and expected effect of the other; and the final result of the alleged process, namely, distributing gas at a uniform pressure, is the same as that produced by processes old in the art, as above stated. The appellants have therefore not invented a new and patentable process, although, as held in a companion case, they have devised an apparatus by which the old process of storing gas can be made practically and commercially useful. Claims to that apparatus have been allowed, and it is believed that it is the only patentable invention disclosed by them.

. . . . . .

"It appears, further, that they do not cover proper methods, but merely the functions of mechanism, and that they are not patentable in view of the decisions in Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139, and Boyden Power Brake Co. v. Westinghouse, 83 Off. Gaz. 1067. Claim 3 clearly covers several independent disconnected steps which do not go to make up a patentable process."

The "companion case" referred to by the Commissioner is the patent in suit, and it will be observed that the Commissioner said it was for an apparatus by which the old process of storing gas could be made practically and commercially useful and that claims to it had been allowed. It was, therefore, distinctly a patent for an apparatus, while, on the contrary, all the foreign patents are explicitly for methods. The devices described in them were not a result of the operation of the methods. Some receptacle or apparatus was necessary to be shown to produce and hold the solution of the gas and the liquid employed as a solvent. Something else was necessary for [168] the use of the solution, and the device of the United States patent was aimed to secure it. It is distinct from the method. Whether it has patentable novelty is another question. And a serious question it is. The solubility of acetylene in liquids, especially in acetone, is availed of in all of the patents, United States and foreign. This cannot be denied,—indeed, is admitted,—and, as we have seen, there are devices described in the foreign patents for storing the solution and devices indicated for its use. The similarities and differences between the patents have given rise to a diversity of opinion and decision.

The circuit court of appeals for the sixth circuit discerned a difference between the British patent and that in suit, and considered that the former was for a process and the latter for an instrument to perform the process, and therefore the two were not for the same invention, and that necessarily the United States patent did not expire with the British patent. 112 C. C. A. 573, 192 Fed. 321.

The circuit court of appeals for the seventh circuit expressed a contrary view and decided that the British patent and the patent in suit were for substantially the same invention, and the British patent having expired, the patent in suit expired with it. The decisions had, respectively, the support of Judge Denison (188 Fed, 89) and Judge Kohlsaat (188 Fed. 85, 112 C. C. A. 573, 192 Fed. 321).

It was decided in the circuit court for the eastern district of Wisconsin, Judge Quarles sitting, that the device of the patent in suit was patentable and was not anticipated by anything in the prior art. 166 Fed. 907; see also 181 Fed. 387.

It was this conflict of views that induced this writ, but the conflict is not as to all questions in the case. If the decisions of the trial courts may be in opposition on invention and infringement as well as on the effect of the [169] foreign patents, such conflict cannot be asserted of the opinions of the circuit courts of appeal. That of the eighth circuit—and to which this writ is directed—refrained from a decision on the merits, and considered only the propriety of the discretion exercised by the trial court in granting a preliminary injunction; and, reviewing the expression of judicial opinion, decided that the court was justified in making the order. The court of appeals went no farther, as we have seen, and we are disposed to a like limitation. The questions are seriously disputable, as the difference in decision indicates, and we think

we should follow the circuit court of appeals and imitate the example of Leeds & C. Co. v. Victor Talking Mach. Co. 213 U. S. 301, 311, 312, 53 L. ed. 805, 809, 810, 29 Sup. Ct. Rep. 495. We have not the aid—and its value in inestimable—of the judgment of the trial court or of the circuit court of appeals, but must consider the question upon conflicting allegations and affidavits. The better course, therefore, is to reserve all questions except that of the identity of the patent in suit with the foreign patents, and its termination by their expiration, and, with that reservation, we decide only that there was no abuse of discretion in granting and sustaining the order of injunction.

Affirmed.

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[170] NELLIE PORTER, Plff. in Err.,
v.
OLLIE A. WILSON, Charles W. Wilson, Omer A. Garner, and W. M. Jackson.

(See S. C. Reporter's ed. 170-175.)

Constitutional law — privileges and immunities — due process of law — sustaining demurrer to evidence.

1. The sustaining of a demurrer to the evidence and the entry of a decree for defendant in a suit tried without a jury cannot be said to abridge the plaintiff's privileges and immunities, nor to take her property without due process of law, contrary to U. S. Const., 14th Amend., because of the declaration in Okla. Rev. Laws, § 5039, that "the provisions of this article respecting trials by jury apply so far as they are in their nature applicable to trials by the court," where the Oklahoma supreme court, in affirming such decree, decided that the trial court "did not render its judgment alone upon the demurrer to the evidence, but, after a consideration of the proof submitted by plaintiff, made its findings of fact, thereby necessarily weighing the plaintiff's testimony," and pointed out that "even though it were conceded that technical error was committed, the substantial rights of the plaintiff were not affected," adding that it was required by statutes and its own decisions to disregard errors or defects which did not affect the substantial rights of the parties.

[For other cases, see Constitutional Law, IV. a, 7; IV. b, 8, in Digest Sup. Ct. 1908.]

Indian allotments — descent — legitimacy.

2. Rights of inheritance as to Creek lands in the Indian Territory were not affected by the enactment of the act of February 28, 1891 (26 Stat. at L. 794, chap. 383, Comp. Stat. 1913, § 4222), § 5, which amended the general allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4206), by providing that "for the purpose of determining the descent of land to the heirs of any deceased Indian" under the provisions of § 5 of said act of February 8, 1887, the issue of Indians cohabiting as husband and wife "according to the custom and manner of Indian life" shall be "taken and deemed to be legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall, for such purposes, be taken and deemed to be the legitimate issue of the father of such child," since by § 8 of the earlier act the territory occupied by the Creeks in the Indian Territory was expressly excepted from the provisions of that act.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 58.]

Submitted November 5, 1915. Decided November 29, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Hughes County, in that state, in favor of defendants in a suit to quiet title. Affirmed.

See same case below, 39 Okla. 500, 135 Pac. 732.

The facts are stated in the opinion.

Messrs. **Lewis C. Lawson** and Frank L. Montgomery submitted the cause for plaintiff in error.

No brief was filed for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

Suit to quiet title, brought in the district court of Hughes county, state of Oklahoma, and in which plaintiff [171] in error was plaintiff and defendants in error defendants, and we shall so designate them.

The case concerns the inheritance of an allotment to one Ben Porter, a Creek citizen and member of the tribe of the Creek Nation. Plaintiff contends that she is the daughter and only child of Porter and Jennie McGilbra, whom he married, it is asserted, in 1893, and with whom he afterwards resided for one and one-half years as husband in accordance with the usages and

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 570.

customs of the Creek Nation. He subsequently separated from her, it is alleged, but never got a divorce from her, and that therefore they remained husband and wife until the time of his death, which occurred about November 23, 1906; he dying intestate, and being seised of the lands in controversy at that time, plaintiff, Nellie Porter, became entitled in fee simple to all of them.

It is averred that after Porter's separation from his wife he "took up" with another woman by the name of Lena Canard, who, after the death of Porter, married one William Freeman; that Porter left surviving him one Sam Porter, a half brother, a Seminole Indian and so enrolled, and one Nannie Broadnax, a half sister. From this brother and sister and Mrs. Freeman the defendants in error derive their title.

Defendants deny the marriage of Porter and Jennie McGilbra, or that plaintiff was his child or in any way related to him, and aver that their grantors "were the sole and exclusive heirs of Porter, and as such inherited the lands from him."

The judgment recites that the cause coming on, upon hearing upon the pleadings and upon evidence offered on the part of the plaintiff, and upon the plaintiff resting her cause with the court upon the evidence offered, the defendants demurred to the evidence and the court sustained the demurrer, and found "that the alleged marital relation between Ben Porter and Jennie McGilbra was [172] not established by the proof and did not exist, either by reason of customs or the laws of the Creek Nation; that the relation was illicit; that the plaintiff, Nellie Porter, was the illegitimate child of this illicit relation." The court entered a decree dismissing plaintiff's bill and forever quieting the title of defendants against plaintiff. The decree was affirmed by the supreme court.

The supreme court sustained the action of the trial court in rendering judgment upon the evidence, saying: "It is obvious from the record that the court passed upon the entire case," and that "it would be too subtle a refinement to say that the court should have overruled the demurrer and thereupon, on the same evidence, have found for the defendant; otherwise a reversal must follow." And further: "Ultimately plaintiff's right to recover involved a question of fact for the court's determination. That the court did consider the testimony and determine the insufficiency is clearly established from the language of the journal entry. The burden of proof rested upon the plaintiff to prove, not only the Indian customs of the Creek Nation pertaining to marriage, but to establish her rights thereunder. There was more or less conflict in the testimony of plaintiff's witnesses, from which different conclusions might be drawn, and there being testimony reasonably tending to support the judgment of the court, the same will not be weighed by this court to ascertain whether the court's decision is against the preponderance of the testimony." [39 Okla. 507, 135 Pac. 732.] For which conclusion the court cited a number of Oklahoma cases.

Against the action of the trial court and its affirmance by the supreme court it is contended that the Constitution of the state and the 14th Amendment have been violated in that the plaintiff's privileges and immunities have been abridged and her property taken without due process of law. The foundation of the contention is § 5039 of the Revised Laws of Oklahoma. It provides [173] that "the provisions of this article respecting trials by jury apply, so far as they are in their nature applicable, to trials by the court." The argument is that under that section "a citizen of the said state and of the United States is entitled to the same protection and enforcement of the law, on a demurrer to the evidence where their causes of action are tried by the court, as when tried to a jury." And, it is further argued, if there be any evidence, "conflicting evidence cannot be weighed or considered by the court," and the demurrer should have been overruled. These contentions are attempted to be supported by citation of many cases and elaborate comment made upon them to sustain the assertion "that a demurrer to the evidence presents a proposition of law, and not of fact; and that conflicting evidence in the case is not to be considered, if there be evidence even tending to support the claims of the demurree."

The contention is difficult to handle. It seems to confound so completely the purpose and various qualities of evidence and the functions of a court.

Whether, however, there be a technical difference between the final submission of a case to the court and its submission upon a demurrer to the evidence we need not dwell upon. The difference has been made unimportant, indeed, removed from the present case, by the decision of the supreme court. The court decided, as we have seen, that the trial court "did not render its judgment alone upon the demurrer to the evidence, but, after a consideration of the proof submitted by plaintiff, made its findings of fact, thereby necessarily weighing the plaintiff's testimony for the purpose of determining the rights of the respective parties to a recovery." And the court pointed out that "even though it were

conceded that technical error was committed, the substantial rights of the plaintiff were not affected, as she had introduced her evidence and rested her case. She was not caused to change [174] her position, nor did she suffer any disadvantage in the procedure adopted." The court added that it was required by the statutes of the state and its decisions to disregard errors or defects in the pleadings or proceedings which did not affect the substantial rights of the parties.

It is manifest, therefore, that the action of the trial court was in full exercise of the power intrusted to it under the laws of the state, and the contention of plaintiff that the Constitution of the United States is violated is untenable. We, of course, accept the the decision of the supreme court of the state that the state Constitution is not violated.

The next contention of plaintiff is that she inherited the lands by virtue of § 5 of the act of Congress of February 28, 1891 (26 Stat. at L. 794, chap. 383, Comp. Stat. 1913, § 4222), which amended the general allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4206). By this section it is provided "that for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act" of February 8, 1887, the issue of Indians cohabiting as husband and wife "according to the custom and manner of Indian life" shall be "taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall, for such purpose, be taken and deemed to be the legitimate issue of the father of such child."

But by § 8 of the act of February 8, 1887, "the territory occupied by the . . . Creeks . . . in the Indian Territory" was expressly excepted from the provisions of that act. It was hence concluded by the supreme court of the state that § 5 of the act of 1891, supra, "was without effect upon the right of inheritance, as to the Creek Indians in the Indian Territory."

Plaintiff attacks this conclusion by citing § 38 of the act of May 2, 1890 (26 Stat. at L. 81, 98, chap. 182), which organized the territory of Oklahoma. It provides "that all marriages [175] heretofore contracted under the laws or tribal customs of any Indian Nation now located in the Indian Territory, are hereby declared valid and the issue of such marriages shall be deemed legitimate and entitled to all inheritances of property or other rights, the same as in the case of the issue of other forms of lawful marriage. . . ."

It will be observed that the asserted marriage between Porter and the mother of plaintiff took place in 1893; that is, subsequent to the act of 1890, organizing the territory of Oklahoma, and therefore was not a marriage within the meaning of § 38, theretofore contracted, and therefore plaintiff's reliance must be upon the provision, before stated, in § 5 of the act of 1891. As that section was expressly restricted to lands allotted under § 5 of the act of 1887, and as the lands occupied by the Creeks in the Indian Territory could not be and were not allotted under the latter section, it follows that the provision relied upon had no application to the lands here in question, they being part of the territory so occupied by the Creeks.

Judgment affirmed.

WILLIAM E. HEIM, Cranford Company, and Flinn-O'Rourke Company, Inc., Plffs. in Err.,

v.

EDWARD E. McCALL, Milo R. Maltbie, J. Sargeant Cram, George V. S. Williams, and Robert C. Wood, as Members of and Constituting the Public Service Commission for the First District of the State of New York.

(See S. C. Reporter's ed. 175–194.)

Error to state court — Federal question — local law.

1. The application of the provisions of N. Y. Consol. Laws, chap. 31, § 14, against the employment of aliens on public works to contracts for the construction of subways in New York city, and the extent to which they affect the corporate rights of the city or of the subway contractors, are local questions not open for review in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Municipal corporations — legislative control — labor on public works.

2. The general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works by or for such municipalities.

[For other cases, see Municipal Corporations, 7–12, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme

Constitutional law — privileges and immunities — employment on public works.

3. Privileges and immunities of the citizens of the several states are not abridged, contrary to U. S. Const. art. 4, § 2, by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[For other cases, see Constitutional Law, 213-238, in Digest Sup. Ct. 1908.]

Constitutional law — freedom to contract — employment on public works.

4. The freedom to contract secured by U. S. Const., 14th Amend., is not infringed by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[For other cases, see Constitutional Law, 591-607, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —equal protection of the laws — employment on public works.

5. Property is not taken without due process of law, nor is the equal protection of the laws denied, contrary to U. S. Const., 14th Amend., by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[For other cases, see Constitutional Law, 213-238, 441-498, 891-894, in Digest Sup. Ct. 1908.]

Aliens — treaty rights — state regulation — employment on public works.

6. The equality of rights and privileges with citizens of the United States with respect to security for persons and property which citizens of Italy are assured by the Italian treaty of February 26, 1871 (17 Stat. at L. 845), is not infringed by the provisions of N. Y. Consol. Laws, chap. 31, § 14, that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York state must be given preference.

[For other cases, see Treaties, I. in Digest Sup. Ct. 1908.]

[No. 386.]

Argued October 12, 1915. Decided November 29, 1915.

IN ERROR to the Court of Appeals of the State of New York to review a decree which reversed a decree of the Appellate Division of the Supreme Court, First Department, reversing a decree of the Supreme Court in and for New York County, in that state, which had sustained a demurrer to the bill in a suit to restrain the Public Service Commission from declaring certain subway contracts forfeited for violation of the anti-alien labor laws. Affirmed.

See same case below, in Appellate Division, 165 App. Div. 449, 150 N. Y. Supp. 933; in Court of Appeals, 214 N. Y. 629, 108 N. E. 1095.

Statement by Mr. Justice McKenna:

Bill in equity to restrain the Public Service Commission for the First District of the State of New York from declaring certain contracts for the construction of portions of the rapid subway system of the city of New York void and forfeited for violation of certain provisions inserted in the contracts in pursuance of § 14 of the labor law (so-called) of the state. Laws 1909, chap. 36, Consol. Laws, chap. 31. It reads as follows:

"Section 14. Preference in employment of persons upon public works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference

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Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see 60 L. ed.

note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Generally, as to statutory restrictions on contracts between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325; Ramsey v. People, 17 L.R.A. 853; State v. Loomis, 21 L.R.A. 789; and Ritchie v. People, 29 L.R.A. 70.

On treaty guaranties to aliens—see note to Gandolfo v. Hartman, 16 L.R.A. 277.

On power of state, under 14th Amendment to the United States Constitution, to deny to aliens the right to engage in a lawful occupation—see notes to Com. v. Hana, 11 L.R.A.(N.S.) 799; People v. Crane, L.R.A. 1916D, 569.

[177] shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void . . ."[1]

It is provided that a list of contracts theretofore made, with the names and addresses of the contractors, shall be filed in the office of the commissioner of labor; and when new contracts are allowed the names and addresses of such new contractors shall likewise be filed, and, upon demand, each contractor shall furnish a list of subcontractors in his employ. Each contractor is required to keep a list of his employees which shall set forth whether they are naturalized or native-born citizens of the United States. A violation of the section is made a misdemeanor.

The case went off on demurrer, and it is therefore necessary to give a summary of the bill, which we do in narrative form, as follows:

Heim is a property owner and taxpayer of the state of New York. The defendants are the acting Public Service Commissioners for the First District of the State of New York and have been constituted and are the Public Service Commission of that district.

The board of Rapid Transit Railroad Commissioners for the City of New York, under the laws of the state (referred to as the rapid transit act), in 1906 laid out and established a route for said railroad in the city, and which was subsequently constructed, equipped, and operated. [178] Afterwards other routes were established, constructed, equipped, and operated.

These routes were located in the boroughs of Manhattan and the Bronx and Brooklyn, and since 1912 and prior thereto have been leased and operated by the Interborough Rapid Transit Company, referred to as the Interborough Company. There has been a like lease of roads in Brooklyn by the Consolidated Railroad Company, called the Brooklyn Company.

The Board of Rapid Transit Commissioners, acting under the laws of the state, decided that other rapid transit railroads were necessary, and determined and established routes and the general plans for the construction thereof.

The lines are described and respectively called Interborough lines and Brooklyn lines.

The Board and the Public Service Commission contemplated that such extension and additions would form, with the existing Interborough and Brooklyn lines, a complete and comprehensive rapid transit system for the accommodation of the entire city. And the construction of such roads was deemed and was and has been an imperative necessity for the comfort and convenience of the residents and taxpayers of the city.

The cost of construction of such new roads was upwards of $235,000,000 and their equipment $44,000,000. The city had no available money and could not borrow the necessary moneys for a large part of such construction or equipment without exceeding its legal and constitutional debt limit by many million dollars.

To utilize the old with the new systems upon a 5-cent fare basis, and to overcome the difficulties and delays for lack of funds, and accomplish the early construction and operation of the system on the best possible terms for the city, negotiations were entered into between the Public Service Commission and the city authorities on the one [179] part and the Interborough Company and the Brooklyn Company on the other part, with a view of formulating and entering into contracts with the companies for the provision of funds for the construction and operation of roads.

A form of contract was finally agreed upon and a contract was duly signed, executed, and delivered by the Interborough Company on the one part and the Public Service Commission in behalf of the city on the other part, on or about March 19, 1913.

As a result of the negotiations another contract was entered into with the New York Municipal Railway Company, which had been formed in the interest of the Brooklyn Company, whereby the latter company agreed to contribute toward the cost of construction and equipment and to lease and operate a portion of the roads in conjunction with the then-existing system. There is an enumeration of the provisions of the contracts and the amounts to be contributed by the companies and for the lease of the routes.

The contracts were made a part of the public records and approved by the Board of Estimates and Apportionment and other proper authorities before execution.

The Public Service Commission has let and awarded each of the contracts for construction of the new routes, and the Interborough Company became a party to many of them for the purpose stated in the contracts; that is, "solely for the purpose of paying out a part of its contribution towards the cost of construction of the said respective routes."

[1] Section 14 of the labor law was amended by act of March 11, 1915, chap. 51, Laws of New York, 1915, as follows:

"Section 14. Preference in employment of persons upon public works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, preference shall be given to citizens over aliens. Aliens may be employed when citizens are not available. . . ."

The new routes were duly approved by the proper authorities and the Public Service Commission, in accordance with the general plan of the routes, either obtaining the consent of the property owners along the routes, or, failing to obtain such consent, having commissioners appointed by the appellate division of the supreme court to determine [180] and report whether the routes were to be constructed and operated according to the plans adopted. The commissioners reported favorably and their report was confirmed by the court, and the general plans "thereafter constituted and now are the routes and general plans of the so-called Dual System of Rapid Transit Railroads herein referred to."

In pursuance of the rapid transit act the Public Service Commission prepared plans and specifications for the construction of the major portion of said routes in accordance with the general plans, and thereafter, before awarding any contract, advertised for proposals in the form of an invitation to contractors and in compliance with the rapid transit act and the acts amending and supplementing it.

Bids were duly made and contracts duly awarded and approved by the proper authorities.

Each of the contracts contained the following provisions:

"In obedience to the requirements of § 14 of the labor law, it is further provided that if the provisions of said § 14 are not complied with, this contract shall be void." A provision in identical language was contained in the invitation to bidders.

The requirement (it is alleged) both in the proposals and contracts is unconstitutional, void, and of no effect, in that it is in conflict with § 2 of article 4 of the Constitution of the United States (that is, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states") and with § 1 of article 14 of the Amendments to the Constitution, and with other sections and provisions; also in violation of the Constitution of the state, and in conflict with the treaty between the United States and Italy and various other treaties which contain "the most favored nation clause,"—in other words, providing that the citizens of such countries shall enjoy all the privileges, rights, and [181] immunities which the citizens of countries most favored in any existing treaty with the United States enjoy.

All of the contractors promptly made the necessary preparations for the execution of their contracts and all are in the process of performance at different stages, some of them having been performed to the extent of 75 per cent, and all performed to a very large extent. In no instance are any of the contractors in default.

In the course of construction each of the contractors has constantly employed and now employs a large number of laborers and mechanics who are residents of the city of New York, but who were born in Italy and are subjects of its King, and also employed laborers who, though citizens of the United States, were not citizens of New York, and did not give preference to citizens of the state of New York over such laborers so employed who were not citizens of the state, but citizens of the United States.

At the time of the proposals it was known to be and is necessary to employ a large number of such subjects of the King of Italy and citizens of other states and of other countries to perform said contracts within the time and at the prices stated in order to keep the construction and equipment of the Dual System within the total amount provided and specified in the contracts and plans.

The treaty between the United States and Italy of 1871 [17 Stat. at L. 845] provides that the subjects of the King of Italy residing in the United States shall have and enjoy the same rights and privileges with respect to persons and property as are secured to the citizens of the United States residing in the United States.

At no time since the letting of such contracts has there been available a sufficient force or number of laborers citizens of the United States or of the state of New York to perform the work in accordance with such contracts; and no question was raised until a few days since of the right of the contractors to employ alien laborers, which [182] the contractors believed that they had a right to do, and they regarded the provision of the law and of the contract prohibiting the same as in effect null and void.

Within the past ten days complaint has been made to the Public Service Commission of the violation of the law and the alien labor provision in the contracts, and the Commission has threatened to refuse to approve further monthly estimates of amounts payable to contractors, thus depriving them of the means of prosecuting the work and the right to perform the same; indeed, have refused to approve certain monthly estimates, and, unless enjoined, will declare such contracts void and terminate the same.

The termination of the contracts will result in irreparable loss and damage and waste of money to the city, the work will be delayed or not done, or the cost will be enormously increased because the supply of labor will be diminished, resulting necessarily

in the diminution of labor available for the work, which will greatly protract the same; and litigation with the contractors will be caused. Also damage will result because of the fact that a large percentage of capital and money necessary for the work is supplied by third parties under contract with the city to supply the same, which contracts were based upon estimates made in advance, and said contracts may be invalidated and the purpose for which they were made defeated.

The total capital to be supplied was $250,000,000, of which the said third parties agreed to supply $115,000,000, and the city the balance. If the contracts be declared void the capital so to be supplied will be inadequate for the work, and the money already supplied by the city and the said third parties will have been wasted.

Injunction is prayed against declaring the contracts void and forfeited and refusing to prepare and certify vouchers of the amount of monthly estimates for work done.

[183] There was a demurrer to the bill, which was sustained by the supreme court, and injunction denied. The judgment was reversed by the appellate division and an injunction ordered, which action was reversed by the court of appeals and the bill ordered dismissed. 214 N. Y. 629, 108 N. E. 1095.

Mr. Thomas F. Conway argued the cause, and, with Mr. Thomas E. O'Brien, filed a brief for plaintiff in error William E. Heim:

A municipal corporation possesses two kinds of powers: One governmental and public, and to the extent this power is held and exercised, it is clothed with sovereignty; the other private, and to the extent this power is held and exercised, it is a legal individual.

Lloyd v. New York, 5 N. Y. 374, 55 Am. Dec. 347; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; Bieling v. Brooklyn, 120 N. Y. 106, 24 N. E. 389; 1 Dill. Mun. Corp. 5th ed. § 39; Re Rapid Transit R. Comrs. 197 N. Y. 96, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366.

The city, in the exercise of its corporate powers and the enjoyment of its corporate rights, is entitled to the same protection as an individual or private corporation, under the Constitutions both of the United States and of the state.

People v. Ingersoll, 58 N. Y. 29, 17 Am. Rep. 178; People v. Fields, 58 N. Y. 491; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Home Ins. Co. v. Morse, 20 Wall. 445, 455, 22 L. ed. 365, 369; Hunter v. Pittsburgh, 207 U. S. 161, 179, 52 L. ed. 151, 159, 28 Sup. Ct. Rep. 40; People ex rel. Park Comrs. v. Detroit, 28 Mich. 227, 15 Am. Rep. 202; 1 Dill. Mun. Corp. 5th ed. § 39; Albany County v. Hooker, 204 N. Y. 9, 97 N. E. 403, Ann. Cas. 1913C, 663; South Carolina v. United States, 199 U. S. 437, 461, 50 L. ed. 261, 269, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709; Mead v. New Haven, 40 Conn. 72, 16 Am. Rep. 14; Petersburg v. Applegarth, 28 Gratt. 343, 26 Am. Rep. 357; Eastman v. Meredith, 36 N. H. 285, 72 Am. Dec. 302; Western Sav. Fund Soc. v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; Richmond County v. Ellis, 59 N. Y. 620; Ft. Edward v. Fish, 156 N. Y. 363, 50 N. E. 973; United States v. Baltimore & O. R. Co. 17 Wall. 322, 332, 21 L. ed. 597, 601; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; Mt. Pleasant v. Beckwith, 100 U. S. 514, 524, 25 L. ed. 699, 701; Hunter v. Pittsburgh, 207 U. S. 161, 179, 52 L. ed. 151, 159, 28 Sup. Ct. Rep. 40; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep 142; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.

The city owns the subway, and it is a railroad corporation, so far as the construction, operation, and leasing thereof is concerned.

Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366.

There are certain things which it is not competent for state legislatures to do by enactment, even if there should be found in the Constitution of a state or of the United States no special restrictions on their power.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; Wilkinson v. Leland, 2 Pet. 627, 7 L. ed. 542; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; State ex rel. Atty. Gen. v. Moores, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175; Bradshaw v. Rodgers, 20 Johns. 103; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; Camp v. Rogers, 44 Conn. 291; Bonham's Case, 8 Coke, 114a; London v. Wood, 12 Mod. 669; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; People ex rel. Darling v. Warden, 154 App. Div. 413, 139 N. Y. Supp. 277.

Under the principles recognized and established by this court and the courts of many states, the provisions of § 14, of the

labor law, prohibiting the employment of aliens, and giving preference to citizens of New York state, in subway construction or other municipal work, are plainly in violation of the United States Constitution above referred to, both as regards the rights of the municipality and those of individuals, especially taxpayers of the city, citizens of other states, and aliens residing in said state, as well as contractors with the city.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 150, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; Yick We v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Ward v. Maryland, 12 Wall. 430, 20 L. ed. 452; Stockton Laundry Case, 26 Fed. 611; United States v. Martin, 94 U. S. 400, 403, 24 L. ed. 128; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 757, 28 L. ed. 585, 591, 4 Sup. Ct. Rep. 652; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 31, 25 L. ed. 989, 992; Hayes v. Missouri, 120 U. S. 68, 71, 30 L. ed. 578, 580, 7 Sup. Ct. Rep. 350; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; Pearsons v. Portland, 69 Me. 278, 31 Am. Rep. 276; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; Meyers v. New York, 58 App. Div. 534, 69 N. Y. Supp. 529; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 378, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; People v. Williams, 189 N. Y. 134, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 821, 25 Am. St. Rep. 863, 10 S. E. 285; Ex parte Kuback, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; McChesney v. People, 200 Ill. 146, 65 N. E. 626; Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

If the state, which has reserved the right and power to amend, alter, or repeal the charter of a private corporation, may not legitimately exercise that power to destroy rights acquired by virtue of the charter granted, or which, by a legitimate use of the powers granted, have become vested in the corporation, how can it be contended that the rights of the city of New York, acquired by it under its ancient charters, or those of a later date, and also under the authority of the legislature, may be interfered with by subsequent legislative enactment?

Sinking Fund Cases, 99 U. S. 700, 720, 25 L. ed. 496, 502; Maine C. R. Co. v. Maine, 96 U. S. 510, 511, 24 L. ed. 840, 841; Com. v. Essex Co. 13 Gray, 239; Miller v. New York, 15 Wall. 498, 21 L. ed. 104; Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Trustees of University v. Foy, 3 N. C. (2 Hayw.) 310; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

Apart from the foregoing considerations, § 14 of the labor law on its face applies to contracts in existence at the time of its passage, as well as to contracts to be entered into after its passage, and is therefore void.

Wynehamer v. People, 13 N. Y. 378; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; Russell v. Sebastian, 233 U. S. 195, 58 L. ed. 912, L.R.A.—, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Von Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485; New Orleans v. Southern Teleph. & Teleg. Co. 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 57 L. ed. 633, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Miller v. New York, 15 Wall. 498, 21 L. ed. 104; Pearsall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

The principles of natural justice are the principles determining what is and what is not due process of law within the 14th Amendment.

Camp v. Rogers, 44 Conn. 297; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Bank of Columbia v. Okely, 4 Wheat. 235–244, 4 L. ed. 559–561; Brown v. Levee Comrs. 50 Miss. 468; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655–662, 22 L. ed. 455–461; Reich v. Truax, 219 Fed. 273.

Privileges and immunities of citizens in the several states are denied by the preference granted citizens of the state of New York by the labor law.

Slaughter-House Cases, 16 Wall. 36, 75, 21 L. ed. 394, 408; Paul v. Virginia, 8 Wall. 168, 180, 19 L. ed. 357, 360; Lemmon v. People, 20 N. Y. 608; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449.

Section 14 of the labor law in question, prohibiting the employment of alien labor, is in conflict with the provisions of the treaties now existing between many foreign nations and the United States, and is therefore void.

Society for Propagation of the Gospel v. New Haven, 8 Wheat. 464, 5 L. ed. 662; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 1 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 598, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247; 5 Moore, Int. Law Dig. p. 566; Baldwin v. Franks, 120 U. S. 678, 682, 683, 30 L. ed. 766–768, 7 Sup. Ct. Rep. 656, 763; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Baker v. Portland, 5 Sawyer, 566, Fed. Cas. No. 777; Live-Stock Dealers & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 389, Fed. Cas. No. 8,408; Robbins v. Taxing Dist. 120 U. S. 489, 493, 30 L. ed. 694, 695, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Rutgers v. Waddington (N. Y.) decided in Mayor's Ct. 1784; Dufour's Succession, 10 La. Ann. 391; Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530; Amat's Succession, 18 La. Ann. 403; Crusius's Succession, 19 La. Ann. 369; Wunderle v. Wunderle, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; Opel v. Shoup, 100 Iowa, 407, 37 L.R.A. 583, 69 N. W. 560; Rabasse's Succession, 47 La. Ann. 1454, 49 Am. St. Rep. 433, 17 So. 867; Rixner's Succession, 48 La. Ann. 553, 32 L.R.A. 177, 19 So. 597; Tellefsen v. Fee, 168 Mass. 188, 45 L.R.A. 481, 60 Am. St. Rep. 379, 46 N. E. 562; Bahaud v. Bize, 105 Fed. 485; Doe ex dem. Dockstader v. Roe, 4 Penn. (Del.) 398, 55 Atl. 341; Lehman v. State, 45 Ind. App. 330, 88 N. E. 365; Re Stixrud, 58 Wash. 339, 33 L.R.A. (N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850; People ex rel. Atty. Gen. v. Gerke, 5 Cal. 381; Blythe v. Hinckley, 127 Cal. 431, 59 Pac. 787; Wilcke v. Wilcke, 102 Iowa, 174, 71 N. W. 201.

This court is not concluded by any construction put upon § 14 of the labor law by the New York court of appeals in the decision of this case.

Jefferson Branch Bank v. Skelly, 1 Black, 436, 443, 17 L. ed. 173, 177; Wright v. Nagle, 101 U. S. 791, 25 L. ed. 921; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; Swift v. Tyson, 16 Pet. 1, 19, 10 L. ed. 865, 871; Russell v. Southard, 12 How. 139, 147, 13 L. ed. 927, 930; Watson v. Tarpley, 18 How. 517, 520, 15 L. ed. 509, 511; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Butz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; Boyce v. Tabb, 18 Wall. 546, 21 L. ed. 757; Oates v. First Nat. Bank, 100 U. S. 239, 246, 25 L. ed. 580, 583; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Pana v. Bowler, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 160, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 369, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Hairston v. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 58 L. ed. 924, 34 Sup. Ct. Rep. 522.

Every question which was before the state court is before this court, except the question as to the conflict of § 14 of the labor law with the provisions of the Constitution of the state of New York.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648.

Even if § 14 of the labor law be held constitutional, it does not apply to labor employed in the performance of the subway contracts in question for the following reasons:

(a) They are not the character of "public" contracts mentioned in § 14.

Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347; Re Rapid Transit R. Comrs. 197 N. Y. 81, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; Sutherland, Stat. Constr. § 380.

(b) Even if they were, the section must be deemed to be repealed or superseded by the rapid transit act and its amendments.

Schieffelin v. McClellan, 135 App. Div. 665, 120 N. Y. Supp. 215; Heckmann v. Pinkney, 81 N. Y. 211; Excelsior Petroleum Co. v. Lacey, 63 N. Y. 422; People v. Gold & Stock Teleg. Co. 98 N. Y. 67; New York Cable Co. v. New York, 104 N. Y. 15, 10 N. E. 332; Woods v. Madison County, 136 N. Y. 403, 32 N. E. 1011; Ackerson v. Niag-

ara County, 72 Hun, 616, 25 N. Y. Supp. 196; Cooley, Const. Lim. 7th ed. p. 255.

(c) If the labor law ever did apply, the city was estopped from invoking it, or its right to do so had been waived.

Re Reynolds, 202 N. Y. 430, 96 N. E. 87, 416; Kiernan v. Dutchess County Mut. Ins. Co. 150 N. Y. 190, 44 N. E. 698; Draper v. Oswego County Fire Relief Asso. 190 N. Y. 12, 82 N. E. 755; Clark v. West, 193 N. Y. 349, 86 N. E. 1.

The covenant in the construction contracts to comply with § 14 of the labor law is not binding on the contractors if the law itself is invalid because it conflicts with the Constitution or with treaty provisions.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People ex rel. North v. Featherstonhaugh, 172 N. Y. 112, 60 L.R.A. 768, 64 N. E. 802; Knowles v. New York, 176 N. Y. 430, 68 N. E. 860; Meyers v. New York, 58 App. Div. 534, 69 N. Y. Supp. 529; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Cleveland v. Clements Bros. Constr. Co. 67 Ohio St. 197, 59 L.R.A. 775, 93 Am. St. Rep. 670, 65 N. E. 885.

If the stipulation in the contract to comply with the provisions of § 14 of the labor law, that is, to employ no aliens, and to prefer among laborers those who are citizens of the state of New York, be considered without regard to the terms of § 14 of the labor law, requiring the insertion of the stipulation, and be considered merely as a stipulation inserted by the city on its own authority, it is manifestly invalid, not only for all the reasons set forth above with regard to § 14 of the labor law, as a legislative enactment in violation of the Constitution, but for the further reason that it is against public policy, and in restraint of trade and competition, and prevents free and unrestricted bidding upon municipal works.

Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161; People ex rel. John Single Paper Co. v. Edgcomb, 112 App. Div. 604, 98 N. Y. Supp. 965; Inge v. Public Works, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678; McChesney v. People, 200 Ill. 146, 65 N. E. 626; Sweet v. People, 200 Ill. 536, 65 N. E. 1094; Glover v. People, 201 Ill. 545, 66 N. E. 820; Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

An action may be maintained by a taxpayer to enjoin an official, or threatened official, act, upon the ground of illegality simply, or to enjoin an official act which will result in waste or injury to the public.

Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 93, 35 L. ed. 943, 948, 12 Sup. Ct. Rep. 142; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; Gage v. New York, 110 App. Div. 403, 97 N. Y. Supp. 157; Ziegler v. Chapin, 126 N. Y. 342, 27 N. E. 471; Warrin v. Baldwin, 105 N. Y. 534, 12 N. E. 49; Hicks v. Eggleston, 105 App. Div. 73, 93 N. Y. Supp. 909; Peck v. Belknap, 130 N. Y. 394, 29 N. E. 977; Hopper v. Wilcox, 155 App. Div. 213, 140 N. Y. Supp. 277; Brill v. Miller, 140 App. Div. 602, 126 N. Y. Supp. 865; Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161; Rogers v. Westchester County, 77 App. Div. 501, 78 N. Y. Supp. 1081; Wenk v. New York, 171 N. Y. 607, 64 N. E. 509; Perkins v. Stimmel, 114 N. Y. 368, 11 Am. St. Rep. 659, 21 N. E. 729.

Mr. James F. McKinney filed a brief for plaintiffs in error the Cranford Company and the Flinn-O'Rourke Company:

While the people of the state constitute the state, and its members are its citizens (Penhallow v. Doane, 3 Dall. 54, 93, 1 L. ed. 507, 523; Texas v. White, 7 Wall. 700, 19 L. ed. 227; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588), and while aliens are not constituents of such membership, the control of the state over the property of its citizens is by no means absolute.

The power of taxation, which has been held to be the very essence of the governing power, is not unlimited.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The power of the state over the public property is no more absolute. A present legislative body cannot abdicate its authority, nor foreclose a succeeding legislature from action in the same matter, nor can the state permanently relinquish the trust vested in it to control and manage the public property.

Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

Nor can the state recall powers vested in a municipality in such a way as to impair the obligation of contracts.

Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; 1 Dill. Mun. Corp. 5th ed. §§ 108–111, 113–116, 118–120, 132; People ex rel. LeRoy v. Hurlbut, 24 Mich. 103; State ex rel. Board of Education v. Haben, 22 Wis. 660; Mt. Hope Cemetery v. Boston, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695; Webb v. New York, 64 How. Pr. 10.

The states have voluntarily, deliberately, and irrevocably given up for the common national advantage certain attributes of sovereignty, and have vested in the national legislative body and its executive certain powers of action which preclude the exercise of similar powers in the states, and at the

same time have solemnly covenated that any state action conflicting with such ceded powers shall be null and void.

Penhallow v. Doane, 3 Dall. 54, 1 L. ed. 507; Texas v. White, 7 Wall. 720, 19 L. ed. 236; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

Authority for this law does not lie in the police power.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; New Orleans Gaslight Co. v. Louisiana Light, & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

The distinction between citizens and aliens is insufficient to justify the act.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Section 14 of the labor law violates the 14th Amendment of the Constitution of the United States, reinforced as it is by § 1977, Rev. Stat. (Comp. Stat. 1913, § 3925).

Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Freund, Pol. Power, §§ 705, 706; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; Ex parte Orozco, 201 Fed. 106; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Re Baldwin, 27 Fed. 187; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; M'Culloch v. Maryland, 4 Wheat. 316, 405, 4 L. ed. 579, 601; Gandolfo v. Hartman, 16 L.R.A. 277, 49 Fed. 181; Workman v. New York, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; McChesney v. People, 200 Ill. 146, 65 N. E. 626; Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

Section 14 of the labor law also violates treaties duly entered into by the United States government with foreign nations, and § 1977, Rev. Stat. (Comp. Stat. 1913, § 3925).

38 Cyc. 906; Penhallow v. Doane, 3 Dall. 54, 1 L. ed. 507; Chae Chan Ping v. United States, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; Hauenstein v. Lynham, 100 U. S. 487, 25 L. ed. 629; Re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777.

The constitutional protection of liberty and property includes the right to labor at any chosen lawful occupation.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep 652.

Mr. George S. Coleman argued the cause and filed a brief for defendants in error:

Section 14 of the labor law of the state of New York, in providing that only citizens of the United States shall be employed in the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, does not clearly violate either the Constitution of the state, the Constitution of the United States, or treaties with foreign countries.

People ex rel. Wood v. Draper, 15 N. Y. 543; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 160, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; People v. I. M. Ludington's Sons, 74 Misc. 364, 131 N. Y. Supp. 550, 32 Cyc. 1251; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

The alleged inability of the contractors to secure a sufficient number of citizen laborers able and willing to do the work required does not excuse a violation of the law.

People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 159, 24 L.R.A.(N.S.) 201, 85 N. E. 1070.

The provisions of the labor law are applicable to the work of building subways for the Rapid Transit system in the city of New York.

Blank v. Kearny, 44 App. Div. 592, 61 N. Y. Supp. 79; State v. Butler, 178 Mo. 317, 77 S. W. 560.

After stating the case as above, Mr. Justice McKenna delivered the opinion of the court:

There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship. The appellate division felt that there might be objection to the right, under the holding of a [187] cited case. The court of appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit; and, so assuming, we pass to the merits.

The supreme court put its decision upon the power of the state "to provide what laborers shall be employed upon public works," and that "the state has the same right in conducting its business that an individual has," and had, therefore, "a perfect right to enact § 14 of the labor law, and it does not violate any rights of an alien under existing treaties."

The appellate division of the court, however, was of opinion that the law could not be sustained upon such consideration, and saw in it such flagrant discrimination as to be offensive to the 14th Amendment to the Constitution of the United States; and, so concluding, the court considered it unnecessary to discuss the effect of treaties.

The court also passed, without absolute decision, the question whether the labor law applies to the work of building subways for the Rapid Transit in the city of New York. It was, however, stated in the opinion of the court that, in view of the language in a cited case, there was "much ground for saying that even if the state could lawfully impose the test of citizenship upon employees of its own contractors, and the contractors with the city engaged in what is properly state work, it has no more power to impose such test upon persons employed in building a subway for the city than it would have if the subways were being constructed by a private corporation or individual." [165 App. Div. 460, 150 N. Y. Supp. 933.] Two members of the court were clear that the state had no such power, and concurred besides with the majority in holding that the labor law was "a violation of both the Federal and state Constitutions."

The court of appeals reversed the action of the appellate division.

[188] The basic principle of the decision of the court of appeals was that the state is a recognized unit, and those who are not citizens of it are not members of it. Thus recognized it as a body corporate, and, "like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state (Illinois v. Illinois C. R. Co. 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110). It is the people, *i. e.*, the members of the state, who are contracting or expending their own moneys through agencies of their own creation." [People v. Crane, 214 N. Y. 160, L.R.A.1915D, 550, 108 N. E. 427, Ann. Cas. 1915B, 1254.] And it was hence decided that in the control of such agencies and the expenditure of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the national or the state Constitution. "The statute is nothing more," said Chief Judge Bartlett, concurring in the judgment of the court, "in effect than a resolve by an employer as to the character of his employees."

Notwithstanding the simplicity of the determining principle pronounced by the court of appeals, its decision is attacked in many and voluminous briefs.

The fundamental proposition of plaintiff in error Heim is that, assuming that § 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United States (a) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (b) the rights of the various subway contractors with the city, (c) the rights of aliens and citizens of other states resident in New York, and (d) it is in violation of treaty rights.

Plaintiffs in error Cranford Company and Flinn-O'Rourke Company were made defendants upon their motion at the argument for injunction. In the appellate division they, their counsel say, "neither assenting to nor denying the special allegations, doubtless urged by complainant's [189] counsel, . . . urged the single ground of the unconstitutionality of the law and its violation of treaties." And these ground are again urged.

To sustain the charge of unconstitutionality the 14th Amendment is adduced and the specification is that the law abridges the privileges and immunities of the contractors and those of their alien employees in depriving them of their right of contracting for

labor, and that the state of New York, by enacting and enforcing the law, deprives employers and employees of liberty and property without due process of law, and denies to both the equal protection of the law.

The treaty that it is urged to be violated is that with Italy, which, it is contended, "put aliens within the state of New York upon an equality with citizens of the state with respect to the right to labor upon public works;" and that Congress has fortified the treaty by § 1977 of the Revised Statutes (Comp. Stat. 1913, § 3925),—a part of the civil rights legislation.

The application of the law to the subway contracts, and whatever its effect and to what extent it affects the corporate rights of the city or of the subway contractors, are local questions (Stewart v. Kansas City, decided November 1, 1915 [239 U. S. 14, ante, 120, 36 Sup. Ct. Rep. 15]), and have in effect been decided adversely to plaintiffs in error by the court of appeals. The principle of its decision was, as we have seen, that the law expressed a condition to be observed in the construction of public works; and this necessarily involved the application of § 14 to subway construction and the subordinate relation in which the city stood to the state. Therefore, the contention of plaintiffs in error that the rapid transit lines have given the city rights superior to the control of the state, so far as the law in question is concerned, has met with adverse decision. Whatever of local law or considerations are involved in the decision we are bound by; whatever of dependence the decision has in the general power of a [190] state over its municipalities has support in many cases. We have recently decided the power exists, and we may be excused from further discussion of it. Stewart v. Kansas City, supra.

With the rejection of the asserted rights of the city must go the asserted rights of residents and taxpayers therein and the rights of subway contractors, so far as they depend upon the asserted freedom of the city from the control of the state.

The claim of a right in the city of such freedom is peculiar. The state created a scheme of rapid transit, constituted officers and invested them with powers to execute the scheme, yet, the contention is that scheme, officers, and powers have become in some way in their exercise and effect superior to the state law; or, according to the explicit contention (we say explicit contention, but it is rather a conclusion from an elaborate argument and much citation of cases), that the city's action in regard to the subway is proprietary in character, and, being such, the city can assert rights against the state, and that individual rights have accrued to residents of the city of which the city is the trustee, and which "are so interwoven and bound up with the rapid transit system as to be 'beyond the control of the state.'" Counsel have not given us a sure test of when action by a city is governmental and when proprietary. We need not attempt a characterization. If it be granted that the city acted in the present case in a proprietary character and has secured proprietary rights, to what confusion are we brought! A taxpayer of the city, invoking the rights of the city, asserts against the control by the state of the proprietary action of the city the protection of the 14th Amendment, and then against the proprietary action of the city that Amendment is urged in favor of the contractors with the city, and their exemption from the performance of their contracts declared. There seems to be a jumble of rights. [191] If the city is not an agent of the state (it is contended the city is not), but a private proprietor (it is contended the city is), it would seem as if it has the rights and powers of such a proprietor, and, as such, may make what contracts please it, including or excluding alien laborers.

But upon these suppositions we need not dwell. It is clear it is with the state law and the city's execution of it as agent of the state that we must deal, and only on the assumption that the state law has been held to apply by the court of appeals, and, by a consideration of the power to enact it, determine the contentions of all of the plaintiffs in error.

The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. It was there declared, and it was the principle of decision, that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." And it was said: "No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

This was the principle declared and applied by the court of appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In Atkin v. Kansas the law attacked and sustained prescribed the hours

(8) which should constitute a day's work for those employed by or on behalf of the state, or by or on behalf of any of its subdivisions. The 14th Amendment was asserted against the law; indeed, there is not a contention made in this case that was not made in that. Immunity of municipal corporations from legislative [192] interference in their property and private contracts was contended for there (as here); also that employees of contractors were not employees of cities. It was contended there (as here) that the capacity in which the city acted, whether public or private, was a question of general law not dependent upon local considerations or statutes, and that this court was not bound by the decision of the state court. And there (as here) was asserted a right to contest the law, though the contracts were made subsequent to and apparently subject to it, upon the ground that they were entered into under the belief that the law was void. Finally the ultimate contention there was (as it is here) that the liberty of contract assured by the 14th Amendment was infringed by the law. In all particulars except one the case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases,—the right of the individual employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; that is, the public character of the work.

The power of regulation was decided to exist whether a state undertook a public work itself or whether it "invested one of its governmental agencies with power to care" for the work, which, it was said, "whether done by the state directly or by one of its instrumentalities," was "of a public, not private, character." And, being of public character, it (the law—the Kansas statute) did not "infringe the liberty of anyone." The declaration was emphasized. "It cannot be deemed," it was said, "a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state." And obversely it was said (as we have already quoted): "On the contrary, it belongs to the state, as the guardian of its people, and [193] having control of its affairs, to prescribe the *conditions* [italics ours] upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." See also Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589. The contentions of plaintiffs in error, therefore, which are based on the 14th Amendment, cannot be sustained.

Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that treaty (1871) it is provided:

"The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives." [17 Stat. at L. 846.]

There were slight modifications of these provisions in the treaty of 1913, as follows: That "the citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant security and protection for their persons and property and for their rights . . ." [38 Stat. at L. 1670.]

Construing the provision of 1871, the court of appeals decided that it "does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys." The conclusion [194] is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in Patsone v. Pennsylvania, 232 U. S. 138, 145, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property." And the ruling was given point by a citation of the power

of the state over its wild game, which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject-matter,—a power which exists in the case at bar, as we have seen.

From these premises we conclude that the labor law of New York and its threatened enforcement do not violate the 14th Amendment or the rights of plaintiffs in error thereunder, nor under the provisions of the treaty with Italy.

Judgment affirmed.

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[195] CLARENCE A. CRANE, Plff. in Err.,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 195–198.)

Constitutional law — equal protection of the laws — classification — discrimination against aliens.

The discrimination made between aliens and citizens by the provisions of N. Y. Consol. Laws, chap. 31, § 14, making it a misdemeanor to employ aliens on public works, does not offend against U. S. Const., 14th Amend., as violating the principle of classification.

[For other cases, see Constitutional Law, 213–238, in Digest Sup. Ct. 1908.]

[No. 388.]

Argued October 12, 1915. Decided November 29, 1915.

IN ERROR to the Court of Special Sessions, First District, of the City of New York and State of New York, to review a judgment of conviction for a violation of the anti-alien labor law, entered pursuant to the mandate of the Court of Appeals of that state, which reversed a judment of the Appellate Division of the Supreme Court, First Department, which had in turn reversed the conviction in the Court of Special Sessions. Affirmed.

See same case below, in Appellate Division, 165 App. Div. 449, 150 N. Y. Supp. 933; in Court of Appeals, 214 N. Y. 154, L.R.A.1916D, 550, 108 N. E. 427, Ann. Cas. 1915B, 1254.

The facts are stated in the opinion.

Mr. Thomas F. Conway argued the cause, and, with Mr. James F. McKinney filed a brief for plaintiff in error.

For his contentions, see his brief as reported in Heim v. McCall, ante, 206.

Mr. Robert S. Johnstone argued the cause, and, with Messrs. Charles Albert Perkins and George Z. Medalie, filed a brief for defendant in error:

The fundamental mistake of the plaintiff in error, and of the learned judges below who deemed the statute unconstitutional, is that they, while recognizing the truth of the general proposition that the right to labor at a lawful trade or calling is a right of liberty and property (Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Smith v. Texas, 233 U. S. 630, 636, 58 L. ed. 1129, 1132, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420), overlooked the proposition, equally true, that no one is entitled of absolute right and as a part of his liberty or property to work for another against that other's wishes (Coppage v. Kansas, 236 U. S. 1, 10, 59 L. ed. 441, 444, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240); or to work or perform labor for the state (Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124); that liberty of contract includes both parties to it (Lochner v. New York, 198 U. S. 45, 56, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133).

The distinction between the corporate or contractual power of the state and the police power, and, indeed, the transition from the one to the other, may be clearly seen in noting the ascending measure of control from (1) that which may be exercised over individuals and corporations with respect to matters wholly private (Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240 to (2) that which may be exercised with respect to matters semipublic or affected with

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NOTE.—As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

On treaty guaranties to aliens—see note to Gandolfo v. Hartman, 16 L.R.A. 277.

Generally as to statutory restrictions on contracts between master and servant—see notes to Com. v. Perry, 14 L.R.A. 325; Ramsey v. People, 17 L.R.A. 853; State v. Loomis, 21 L.R.A. 789; and Ritchie v. People, 29 L.R.A. 79.

On power of state, under 14th Amendment to the United States Constitution, to deny to aliens the right to engage in a lawful occupation—see notes to Com. v. Hana, 11 L.R.A.(N.S.) 799; People v. Crane, L.R.A.1916D, 569.

a public interest (Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Interst. Com. Rep. 45, 12 Sup. Ct. Rep. 468, affirming 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670; Brass v. North Dakota 153 U. S. 391, 38 L. ed. 757, 4 Interst. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612), to (3) that which may be exercised with respect to matters wholly public—when the power becomes absolute, and examples of which are seen in the control by the state of its municipal corporations in all their public undertakings and affairs (Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup Ct. Rep. 617; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599).

This absolute power arises from the proprietary relationship of the state to the matters in question. A question of power becomes one of policy.

Atkin v. Kansas, 191 U. S. 207, 222, 48 L. ed. 148, 157, 24 Sup. Ct. Rep. 124; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 414, 58 L. ed. 1011, 1022, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

One of the basic theories upon which the constitutionality of this law can be sustained is fundamentally the same as that upon which a law restraining the right of a private individual to employ or refuse to employ whom he will in his private capacity might be deemed invalid.

Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240.

The head of a large business enterprise may employ or refuse to employ whomsoever he will, and for any reason that to him seems sufficient.

Coppage v. Kansas, 236 U. S. 1, 10, 24, 59 L. ed. 441, 444, 450, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; Jacobs v. Cohen, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280; National Protective Asso v. Cumming, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369.

Has not the state for itself and for each of its separate governmental agencies the right to declare that, with respect to works of a public nature done by contract, the person contracting to do that work shall only employ such persons as the state may direct, and to place a restriction, if it sees fit to do so, upon the classes of persons who may be employed by the contractor?

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; United States v. Martin, 94 U. S. 400, 24 L. ed. 128; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People v. Orange County Road Constr. Co. 175 N. Y. 90, 65 L.R.A. 33, 67 N. E. 129; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 163, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; People v. I. M. Luddington Sons, 74 Misc. 363, 131 N. Y. Supp. 550; Coppage v. Kansas, 236 U. S. 1, 10, 59 L. ed. 441, 444, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

The individual as an employer of labor and the state as an employer of labor stand on the same footing.

Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; People v. Orange County Road Constr. Co. 175 N. Y. 89, 65 L.R.A. 33, 67 N. E. 129; United States v. Martin, 94 U. S. 400, 404, 24 L. ed. 128, 129; Clark v. State, 142 N. Y. 101, 36 N. E. 817; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; People v. I. M. Luddington Sons, 74 Misc. 363, 131 N. Y. Supp. 550.

The state may dictate its employment policy respecting public works, whether constructed by the state itself, its municipalities, or contractors.

Keefe v. People, 37 Colo. 317, 8 L.R.A.(N.S.) 131, 87 Pac. 791; State v. Livingston Concrete Bldg. & Mfg. Co. 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204; Re Broad, 36 Wash. 449, 70 L.R.A. 1011, 78 Pac. 1004, 2 Ann. Cas. 212; Re Dalton, 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193

N. Y. 161, 24 L.R.A.(N.S.) 201, 85 N. E. 1070.

It was not necessary, so far as this case is concerned, that the provision of the statute should have been actually incorporated into or set forth in the contract. The parties to the contract were chargeable with knowledge of its provisions, and, if they are valid, they will be read into the contract by operation of law.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Medina v. Dingledine, 211 N. Y. 28, 104 N. E. 1118.

The state, we submit, had an undoubted right to refuse employment to aliens on public works. The defendant as a private person, pursuing his private concerns, had a right to employ aliens to work for him if he saw fit to do so; and in that right the Constitution protects him. But if, in undertaking to do public work for the city, the state (the principal and master) exacted as a condition that he should not employ aliens, he could waive any general constitutional right, and did so by accepting the service or privilege knowing the conditions thereto attached by the statute.

People v. Rosenheimer, 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; Ex parte Kneedler, 243 Mo. 632, 40 L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923; Bertholf v. O'Reilly, 74 N. Y. 517, 30 Am. Rep. 323; Ryan v. New York, 177 N. Y. 279, 69 N. E. 599; People ex rel. McLaughlin v. Police Comrs. 174 N. Y. 456, 95 Am. St. Rep. 596, 67 N. E. 78; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Crowley v. Christensen, 137 U. S. 86, 91, 34 L. ed. 620, 623, 11 Sup. Ct. Rep. 13; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Wilson v. United States, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912D, 558.

When the state made a contract it did not give up its power to make a law,—its sovereignty. It could make a breach of the contract—a disobedience of its mandate—criminal.

Ellis v. United States, 206 U. S. 246, 255, 256, 51 L. ed. 1047, 1052, 1053, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; United States v. Reynolds, 235 U. S. 133, 150, 59 L. ed. 162, 169, 35 Sup. Ct. Rep. 86; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129.

The provision prohibiting the employment of aliens on public works is a valid exercise of the police power—and this even if the contractor be regarded as occupying the position of a private person as related to his workmen, with respect to the performance of the work in question.

Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586; Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; Williams v. Fears, 179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Muller v. Oregon, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 567, 55 L. ed. 328, 338, 31 Sup. Ct. Rep. 259; Erie R. Co. v. Williams, 233 U. S. 685, 699, 704, 58 L. ed. 1155, 1160, 1162, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Price v. Illinois, 238 U. S. 446, 453, 59 L. ed. 1400, 1405, 35 Sup. Ct. Rep. 892; Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501; People ex rel. Nechamcus v. Warden, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; People v. Ewer, 141 N. Y. 132, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; Bloomfield v. State, 86 Ohio St. 253, 41 L.R.A.(N.S.) 726, 99 N. E. 309, Ann. Cas. 1913D, 629; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Williams v. Arkansas, 217 U. S. 79, 88, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Com. v. Hana, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281, 231 Pa. 46, 79 Atl. 928; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; People v. Lowndes, 130 N. Y. 462, 29 N. E. 751; Com. v. Hilton, 174 Mass. 29, 45 L.R.A. 475, 54 N. E. 362; Blythe v. Hinckley, 180 U. S. 333, 341, 45 L. ed. 557, 562, 21 Sup. Ct. Rep. 390; Freund, Pol. Power, § 706; 4 Moore, Int. Law Dig. § 541; Drew v. Rogers, 4 Cal. Unrep. 369, 34 Pac. 1081; State ex rel. Perine v. Van Beek, 87 Iowa, 569, 19 L.R.A.(N.S.) 622, 43 Am. St. Rep. 397, 54 N. W. 525; Opinion of Justices, 122 Mass. 594; Scott v. Strobach, 49 Ala. 477; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; State v. Travelers' Ins. Co. 70 Conn. 600, 66 Am. St. Rep. 138, 40 Atl. 465; Re O'Neill, 90 N. Y. 584. See also Com. v. Hana, 11 L.R.A. (N.S.) 799, note; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

The courts must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it (Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 480, 46 L. ed. 283, 287, 22 Sup. Ct. Rep. 176). They are not at liberty to inquire into the motives of the legislature; they can only examine into its power under the Constitution (Ex parte McCardle, 7 Wall. 506, 514, 19 L. ed. 264, 265; Cooley, Const. Lim. 7th ed. 257). They have nothing to do with the policy, wisdom, justice, or fairness of the act; those questions are for the consideration of those to whom the state has intrusted its legislative power, and their determination of them is not subject to review or criticism by this court (Hunter v. Pittsburgh, 207 U. S. 161, 176, 52 L. ed. 151, 158, 28 Sup. Ct. Rep. 40; United States v. First Nat. Bank, 234 U. S. 245, 260, 58 L. ed. 1298, 1304, 34 Sup. Ct. Rep. 846). And it is not necessary that the legislature should declare on the face of a statute the policy or purpose for which it was enacted.

People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610.

On the same principle that the national government may exclude aliens for the material and economic protection of its people, we submit the states may bar them from employment on their public works.

4 Moore Int. Law Dig. § 561, pp. 153–158; 1 Calvo, 4th ed. § 208; Phillimore Int. Law, 2d ed. § 211; 2 Wheaton, Int. Law, chap. 1, § 2; Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336.

There is no invalid classification.

Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 56, 59 L. ed. 1192, 1198, 35 Sup. Ct. Rep. 671; International Harvester Co. v. Missouri, 234 U. S. 199, 214, 58 L. ed. 1276, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Williams v. Arkansas, 217 U. S. 79, 90, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Barrett v. Indiana, 229 U. S. 26, 30, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 55, 54 L. ed. 921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

The municipality of the city of New York, in constructing a sewer, under legislative sanction, is engaged in a public work or improvement in which it acts as the agent of the state, and the construction of such work by the municipality is under legislative or state control.

Hughes v. Auburn, 161 N. Y. 104, 46 L.R.A. 636, 55 N. E. 389, 7 Am. Neg. Rep. 139; Uppington v. New York, 165 N. Y. 228, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Re Protestant Episcopal Public School, 46 N. Y. 180; People ex rel. Williams Engineering & Contracting Co. 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Keefe v. People, 37 Colo. 317, 8 L.R.A.(N.S.) 131, 87 Pac. 791; Seibert v. Cavender, 3 Mo. App. 421; Paulsen v. Portland, 149 U. S. 40, 37 L. ed. 641, 13 Sup. Ct. Rep. 750; Heim v. McCall, 165 App. Div. 449, 150 N. Y. Supp. 933, 214 N. Y. 629, 108 N. E. 1095; Re Rapid Transit R. Comrs. 197 N. Y. 97, 36 L.R.A.(N.S.) 647, 90 N. E. 456, 18 Ann. Cas. 366; Sun Printing & Pub. Asso. v. New York, 152 N. Y. 267, 37 L.R.A. 788, 46 N. E. 499; Carpenter v. New York, 115 App. Div. 557, 101 N. Y. Supp. 402.

It is for the state courts to decide what shall be deemed public uses in that state. It is likewise for them to decide what shall be considered public works.

Williams v. Eggleston, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Forsyth v. Hammond, 166 U. S. 506, 519, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665; Claiborne County v. Brooks, 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. Rep. 489; Detroit v. Osborne, 135 U. S. 492, 499, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116, 57 L. ed. 1410, 1416; 33 Sup. Ct. Rep. 967; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 219, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522; Hairston v. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008.

The broad classification of municipal functions into matters governmental (*i. e.*, sovereign) in the strict sense, and quasi private, is obviously incomplete for all purposes. It is fundamentally and chiefly of value only in the determination of those questions involving the relationship of the municipality to third persons—the civil liability of the city to third persons for damages caused by the negligent execution of the powers or functions. For that limited purpose, and in that limited sense, the broad classification may be sufficiently accurate (Wilcox v. Rochester, 190 N. Y. 142, 17 L.R.A.(N.S.) 741, 82 N. E. 1119, 13 Ann. Cas. 759; Missano v. New York, 160 N. Y. 129, 54 N. E. 744, 6 Am. Neg. Rep. 652; Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468; Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347; Dill. Mun. Corp. 5th ed. § 39). But it is of little or no assistance in determining questions concerning the extent of legislative control over the municipal corporations in relation to matters of a public nature or af-

fected by a public interest, such, for example, as the carrying on of public utilities, the construction of public works,—sewers, waterworks, highways, and the like,—which constitute a large category of a municipality's affairs, and which are public functions in the truest sense, though perhaps occasionally of a local character. These are truly governmental functions,—functions of government,—even though they are not strictly of a sovereign nature. They are public works.

Even where, for some purposes, the municipality may be considered to act as a legal individual, a corporate body, in the exercising or performance of the function, the function itself is a special power granted to it by the legislature.

Missano v. New York, 160 N. Y. 129, 54 N. E. 744, 6 Am. Neg. Rep. 652; Lloyd v. New York, 5 N. Y. 369, 55 Am. Dec. 347; Maxmilian v. New York, 63 N. Y. 160, 20 Am. Rep. 468; Barnes v. District of Columbia, 91 U. S. 540, 544, 23 L. ed. 440, 441.

A great mass of a municipality's functions and powers may be private in their execution as regards third parties, but they are public in regard to the state. They are public matters, authorized by the legislature, and subject to legislative control.

1 Dill. Mun. Corp. 5th ed. p. 184; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248.

As respects the state, the erection of public works, the carrying on of public undertakings, are wholly public, and the legislature (except where it is restrained by special constitutional provision, operating as a restriction on the general sovereign power exercised by the legislature) has over them complete and transcendent control. From it such corporations derive their being and all the powers they possess. It made them and it may regulate or even destroy them at its uncontrolled will. As against it they have no contract, they have no vested rights.

People v. Morris, 13 Wend. 329; Darlington v. New York, supra; Demarest v. New York, 74 N. Y. 167; MacMullen v. Middletown, 187 N. Y. 44, 11 L.R.A.(N.S.) 391, 79 N. E. 863; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Mt. Pleasant v. Beckwith, 100 U. S. 514, 525, 25 L. ed. 699, 701; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Cooley, Const. Lim. 7th ed. 266–268.

What constitutes a contract in the case of a private corporation—its charter—is, as to a public corporation, a legislative command (Piqua Branch of State Bank v. Knoop, 16 How. 369, 380, 14 L. ed. 977, 981), subject to change at the legislative will, limited only by specific constitutional restriction.

Cooley, Const. Lim. 7th ed. pp. 266–269; 1 Dill. Mun. Corp. 5th ed. §§ 37–39; MacMullen v. Middletown, 187 N. Y. 42, 11 L.R.A.(N.S.) 391, 79 N. E. 863; Scott v. Saratoga Springs, 199 N. Y. 178, 92 N. E. 393; Murphy v. Ft. Edward, 213 N. Y. 400, 107 N. E. 716, 9 N. C. C. A. 279; Detroit v. Osborne, 135 U. S. 492, 499, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; Barnes v. District of Columbia, 91 U. S. 540, 544, 23 L. ed. 440, 441; Ryan v. New York, 177 N. Y. 273, 69 N. E. 599; Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Demarest v. New York, 74 N. Y. 166; Darlington v. New York, 31 N. Y. 194, 88 Am. Dec. 248; People v. Pinckney, 32 N. Y. 377.

A municipality may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature; but, concededly, these are difficult to define.

Cooley, Const. Lim. 7th ed. p. 342; Dill. Mun. Corp. 5th ed. § 111; Hunter v. Pittsburgh, 207 U. S. 161, 180, 181, 52 L. ed. 151, 160, 28 Sup. Ct. Rep. 40. See State ex rel. Bulkeley v. Williams, 48 L.R.A. 465, note.

It may be assumed that there are or may be in municipalities certain vested rights of property in respect to private property which are not completely under the uncontrolled will of the legislature, and which will be protected from confiscatory action on the part of the legislature, and which it might not have power to wholly divert to any use it saw fit, and particularly where vested interests of third parties would be affected.

Cooley Const. Lim. 7th ed. pp. 342, 390–392, et seq.; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 551, 49 L. ed. 591, 596, 25 Sup. Ct. Rep. 327; Tippecanoe County v. Lucas, 93 U. S. 108, 114, 115, 23 L. ed. 822, 824, 825; Webb v. New York, 64 How. Pr. 10; People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; People v. Fields, 58 N. Y. 491; MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 161, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Dill. Mun. Corp. 5th ed. § 110.

Yet it would seem to be obvious that regulations of the use of property, and of the contractual powers of the city with respect thereto, when it is held for some public use, should be subject to legislative control and direction. Any other doctrine would be wholly illogical and inconsistent with the relations of a municipality to the state.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People ex rel. Williams Engineering Contracting Co. v. Metz, 193 N. Y. 161, 24 L.R.A.(N.S.) 201, 85 N. E. 1070.

The exaction of an obedience to the employment policy of the state in the performance of public municipal enterprises, undertaken by legislative sanction and authorization, by which the contractual rights of the municipality are to some extent controlled or diminished, would not constitute a taking or deprivation of the property of the municipality in a constitutional sense.

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 78, 59 L. ed. 1204, 1211, 35 Sup. Ct. Rep 678.

The right to contract may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes.

Williams v. Fears, 179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128; Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. ed. 832, 836, 17 Sup. Ct. Rep. 427; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

And by the statute here in question the state has declared its policy, and has enjoined upon its several agents and agencies the duty of executing this policy.

People ex rel. Rodgers v. Coler, 166 N. Y. 25, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599.

The legislature, which conferred the power of performance, may regulate the mode of performance, and conform it to the policy of the state.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 159, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Dill. Mun. Corp. 5th ed. § 116, pp. 200, 201.

The courts of New York have asserted the broadest measure of legislative control over municipal corporations and their property.

1 Dill. Mun. Corp. 5th ed. p. 184, note 1; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; People v. Kerr, 27 N. Y. 213.

The restrictions on the legislature are only such as are expressly imposed.

MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 391; People ex rel. Devery v. Coler, 173 N. Y. 103, 65 N. E. 956; People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 433, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; People ex rel. Simon v. Bradley, 207 N. Y. 611, 101 N. E. 766.

The supreme court of Connecticut also takes the emphatic view that no inherent right of local self-government exists, and that the power of the legislature over municipalities is only limited by express constitutional restriction. It may be compelled to spend its money for local improvements without violating the 14th Amendment.

State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421, affirmed as Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617.

The legislature has the power to disregard, if it sees fit, local subdivisions, and to ignore the municipality to the extent of creating new districts within it, and of appointing state officials in those districts for the performance of functions which the municipality ordinarily performs. In other words, there is no such thing under the general provisions of the Federal or state Constitutions as the inherent right of local self-government.

People ex rel. Wood v. Draper, 15 N. Y. 532; People v. Pinckney, 32 N. Y. 377; Astor v. New York, 62 N. Y. 567; People ex rel. v. State Tax Comrs. 174 N. Y. 444, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; Dill. Mun. Corp. 5th ed. § 101, p. 170.

No one would deny that the laying out and improvement of streets for public travel is a public work and a function of government; yet a city may be liable for negligence in failing to repair them and keep them safe for travel (Turner v. Newburgh, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; Quill v. New York, 36 App. Div. 476, 478, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440) unless the legislature otherwise provides.

MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863.

The cases are innumerable which exemplify the plenary power of the legislature over municipal corporations, even in matters which are not of a strictly sovereign nature. They illustrate the practically unlimited control which the legislature may exercise over the contractual and property rights of municipalities in matters even of a local character which are affected with a public interest—the word "public" being

used in the broadest and most inclusive sense. They show that a municipality may be compelled to spend its money in connection with matters which are in no sense sovereign in their nature, and that, in all its powers and functions and duties, it is subject to the will of the state, which created it, expressed through the medium of legislative enactments. In their relations to the state, in all matters of a "public" nature, they have no contractual rights independent of the will of the legislature.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Hunter v. Pittsburgh, 207 U. S. 171, 178, 52 L. ed. 156, 159, 28 Sup. Ct. Rep. 40; Williams v. Eggleston, 170 U. S. 304, 310, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617, affirming State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421; Barnett v. Denison, 145 U. S. 135, 139, 36 L. ed. 652, 653, 12 Sup. Ct. Rep. 819; Hill v. Memphis, 134 U. S. 198, 203, 33 L. ed. 887, 889, 10 Sup. Ct. Rep. 562; Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 8, 33 L. ed. 231, 234, 10 Sup. Ct. Rep. 19; Meriwether v. Garrett, 102 U. S. 472, 513, 26 L. ed. 197, 204; Mt. Pleasant v. Beckwith, 100 U. S. 514, 524, 25 L. ed. 699, 701; Laramie County v. Albany County, 92 U. S. 307, 23 L. ed. 552; Barnes v. District of Columbia, 91 U. S. 540, 544, 23 L. ed. 440, 441; United States v. Baltimore & O. R. Co. 17 Wall. 322, 329, 21 L. ed. 597, 600; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 161, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; Demarest v. New York, 74 N. Y. 166; People v. Ingersoll, 58 N. Y. 21, 17 Am. Rep. 178; People v. Pinckney, 32 N. Y. 393; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; People v. Morris, 13 Wend. 329; See State ex rel. Bulkeley v. Williams, 48 L.R.A. 465, note; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522; People ex rel. McLean v. Flagg, 46 N. Y. 401; Brewster v. Syracuse, 19 N. Y. 116; New York v. Tenth Nat. Bk. 111 N. Y. 446, 18 N. E. 618; Guilford v. Chenango County, 13 N. Y. 143; Syracuse v. Hubbard, 64 App. Div. 587, 72 N. Y. Supp. 802; New Orleans v. Clark (Jefferson City Gaslight Co. v. Clark) 95 U. S. 644, 654, 24 L. ed. 521, 522; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 536, 43 L. ed. 796, 799, 19 Sup. Ct. Rep. 513; Brown v. New York, 63 N. Y. 239; New York v. Fulton Market Fishmongers' Asso. 3 How. Pr. N. S. 500; Re Union Ferry Co. 98 N. Y. 139; Tocci v. New York, 73 Hun, 46, 25 N. Y. Supp. 1089; People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766; Perkins v. Slack, 86 Pa. 270; Potter v. Collis, 19 App. Div. 392, 46 N. Y. Supp. 471, affirmed in 156 N. Y. 16, 50 N. E. 413; Higginson v. The Treasurer (Higginson v. Slattery) 212 Mass. 583, 42 L.R.A.(N.S.) 215, 99 N. E. 523; Re Kingman, 153 Mass. 566, 12 L.R.A. 417, 27 N. E. 778; Re Protestant Episcopal Public School, 46 N. Y. 178; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; Hudson County Water Co. v. McCarter, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Re Adams, 165 Mass. 497, 43 N. E. 682; Prince v. Crocker, 166 Mass. 359, 32 L.R.A. 610, 44 N. E. 446; Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650; Payne v. Treadwell, 16 Cal. 221; Jones v. Lake View, 151 Ill. 663, 38 N. E. 688; Frederick v. Groshon, 30 Md. 436, 96 Am. Dec. 591; Groff v. Frederick City, 44 Md. 67; State Bank v. Madison, 3 Ind. 43; Paterson v. Society for Establishing Useful Manufactures, 24 N. J. L. 385; State ex rel. Cleveland v. Board of Finance & Taxn. 38 N. J. L. 259; Re Dalton, 61 Kan. 257, 47 L.R.A. 380, 59 Pac. 336; Rogers v. Burlington, 3 Wall. 654, 663, 18 L. ed. 79, 82; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 550, 552, 49 L. ed. 591, 595, 596, 25 Sup. Ct. Rep. 327; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 94, 57 L. ed. 1400, 1407, 33 Sup. Ct. Rep. 997; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967.

An uncompensated obedience to legitimate regulations established by the state in carrying out its public policy would not constitute an unconstitutional deprivation of property.

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 78, 59 L. ed. 1204, 1211, 35 Sup. Ct. Rep. 678; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 597, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341.

Whether we call the construction of public works and the operation of public utilities "governmental" or "proprietary," "nongovernmental" or "quasi private," the fact remains that such works are, in every real sense of the word, public undertakings, and, to use the words of the court of appeals, "in all of the public undertakings, the state is the proprietor."

Ryan v. New York, 177 N. Y. 273, 69 N. E. 599; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Astor v. New York, 62 N. Y. 589.

The statute does not contravene the pro-

vision of the Federal Constitution prohibiting the passage by the states of *ex post facto* laws, or laws impairing the obligation of contracts.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 54, 59 L. ed. 127, 128, 35 Sup. Ct. Rep. 21; Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 624, 58 L. ed. 1503, 1505, 34 Sup. Ct. Rep. 941; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 Sup. Ct. Rep. 582; Malloy v. South Carolina, 237 U. S. 180, 183, 184, 59 L. ed. 905–907, 35 Sup. Ct. Rep. 507; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 68, 69, 54 L. ed. 930, 935, 30 Sup. Ct. Rep. 663; People v. West, 106 N. Y. 296, 60 Am. Rep. 452, 12 N. E. 610.

Statutes will be construed to be prospective only (Calder v. Bull, 3 Dall, 386, 391, 1 L. ed. 648, 650; Waugh v. University of Mississippi, 237 U. S. 589, 595, 59 L. ed. 1131, 1136, 35 Sup. Ct. Rep. 720), unless a contrary intent is unavoidable from the language used; and if a statute is susceptible of two constructions, one of which would render it unconstitutional and the other valid, that which upholds it will be adopted.

St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 369, 59 L. ed. 265, 274, 35 Sup. Ct. Rep. 99; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 546, 58 L. ed. 713, 720, 34 Sup. Ct. Rep. 359; People ex rel. Simon v. Bradley, 207 N. Y. 610, 101 N. E. 766.

One who questions the validity of a law must show that its alleged unconstitutional feature injures him, or, at least, the class to which he belongs.

Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, 545, 58 L. ed. 713, 719, 720, 34 Sup. Ct. Rep. 359; Rosenthal v. New York, 226 U. S. 260, 271, 57 L. ed. 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 54, 59 L. ed. 1192, 1197, 35 Sup. Ct. Rep. 671.

The statute is not in conflict with existing treaties.

Geofroy v. Riggs, 133 U. S. 258, 266, 33 L. ed. 642, 644, 10 Sup. Ct. Rep. 295; United States v. Choctaw Nation, 179 U. S. 494, 533, 45 L. ed. 291, 306, 21 Sup. Ct. Rep. 149; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928, affirmed in 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

Mr. Justice McKenna delivered the opinion of the court:

This case was argued and submitted with No. 386, just decided [239 U. S. 175, ante, 206, 36 Sup. Ct. Rep. 78]. It involves the criminal feature of § 14 of the labor law of the state, which was the subject of the opinion in No. 386. It provided that a violation of the section should constitute a misdemeanor and be punished by fine or imprisonment, or by both.

The case was commenced by information which accused Crane, plaintiff in error, while engaged as a contractor with the city in the construction of a public work of such city, by virtue of a contract entered into with the city, of having employed three persons not then citizens of the United States.

The public work was the construction of catch or sewer basins.

The defense was the unconstitutionality of the law, and that it was in violation of the treaties of the United States with foreign countries.

The treaties were put in evidence over the objection of the prosecuting officer, and a motion was made to dismiss the information on the grounds above stated. The motion was denied, and plaintiff in error found guilty and sentenced to pay a fine of $50, or, in default thereof, to be committed to the city prison for the term of ten days.

[198] The case was then appealed to the appellate division of the supreme court, and there heard with Heim v. McCall (No. 386 [239 U. S. 175, ante, 206, 36 Sup. Ct. Rep. 78]).

The judgment was reversed. This action was not sustained by the court of appeals. In that court and in the appellate division the cases were heard together and decided by the same opinions, they being rendered in the present case and the judgment of the trial court (special term) affirmed.

It appeared from the testimony that one of the laborers employed was a subject of the King of Italy (the nationality of the others was not shown), and a treaty between the United States and that country, signed February 25, 1913 [38 Stat. at L. 1669], was received in evidence over the objection of the district attorney on the ground that "none of the parties to the proceeding is a subject of the King of Italy." Treaties with other countries were also received in evidence. To them the district attorney objected on the ground that none of the parties to the proceedings and "nobody who was connected in any way with the subject-matter of the contract or employed in the performance of the work" was "a subject or citizen of any of the countries referred to."

The provisions of the treaty with Italy are set out in the opinion in the Heim Case, and the provisions of the other treaties are

not, so far as their application is concerned, materially different.

The contentions of plaintiff in error are based on the treaties and on the 14th Amendment of the Constitution of the United States. The specifications of error are the same, though varying in expression, as those in the Heim Case, and there considered and declared untenable. There is added the view that a distinction made between aliens and citizens violates the principle of classification. We think this view is also without foundation.

Judgment affirmed.

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[199] ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
GENERAL BURNETTE.

(See S. C. Reporter's ed. 199-201.)

Master and servant — employers' liability act — time for suit — limitation or condition — necessity of pleading.

An action in a state court founded upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), must fail where the record shows that it was not begun until the time had elapsed after which, under § 6 of that act, "no action shall be maintained," although defendant did not raise the objection in his pleading.

[For other cases, see Master and Servant, II.; Pleading, III. g, in Digest Sup. Ct. 1908.]

[No. 66.]

Argued November 9, 1915. Decided November 29, 1915.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which reversed a judgment of the Superior Court of Edgecombe County, in that state, in favor of defendant in an action under the Federal employers' liability act. Reversed.

See same case below, 163 N. C. 186, 79 S. E. 414.

The facts are stated in the opinion.

Mr. Frederic D. McKenney argued the cause, and, with Messrs. F. S. Spruill and John Spalding Flannery, filed a brief for plaintiff in error.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff (defendant in error) was a fireman employed by the defendant. On October 5, 1907, he was injured by its negligence while working upon a train running from South Carolina to North Carolina. He brought this [200] action on January 7, 1910, and judgment was ordered for a certain sum by the supreme court of the state. 163 N. C. 186, 79 S. E. 414. The supreme court assumed that the case was governed by the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657. Two errors are assigned. First, in holding that statute applicable to the cause of action, and second, in allowing a recovery under it in an action begun more than two years after the cause of action accrued. Id. § 6. The case was not argued in this court on behalf of the defendant in error, but we gather from the record in the opinion that while, at the trial, the railroad, upon issues not before us, insisted that the Federal statute was not applicable, the contrary was admitted before the supreme court; so that, although the admission seems to have been made with the second question only in view, the first point would appear not to have been drawn to the attention of either court, and there was no discussion of how the case would stand apart from the act. The second objection was met by deciding that the limitation of two years imposed by § 6 could not be relied upon for want of a plea setting it up.

It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. A right may be waived or lost by a failure to assert it at the proper time (Burnet v. Desmornes, 226 U. S. 145, 57 L. ed. 159, 33 Sup. Ct. Rep. 63); but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme. The record shows a case to which the act of 1908 did not apply (Winfree v. Northern P. R. Co. 227 U. S. 296, 57 L. ed. 518, 33 Sup. Ct. Rep. 273), and which the earlier act of 1906 [34 Stat. at L. 232, chap. 3073] probably could not affect (Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 489, 52 L. ed. 297, 305, 28 Sup. Ct. Rep. 141. It also shows that the action was brought too late, and that the defendant insisted upon that point, although it had not plead-

NOTE.—On the constitutionality, application, and effect of Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On the necessity of pleading limitation as bar to statutory action for death—see note to Martin v. Pittsburgh R. Co. 26 L.R.A. (N.S.) 1221.

As to necessity for alleging that action for death is within statutory period—see note to Sharrow v. Inland Lines, L.R.A. 1915E, 1192.

ed what was apparent on the allegations of the declaration and the admissions of the answer.

[201] In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865. But, irrespective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. Davis v. Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692; The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. A. J. Phillips Co. v. Grand Trunk Western R. Co. 236 U. S. 662, 667, 59 L. ed. 774, 776, 35 Sup. Ct. Rep. 444. At all events, the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source. Winfree v. Northern P. R. Co. 227 U. S. 296, 302, 57 L. ed. 518, 520, 33 Sup. Ct. Rep. 273. If it be available in a state court to found a right, and the record shows a lapse of time after which the act says that no action shall be maintained, the action must fail in the courts of a state as in those of the United States.

The ground that we have stated is sufficient for the reversal of the judgment so far as it proceeds upon the act of 1908, and therefore we are relieved from the necessity of deciding whether the record is in such shape that the even more fundamental objection to the application of the act cannot be considered by this court.

Judgment reversed.

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[202] NEW ORLEANS-BELIZE ROYAL MAIL & CENTRAL AMERICAN STEAMSHIP COMPANY, Limited, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 202-207.)

Shipping — United States as charterer — demise or contract for service.

1. The United States did not become the owner pro hac vice of a vessel chartered for military service so as to affect the extent of the government's liability for injuries to the vessel and for demurrage due to repairs, where the charter party, although it recites that the owner "does hereby grant and let" and that the government "does hereby take" the vessel, and fixes the price at which the United States may purchase the vessel, and refers to the vessel being "returned," and contemplates that the need of repairs may be attributable to the fault of the government, and gives the government control over the destination, also requires the owner to furnish the master and crew, and to deliver the cargo in good condition, dangers of the sea, etc., excepted, and to assume the marine risk.

[For other cases, see Shipping, IV. a, 3, in Digest Sup. Ct. 1908.]

Shipping — United States as charterer — marine risk.

2. The United States cannot be held liable under the provisions of a charter party for not returning a chartered vessel in the same order as received, and for demurrage due to repairs attributable to its fault, where the damage was due proximately to marine risks which the owner assumed.

[For other cases, see Shipping, IV. a, 3, in Digest Sup. Ct. 1908.]

Claims — jurisdiction — contract or tort.

3. The United States is not suable in the court of claims upon a claim for injuries to a vessel chartered by it for military purposes, which were received while the vessel was performing services outside the contract, under the compulsion of officers of the government.

[For other cases, see Claims, 105-108, 128-131, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued November 11, 1915. Decided November 29, 1915.

APPEAL from the Court of Claims to review a judgment which rejected a claim for injuries to a vessel chartered for military purposes, and for demurrage while undergoing repairs. Affirmed.

The facts are stated in the opinion.

Mr. A. R. Serven argued the cause and filed a brief for appellant:

Does the charter party constitute a demise of the vessel, or is it a mere contract of affreightment?

United States v. Shea, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519; Belcher v. Capper, 11 L. J. C. P. N. S. 275, 4 Mann. & G. 502, 5 Scott, N. R. 257; Raymond v. Tyson, 17 How. 53, 59, 15 L. ed. 47, 48; American Steel-Barge Co. v. Cargo of Coal, 107 Fed. 967; New Bedford & N. Y. Steam Propeller Co. v. United States, 14 Wall. 670, 20 L. ed. 760; The Aberfoyle, Abb. Adm. 255, Fed. Cas. No. 16; Clarkson v. Edes, 4 Cow. 470; Donahoe v. Kettell,

1 Cliff. 135, Fed. Cas. No. 3,980; Drinkwater v. The Spartan, 1 Ware, 149, Fed. Cas. No. 4,085; Gracie v. Palmer, 8 Wheat. 605, 5 L. ed. 696; Holmes v. Pavenstedt, 5 Sandf. 100; Trinity House v. Clark, 4 Maule & S. 288; Perkins v. Hill, 2 Woodb. & M. 158, Fed. Cas. No. 10,987; Pickman v. Woods, 6 Pick. 254; Reed v. United States, 11 Wall. 591, 20 L. ed. 220; Sandeman v. Scurr, L. R. 2 Q. B. 86, 8 Best & S. 50, 36 L. J. Q. B. N. S. 58, 15 L. T. N. S. 608, 15 Week. Rep. 277; Taggard v. Loring, 16 Mass. 336, 8 Am. Dec. 140; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Webb v. Peirce, 1 Curt. C. C. 104, Fed. Cas. No. 17,320.

The wrongful acts of the officers and agents of the United States of the kind committed in this case, which caused damage to the Stillwater, are exactly the kind for which the United States is liable.

Donald v. United States, 39 Ct. Cl. 357.

Is the appellee liable because of its contractual obligations, regardless of the question of demise?

Talbot's Case, 7 Ct. Cl. 420; The Aleppo, 7 Ben. 128, Fed. Cas. No. 158; Alsager v. St. Catherine's Dock Co. 14 Mees. & W. 794, 15 L. J. Exch. N. S. 34; State, Anderson, Prosecutor, v. Camden, 52 N. J. L. 289, 19 Atl. 539; The Apollon, 9 Wheat. 362, 6 L. ed. 111; Baltzer v. Raleigh & A. Air Line R. Co. 115 U. S. 634, 29 L. ed. 505, 6 Sup. Ct. Rep. 216; Bell v. Bruen, 1 How. 169, 11 L. ed. 89; The Bird of Paradise, 5 Wall. 553, 18 L. ed. 664; Blanchard v. Ely, 21 Wend. 342, 34 Am. Dec. 250; Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Campion v. Colvin, 3 Bing. N. C. 17, 3 Scott, 338, 2 Hodges, 116, 5 L. J. C. P. N. S. 317; The Binghamton Bridge, 3 Wall. 51, 18 L. ed. 137; Clark v. Massachusetts F. & M. Ins. Co. 2 Pick. 108, 13 Am. Dec. 400; Clark v. United States, 9 Ct. Cl. 387; The Conqueror, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; Donnell v. Amoskeag Mfg. Co. 55 C. C. A. 178, 118 Fed. 10; Forbes v. United States, 10 Ct. Cl. 248; Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; Hawgood v. 1,310 Tons of Coal, 21 Fed. 681; Hunter v. Northern M. Ins. Co. L. R. 13 App. Cas. 717; The Kimball (Duncan v. Kimball) 3 Wall. 43, 18 L. ed. 50; The Mayflower, Brown, Adm. 380, Fed. Cas. No. 9,345; Mott v. United States, 9 Ct. Cl. 257; The M. S. Bacon v. Erie & W. Transp. Co. 3 Fed. 344; Northwestern Mut. L. Ins. Co. v. Gridley, 100 U. S. 614, 25 L. ed. 746; Owen v. 49,774 Bushels of Rye, 54 Fed. 185; Reybold v. United States, 5 Ct. Cl. 284; The Rhode Island, 2 Blatchf. 114, Fed. Cas. No. 11,744; Richardson v. Winsor, 3 Cliff. 402, Fed. Cas. No. 11,795; Ruggles v. Bucknor, 1 Paine, 358, Fed. Cas. No. 12,115; Sailing-Ship Garston Co. v. Hickie, L. R. 15 Q. B. Div. 580, 53 L. T. N. S. 795, 5 Asp. Mar. L. Cas. 499; Schultz v. United States, 3 Ct. Cl. 56; The Stromlees, 1 Low. Dec. 153, Fed. Cas. No. 13,540; Thames & M. M. Ins. Co. v. Hamilton, L. R. 12 App. Cas. 484, 56 L. J. Q. B. N. S. 626, 57 L. T. N. S. 695, 36 Week. Rep. 337, 6 Asp. Mar. L. Cas. 200; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; United States v. Bevans, 3 Wheat. 336, 4 L. ed. 404; Williamson v. Barrett, 13 How. 101, 14 L. ed. 68.

Assistant Attorney General **Thompson** argued the cause, and, with Mr. William Hitz, filed a brief for appellee:

The charter party was a contract for service, and not a demise.

Reed v. United States, 11 Wall. 600, 601, 20 L. ed. 220; Leary v. United States, 14 Wall. 611, 20 L. ed. 756; Shaw v. United States, 93 U. S. 240, 23 L. ed. 881; Reybold v. United States, 5 Ct. Cl. 284, 15 Wall. 202, 21 L. ed. 57; Donald v. United States, 39 Ct. Cl. 374; Morgan v. United States, 14 Wall. 531, 20 L. ed. 738; Hooe v. Groverman, 1 Cranch, 214, 2 L. ed. 86.

The government should not respond in damages, because the acts complained of fall within the terms of the marine risk assumed by appellant under the contract, or are tortious acts upon the part of government officials.

Gibbons v. United States, 8 Wall. 269, 19 L. ed. 453; Reed v. United States, 11 Wall. 591, 20 L. ed. 220; Morgan v. United States, 14 Wall. 531, 20 L. ed. 738; Schillinger v. United States, 155 U. S. 167, 39 L. ed. 110, 15 Sup. Ct. Rep. 85; United States v. Kimbal, 13 Wall. 636, 20 L. ed. 503; Reybold v. United States, 15 Wall. 202, 21 L. ed. 57.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a claim for injuries to the steamship Stillwater while under charter to the United States from May 16, 1898, to November 3, 1898, and for demurrage from November 2 to December 14, 1898, while the vessel was undergoing repairs. It was rejected by the court of claims on the authority of Plant Invest. Co. v. United States, 45 Ct. Cl. 374.

The injuries were caused as follows: First, in June, 1898, there was a collision with another steamship in Tampa bay, it does not appear by whose fault. Three weeks later the Stillwater was driven

against the rocks while unloading horses in Daiquiri bay, Cuba, during a gale, with other incidental damage. On July 27, in Gauanica Bay, Porto Rico, there was another collision with a steamer. On August 3, in obedience to orders against which the captain protested, the Stillwater assisted in lightering the United States auxiliary cruiser St. Paul, at Arroyo, Porto Rico, and while lying alongside the St. Paul, in rough water, was damaged by the after-gun sponson of the St. Paul being thrown down upon it. On August 4, in obedience to orders from the naval lieutenant in charge, against the protest of the captain, the Stillwater was made fast to the Massachusetts, then on the rocks at Ponce, Porto Rico, and attempted to pull it off. The weather was rough, and in consequence of rolling against the Massachusetts and otherwise the Stillwater was damaged and strained. On August 26, in obedience to orders and against the protest of the captain, the Stillwater was placed alongside the Obdam, in the harbor of Ponce, for the transfer of commissary stores from the latter to her. The ships both rolled and the Stillwater [204] thumped heavily, and was badly injured. On September 3, at Ponce, the Spanish steamship Vasco ran into the Stillwater in the nighttime, doing some damage, and finally, about three weeks later, the Stillwater went aground on a sand bar and a hole afterwards was found in her bottom. The bill for the repairing of the Stillwater was rendered in a lump sum, showing only the cost as a whole.

By the charter party made on May 12, 1908, art. I., the claimant "does hereby grant and let" and a quartermaster of the Army "does hereby take" the vessel for the voyages specified, "and for such longer time as she may be required in the military service of the United States, not to extend beyond" June 30, 1808, unless the charter shall be renewed. II. "The said vessel shall, on the 16th day of May, eighteen hundred and ninety-eight, be ready to load and receive on board at New Orleans, Louisiana, or elsewhere, whenever tendered alongside, by the quartermaster, United States Army, or his agent, only such troops, persons, animals, and supplies or cargo as he shall order and direct, and as the said vessel can conveniently stow and carry," reserving room for the vessel's cables and materials, for officers and crew, and for the necessary coal; and when so laden is to deliver the cargo at such port as the Quartermaster's Department may direct, "in good order and condition (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted)." IV. "The said vessel now is and shall be kept and maintained while in the service of the United States, tight, stanch, strong, and well and sufficiently manned, victualed, tackled, appareled, and ballasted, and furnished in every respect fit for merchant or transport service, at the cost and charge of her owner. The time lost in consequence of any deficiency in these respects, and in making repairs to said vessel not attributable to the fault of the United States or [205] its agents, is not to be paid for by the United States." V. All port charges and pilotage after leaving New Orleans will be paid by the United States, but not the wages of any person employed by the claimant continuously on the vessel as pilot. VI. "The war risk shall be borne by the United States; the marine risk by the owner." VII. The United States is to furnish fuel "until the said vessel is returned to the said company at New Orleans, Louisiana, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in port, bursting of boilers and breakage of machinery excepted." VIII. All water is to be furnished by the government, and all cargo loaded and unloaded at its expense. X. The vessel is valued at $125,000, and if retained in the service of the United States so long that the money paid under the charter (less the cost of running and keeping in repair and a net profit of 33 per cent on the appraised value) is equal to the appraised value, the vessel is to become the property of the United States without further payment except what then may be due for services under the charter. XI. The United States also, during the charter, may purchase the vessel at its appraised value, with a similar clause for deductions. In XIII. and XIV. there are provisions for renewal and against a transfer of the contract or any interest therein by the claimant. These, we believe, are all the portions of the charter party material to the present case.

The main contest is upon the question whether by this contract the United States became owner pro hac vice, as affecting the extent of the liability assumed. The claimant relies upon the words "grant and let" on the one side and "take" on the other, the fixing of the price at which the United States may purchase the vessel, the reference to the vessel being "returned," the contemplation that the need of repairs may be attributable to the fault of the United States, the control of the United [206] States over the destination of the ship, and some details, as showing that the United States was in the place of the owner for the time. But we cannot accept this conclusion. The general owner furnished the crew and a

master who at least regarded himself as representing its interests, since he protested against commands that he received. It agreed to deliver the cargo in good condition, dangers of the sea, etc., excepted. It assumed the marine risk. We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Reybold v. United States, 15 Wall. 202, 21 L. ed. 57. We conclude that the possession followed the navigation and control. The case resembles Morgan v. United States, 14 Wall. 531, 20 L. ed. 738, not United States v. Shea, 152 U. S. 178, 38 L. ed. 403, 14 Sup. Ct. Rep. 519, as in the latter it was found that the vessel was under the exclusive management and control of the Quartermaster's Department. See further Hooe v. Groverman, 1 Cranch, 214, 237, 3 L. ed. 86, 93; Reed v. United States, 11 Wall. 591, 20 L. ed. 220.

The claimant contends, however, that if the ship was not demised, the United States is liable under articles IV. and VII. for not returning the ship in the same order as when received, and for demurrage due to repairs attributable, as it is contended these were, to the fault of the United States. The damage, however, for the most part, was due proximately to marine risks, which the claimant assumed. Morgan v. United States, 14 Wall. 531, 20 L. ed. 738. The demurrage accrued after November 2, the date on which it is found that the charter was ended. How much of it was due to damage from marine risks does not appear. The service in aid of the Massachusetts and others outside the contract, if any, imposed no liability upon the [207] United States. United States v. Kimbal, 13 Wall. 636, 20 L. ed. 503; Reybold v. United States, 15 Wall. 202, 21 L. ed. 57; Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; Harley v. United States, 198 U. S. 229, 234, 49 L. ed. 1029, 1030, 25 Sup. Ct. Rep. 634; Peabody v. United States, 231 U. S. 530, 539, 58 L. ed. 351, 353, 34 Sup. Ct. Rep. 159. We see no ground except the impression that this is a hard case to apply the principle of United States v. Russell, 13 Wall. 623, 20 L. ed. 474.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

PHILLIP WAGNER, Incorporated, Plff. in Err.,
v.
OSCAR LESER, A. B. Cunningham, and John Gill, Jr., Judges of the Appeal Tax Court of Baltimore City, and Jacob W. Hook, Tax Collector of Baltimore City.

(See S. C. Reporter's ed. 207-220.)

Constitutional law — due process of law — paving tax — benefits already accrued.

1. A special assessment levied under the authority of Md. Laws 1912, chap. 688, upon property benefited by improved paving, does not take property without due process of law, contrary to U. S. Const., 14th Amend., because the special benefits for which it was levied had long since accrued.
[For other cases, see Constitutional Law, 561-581, 993-1000, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — paving tax — use of fund.

2. The intention to use in paving other streets in the city the fund created by a special assessment levied under the authority of Md. Laws 1912, chap. 688, upon property benefited by improved paving, does not render the assessment obnoxious to the due process of law clause of U. S. Const., 14th Amend., so long as there was, as to the property so assessed, a benefit formerly conferred and still existing, which it had derived at the public expense.
[For other cases, see Constitutional Law, 561-581, in Digest Sup. Ct. 1908.]

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to tax or assessment for public improvements on highway—see note to Graham v. Detroit, 44 L.R.A.(N.S.) 836.

On notice and hearing required, generally, to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

On landowner's right to notice and hearing for assessment on a public improvement—see note to Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1201.

On necessity of special benefit to sustain assessments for local improvements—see note to Re Madera Irrig. Dist. Bonds, 14 L.R.A. 755.

As to whether an assessment of benefits may rest upon prospective action in completing improvement—see note to Kansas City v. St. Louis & S. F. R. Co. 28 L.R.A.(N.S.) 669.

On notice of proceedings after jurisdiction has attached as a condition of due process of law—see note to Griggs v. Hanson, 52 L.R.A.(N.S.) 1161.

Constitutional law — due process of law — paving tax — notice and hearing.

3. Notice and hearing as to the amount and extent of benefits conferred is not essential to the validity under the due process of law clause of U. S. Const., 14th Amend., of the provisions of Md. Laws 1912, chap. 688, directing that property adjoining or abutting on any public highway in the city of Baltimore, paved with improved paving, should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front.

[For other cases, see Constitutional Law, 745–763, in Digest Sup. Ct. 1908.]

[No. 28.]

Argued October 25 and 26, 1915. Decided November 29, 1915.

IN ERROR to the Court of Appeals of the State of Maryland to review a decree which reversed a decree of the Circuit Court of Baltimore City, overruling the demurrer to a bill to enjoin an assessment for a public improvement. Affirmed.

See same case below, 120 Md. 671, 87 Atl. 1040.

The facts are stated in the opinion.

Messrs. **George Washington Williams** and **Charles J. Bonaparte** argued the cause, and, with Mr. John Holt Richardson, filed a brief for plaintiff in error:

For the fundamental principles underlying special assessments, see Cooley, Const. Law, p. 36; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Ulman v. Baltimore, 72 Md. 592, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709; Norwood v. Baker, 172 U. S. 278, 43 L. ed. 447, 19 Sup. Ct. Rep. 187; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 423, 18 Am. Rep. 729; Thomas v. Gain, 35 Mich. 162, 24 Am. Rep. 535; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Dill. Mun. Corp. § 761.

To levy special assessments conformably to the Maryland statute would be to utterly disregard the fundamental principle underlying and authorizing special assessments.

Norwood v. Baker, 172 U. S. 278, 43 L. ed. 447, 19 Sup. Ct. Rep. 187; 25 Am. & Eng. Enc. Law, 1176; Bennett v. Seibert, 10 Ind. App. 380, 35 N. E. 35, 37 N. E. 1071; Spaulding v. Baxter, 25 Ind. App. 490, 58 N. E. 551; Galveston H. & S. A. R. Co. v. Green, — Tex. Civ. App. —, 35 S. W. 819; Holliday v. Atlanta, 96 Ga. 381, 23 S. E. 406; Kelly v. Luning, 76 Cal. 309, 18 Pac. 335; Bennett v. Emmetsburg, 138 Iowa, 67, 115 N. W. 588; Pease v. Chicago, 21 Ill. 500; Dorathy v. Chicago, 53 Ill. 79; Re Market Street, 49 Cal. 546; Alfred v. Dallas, — Tex. Civ. App. —, 35 S. W. 816; Cooley, Taxn. p. 1155.

The front-foot rule, when made applicable to the city as a whole, is arbitrary, inequitable, unjust, and oppressive.

White v. Gove, 183 Mass. 333, 67 N. E. 359; Ulman v. Baltimore, 72 Md. 594, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709; Clapp v. Hartford, 35 Conn. 66; Doughten v. Camden, 72 N. J. L. 451, 3 L.R.A.(N.S.) 817, 111 Am. St. Rep. 680, 63 Atl. 170, 5 Ann. Cas. 902.

The constitutional provision that no person shall be deprived of life, liberty, or property without due process of law extends to every governmental proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative, or executive.

8 Cyc. 1083; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Ulman v. Baltimore, 72 Md. 587, 11 L.R.A. 224, 20 Atl. 141, 21 Atl. 709; Clark v. Mitchell, 69 Mo. 627; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Cooley, Const. Lim. 505.

This provision was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 235–244, 4 L. ed. 559–561.

The words "by the law of the land," as used in the Constitution, do not mean a statute passed for the purpose of working the wrong.

Cooley, Const. Lim. p. 503.

A notice should have been given even though the apportionment was made by the legislature; certainly, in view of the oppressiveness and arbitrariness of the rule established by the legislature, and its unjust and unequal operation in this case, a notice should have been required, and in its absence the act should be held unconstitutional.

8 Cyc. 1108; 25 Am. & Eng. Enc. Law, 1173, 1174; Maryland Trust Co. v. Baltimore, 125 Md. 40, 93 Atl. 454.

If the property was to be specially assessed, the amount specially assessed, together with the amount to be raised by general taxation, should only equal the cost price of the improvement.

Maryland Trust Co. v. Baltimore, supra.

When the overplus beyond benefits from these local improvements is laid upon a few landowners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive act is not within the proper scope of the taxing power.

Norwood v. Baker, 172 U. S. 278, 43 L. ed. 447, 19 Sup. Ct. Rep. 187; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 415, 18 Am. Rep. 729.

Mr. S. S. Field argued the cause and filed a brief for defendants in error:

The whole subject of special assessments is dealt with in an exhaustive note to the case of Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1124.

The legislature has wide discretion in selecting and classifying the property to be made subject to a special tax.

1 Cooley, Taxn. 3d ed. pp. 76, 77; Daly v. Morgan, 69 Md. 462, 1 L.R.A. 757, 16 Atl. 287; Miller v. Wicomico County, 107 Md. 442, 69 Atl. 118; Joesting v. Baltimore, 97 Md. 589, 55 Atl. 456; Sams v. Fisher, 106 Md. 167, 66 Atl. 711; Frederick County v. Frederick, 88 Md. 654, 42 Atl. 218; Luman v. Hitchens Bros. Co. 90 Md. 25, 46 L.R.A. 393, 44 Atl. 1051; 1 Cooley, Taxn. 3d ed. 78; Gray, Limitations of Taxing Power, § 1440; Hagar v. Reclamation Dist. 111 U. S. 705, 28 L. ed. 571, 4 Sup. Ct. Rep. 663.

The legislature has a wide discretion as to the method of fixing the amount of the charge on each property.

Alexander v. Baltimore, 5 Gill, 384, 46 Am. Dec. 630; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 433, 434, 49 L. ed. 819-821, 25 Sup. Ct. Rep. 466; Hyattsville v. Smith, 105 Md. 318, 66 Atl. 44; Bassett v. Ocean City, 118 Md. 120, 84 Atl. 262; Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1127, note; Baltimore v. Johns Hopkins Hospital, 56 Md. 32; Spencer v. Merchant, 125 U. S. 353, 31 L. ed. 766, 8 Sup. Ct. Rep. 921.

When the act specifies the amount of the tax, it is a decision by the legislature that the property affected is benefited to the amount of the tax, and, in the absence of a clear showing that the tax is arbitrary or oppressive, the legislative decision is conclusive on the courts.

Parsons v. District of Columbia, 170 U. S. 52, 42 L. ed. 946, 18 Sup. Ct. Rep. 521; Schenley v. Allegheny, 25 Pa. 128; Smith v. Worcester, 182 Mass. 235, 59 L.R.A. 728, 65 N. E. 40; Spencer v. Merchant, 125 U. S. 353, 31 L. ed. 766, 8 Sup. Ct. Rep. 921; Baltimore v. Johns Hopkins Hospital, 56 Md. 28; Hyattsville v. Smith, 105 Md. 323, 66 Atl. 44; Baltimore v. Hanson, 61 Md. 464; People ex rel. Griffin v. Brooklyn, 4 N. Y. 442, 55 Am. Dec. 266, quoted and approved in 2 Cooley, Taxn. 1199-1201; Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1151, note; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 433, 444, 49 L. ed. 821, 822, 25 Sup. Ct. Rep. 466; Bassett v. Ocean City, 118 Md. 120, 84 Atl. 262.

Where the amount of the tax is left to be fixed by commissioners, notice and an opportunity to be heard must be given; but where the legislature itself fixes the amount of the tax, no notice is necessary.

Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 356, 31 L. ed. 767, 8 Sup. Ct. Rep. 921; Parsons v. District of Columbia, 170 U. S. 50-56, 42 L. ed. 945-948, 18 Sup. Ct. Rep. 521; Wight v. Davidson, 181 U. S. 380-383, 45 L. ed. 904-906, 21 Sup. Ct. Rep. 616; Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A.(N.S.) 1132, 118 N. W. 182.

The legislature may provide a comprehensive scheme of paving, and levy a specified tax per front foot on abutting property.

Gray, Limitations of Taxing Power, §§ 1889, 1892, 1893; Parsons v. District of Columbia, 170 U. S. 45, 52, 56, 57, 42 L. ed. 943, 946-948, 18 Sup. Ct. Rep. 521; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662; Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A. (N.S.) 1124, and note, 137 Wis. 7, 118 N. W. 182; Baltimore v. Johns Hopkins Hospital 56 Md. 33; Baltimore v. Stewart, 92 Md. 552, 48 Atl. 165; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 434, 49 L. ed. 821, 25 Sup. Ct. Rep. 466; Leominster v. Conant, 139 Mass. 384, 2 N. E. 690; Heavner v. Elkins, 231 U. S. 743, 58 L. ed. 463, 34 Sup. Ct. Rep. 318; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Bassett v. Ocean City, 118 Md. 123, 84 Atl. 262.

The legislature may incorporate into such general plan an improvement previously made, and levy the specified tax on the property abutting thereon.

Leominster v. Conant, 139 Mass. 384, 2 N. E. 690; Parsons v. District of Columbia, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 521.

The special tax or assessment may be levied after the improvement is made.

Gray, Limitations of Taxing Power, §§ 128, 1828 and cases in note 4, 2003; Hall v. Street Comrs. 177 Mass. 434, 59 N. E. 68; Warren v. Street Comrs. 187 Mass. 292, 72 N. E. 1022; Chester v. Pennell, 169 Pa. 390, 32 Atl. 408; Gorton v. Chicago, 201 Ill. 534, 66 N. E. 541; Spencer v. Merchant, 125 U. S. 346, 31 L. ed. 764, 8 Sup. Ct. Rep. 921; Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44; Hamilton, Special Assessments, § 823; Baltimore v. Ulman, 79 Md. 482, 30 Atl. 43, affirmed in

165 U. S. 719, 41 L. ed. 1184, 17 Sup. Ct. Rep. 1001.

The special tax or assessment may be levied though the property has changed hands since the improvement.

Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A.(N.S.) 1169, 118 N. W. 182; Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44; Spencer v. Merchant, 125 U. S. 346, 31 L. ed. 764, 8 Sup. Ct. Rep. 921; 1 Cooley, Taxn. 3d ed. 527, note 1; Tallman v. Janesville, 17 Wis. 76; Leominster v. Conant, 139 Mass. 384, 2 Atl. 690; Parsons v. District of Columbia, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 521; Chester v. Pennell, 169 Pa. 300, 32 Atl. 408; Butler v. Toledo, 5 Ohio St. 231.

That the act may result in some inequalities does not affect its validity. Approximate equality is all that is attainable.

Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A.(N.S.) 1128, 118 N. W. 182; Hagar v. Reclamation Dist. 111 U. S. 705, 28 L. ed. 571, 4 Sup. Ct. Rep. 663; People ex rel. Scott v. Pitt, 169 N. Y. 528, 58 L.R.A. 372, 62 N. E. 662; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 433, 444, 49 L. ed. 821, 822, 25 Sup. Ct. Rep. 466.

The legislature has full power to levy a tax directly without any assessing agency.

Baltimore v. State, 105 Md. 7, 65 Atl. 369, 11 Ann. Cas. 716; Faust v. Twenty-Third German American Bldg. Asso. 84 Md. 192, 35 Atl. 890.

Except as limited by the Constitution, the power of the legislature to tax is absolute.

Faust v. Twenty-Third German American Bldg. Asso. supra; Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A. (N.S.) 1127, 118 N. W. 182; Alexander v. Baltimore, 5 Gill, 384, 46 Am. Dec. 630; Hyattsville v. Smith, 105 Md. 323, 66 Atl. 44.

The statute is presumed to be valid and cannot be declared void unless it violates some provision of the Constitution,—every reasonable doubt is to be resolved in its favor.

Cooley, Const. Lim. 7th ed. pp. 236, 237, 253; Ogden v. Saunders, 12 Wheat. 269, 6 L. ed. 625; Sharpless v. Philadelphia, 21 Pa. 162, 59 Am. Dec. 759.

Levying a tax on property is not a taking of property.

Wight v. Davidson, 181 U. S. 385, 45 L. ed. 906, 21 Sup. Ct. Rep. 616; French v. Barber Asphalt Paving Co. 181 U. S. 324, 337-345, 45 L. ed. 879, 887-890, 21 Sup. Ct. Rep. 625; Gray, Limitations of Taxing Power, § 1963; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Chicago, M. & St. P. R. Co. v. Janesville, 137 Wis. 7, 28 L.R.A.(N.S.) 1145, 118 N. W. 182; Chadwick v. Kelley, 187 U. S. 543, 544, 47 L. ed. 294, 295, 23 Sup. Ct. Rep. 175.

The present tax is justified, just as in the Ulman Case, not only because the city has spent money in the past on the street on which the taxpayer's property abuts, but it is also justified on the ground that the benefit is there now, a continuing one. The improved pavement is there, and the city is bound to maintain it as an improved pavement. The city could not, if it desired, take up the improved pavement and put down cobblestones.

4 Dill. Mun. Corp. 5th ed. 1710; 25 Am. & Eng. Enc. Law, 2d ed. 1179.

The Maryland statute is supported by ample precedent and authority.

Baltimore v. Johns Hopkins Hospital, 56 Md. 33; Baltimore v. Stewart, 92 Md. 552, 48 Atl. 165; Leominster v. Conant, 139 Mass. 386, 2 N. E. 690; Gray, Limitations of Taxing Power, §§ 1889–1893; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662.

The authorities lay down the proposition broadly that a tax may be based upon a past consideration; that a local tax or assessment may be levied for an improvement previously made and paid for; without making any distinction as to whether or not a previous abortive attempt to tax had been made.

Seattle v. Kelleher, 195 U. S. 359, 49 L. ed. 235, 25 Sup. Ct. Rep. 44; Hamilton, Special Assessments, § 823; Leominster v. Conant, 139 Mass. 386, 2 N. E. 690; 1 Cooley, Taxn. 492; Gray, Limitations of Taxing Power, §§ 1035, 2003; 1 Page & J. Assessments, §§ 407, 416; State, Jelliff, Prosecutor, v. Newark, 48 N. J. L. 102, 2 Atl. 627; Hamilton, Special Assessments, § 823; Re Assessment of Lands, 60 N. Y. 398; Ricketts v. Hyde Park, 85 Ill. 110; Howell v. Buffalo, 37 N. Y. 274; Re Van Antwerp, 56 N. Y. 266; Hall v. Street Comrs. 177 Mass. 439, 59 N. E. 68.

The legislature may levy a special tax on account of an improvement previously made and paid for out of a loan or the general levy.

State, Jelliff, Prosecutor, v. Newark, 48 N. J. L. 101, 2 Atl. 627; Re O'Mara, 194 Pa. 86, 45 Atl. 127; Prince v. Boston, 111 Mass. 231; Davis v. Newark, 54 N. J. L. 146, 23 Atl. 276; Re Roberts, 81 N. Y. 62.

The legislature can adopt and sanction an improvement or an expenditure which it could previously authorize. It may authorize an assessment for an improvement,

either before or after the improvement is made, as, in its judgment, is deemed best.

Re Sackett, D. & DeG. Streets, 74 N. Y. 106; Butler v. Toledo, 5 Ohio St. 225; Zahn v. Rutherford, 72 N. J. L. 446, 60 Atl. 1123; Alcorn v. Hamer, 38 Miss. 653; Cleveland v. Tripp, 13 R. I. 50.

A distinction exists between the power of the legislature and the power of the city.

Hyattsville v. Smith, 105 Md. 325, 66 Atl. 44; Parsons v. District of Columbia, 170 U. S. 51, 52, 42 L. ed. 946, 18 Sup. Ct. Rep. 521.

It may be that property once assessed for a part of the cost of a street paving could not again be taxed for the same improvement; that it might be considered two successive taxes for one benefit, and therefore double taxation. But where the property has never paid anything (except the general taxes paid by other property not so benefited), the special tax is not a double tax.

25 Am. & Eng. Enc. Law, 2d ed. 1174, 1175.

If the property abutting on a vitrified brick pavement has only paid the general tax rate imposed on all property, it has not contributed anything more to the cost of the pavement upon which it abuts than property abutting upon cobblestone streets; it has simply paid the same as other property, not enjoying such special benefit, to the general fund for the support of the government, and has paid nothing for the special benefit. The fact that it helps to pay in the general levy the interest and sinking fund on the loan furnishes no ground for the objection to a special assessment.

1 Page & J. Assessments, § 416.

Two successive taxes for one benefit are not illegal.

4 Dill. Mun. Corp. 5th ed. § 1469; Butler v. Toledo, 5 Ohio St. 231; Earl v. Board of Improvement, 70 Ark. 211, 67 S. W. 312.

Wherever the legislature commits the assessment or apportionment to a commission or subordinate body, notice or an opportunity to be heard is necessary where the legislature directly levies the tax.

Spencer v. Merchant, 125 U. S. 348, 31 L. ed. 764, 8 Sup. Ct. Rep. 921; Bassett v. Ocean City, 118 Md. 120, 84 Atl. 262; Parsons v. District of Columbia, 170 U. S. 54, 42 L. ed. 947, 18 Sup. Ct. Rep. 521; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Messrs. S. S. Field and Alexander Preston filed a separate brief for defendants in error.

Mr. Justice Day delivered the opinion of the court:

Phillip Wagner, a corporation, filed its bill on behalf of itself and other taxpayers owning property in Baltimore city, adjoining or abutting upon a public highway which has been paved with improved paving without having been assessed for any part of the cost thereof, and who are similarly situated with the complainant, who is the owner of certain real estate, improved by seven two-story dwelling houses, situated on Philadelphia road, a public highway within the limits of Baltimore [212] city, which property abuts and adjoins upon the public highway, which had been paved with improved paving, to wit, vitrified brick, which property, or its present or former owner, had never been specially assessed for any part of the cost of said improved paving. The bill was filed for the purpose of enjoining the enforcement of a certain act of the general assembly of the state of Maryland (1906, chapter 401; 1908, chapter 202, of the Laws of Maryland), by which statute the general assembly enacted that a special tax be levied and imposed upon property in the city of Baltimore benefited by improved paving of the amount specified; said tax to continue as to each property for ten years from the time it attached thereto, the proceeds to be used for improved paving in the city of Baltimore, as provided in the act. The act provided that, for these purposes, all landed property in the city of Baltimore, adjoining or abutting upon any public highway which had been or should thereafter be paved with improved paving without special assessment of any part of the cost upon the abutting or adjoining property owners, by the city of Baltimore or the state roads commission, or other public commission or agency, or by said city and such commission or agency, or by either or both, and any railroad or railway company, occupying with tracks a portion of such highway, was declared to be specially benefited by such improved paving to an extent greater than the entire amount of the special tax levied under the act. The property so benefited was divided into three classes: Class A to include all landed property in the city of Baltimore, adjoining or abutting upon a public highway paved with improved paving and having a width of not less than 30 feet so paved; Class B to include all such landed property in the city of Baltimore adjoining or abutting upon a public highway paved with improved paving and having a width of less than 30 feet, and [213] not less than 15 feet, so paved; Class C to include all such landed property in the city of Baltimore adjoining or abutting upon any public highway paved with improved paving and having a width of less than 15 feet so paved. The appeal tax

court of the city of Baltimore is authorized and directed by the act to proceed to classify and list for taxation, as provided by the act, for the year 1913, all landed property in the city of Baltimore which, on the 1st day of November, 1912, was in a situation to come under the requirements of either of said classes. Before classifying any property under the special tax provided in the act, the appeal tax court was required to give notice to the owner of the property, designating a certain time when the owner might appear before the court and be heard with reference to the liability of his property for the tax, and the class to which it properly belonged. After having given the owner reasonable notice and an opportunity to be heard, the appeal tax court is required to proceed to make the classification provided, and to certify their action, in making such classification, to the city collector in the same manner as in cases of classification of real and leasehold property in the annex for the different rates of taxation as provided under the act relating thereto; and the city collector is authorized to add the special tax to the tax bills of the property, to be called "special paving tax," and to collect the same in the manner as ordinary taxes on real estate are collected. The city collector is required to account for and pay over to the comptroller, to be by him deposited with the city register, and to be placed to the credit of a new paving fund provided in the Acts of 1906, chapter 401, and 1908, chapter 202, and to be exclusively applicable to the cost of the work authorized by said acts, or by any amendment or amendments thereof. Section 3 of the act defines improved paving to mean any substantial, smooth paving above the grade [214] of ordinary macadam, and to include granite or Belgian blocks, vitrified brick or blocks, wood blocks, asphalt or concrete blocks, sheet asphalt, bitulithic bituminous macadam and bituminous concrete. Section 4 specifies the amount of the special tax to be as follows: On all property embraced in Class A, 15 cents per year per front foot or lineal foot adjoining or abutting upon the public highway; on all property embraced in Class B, 10 cents per year per front foot or lineal foot adjoining or abutting upon the public highway; and on all property embraced in Class C, 5 cents per year per front foot or lineal foot adjoining or abutting upon the public highway.

The bill recites that, under and by virtue of that act, chapter 688 of the Acts of 1912, the general assembly has attempted to levy and impose upon the property of the plaintiff and other property owners similarly situated, taxes under the three classes mentioned, and that the appeal tax court of Baltimore is proceeding now to list and classify for taxes the property so attempted to be levied upon by said act, and has classified said property of the plaintiff, designating it as belonging to Class A. The bill then sets forth various grounds upon which it is claimed the act is illegal, the one with which this court is concerned being that it is in violation of the 14th Amendment to the Constitution of the United States.

The act of 1906, to which reference is made in the act just recited, chapter 401, as amended by chapter 202 of the Acts of 1908, provides for the creation of a paving commission for the city of Baltimore, with powers to carry out a plan for a complete system of improved paving of the streets of the city. The court of appeals in its opinion in this case states that a fund of $5,000,000 was procured by means of a loan provided for this purpose, which loan was approved by the people at an election held on the 2d of May, 1911, and that the act was sustained [215] by the court of appeals in the case of Bond v. Baltimore, 118 Md. 159, 84 Atl. 258; and that the object and purpose of the act of 1912 was to raise an additional fund of $5,000,000, to complete the plan adopted by the city for improved pavements throughout the city, and that this is to be done by a special paving tax upon property in the city specially benefited by improved paving as provided in the act.

The bill was demurred to upon certain grounds: that the complainant had an adequate remedy at law; that the act of 1912 in question did not violate the Constitution of the United States or the Constitution or Bill of Rights of the state of Maryland; that the houses of the plaintiff were enjoying special benefit and advantage, fronting upon a street improved with vitrified brick pavement, while other houses in the city are upon unhealthy and unsightly cobblestone streets, for which special advantage the charge put upon the houses of the plaintiff by the act in question amounts to $1.80 per year upon each of the houses, or $18 upon each house for the entire ten years. The demurrer sets forth certain other reasons why a court of equity should not intervene, not necessary to repeat. The demurrer was overruled in the circuit court of Baltimore city, and upon appeal to the court of appeals of Maryland, that court reversed the lower court and sustained the constitutionality of the act as against the attacks thereon both under the state and Federal Constitutions. (120 Md. 671, 87 Atl. 1040.)

We will notice such matters as are deemed necessary in order to dispose of the contentions concerning the alleged violation of rights secured to the complainant under the Federal Constitution. The provision of that instrument to which appeal is made by the complainant is the 14th Amendment in the protection secured thereunder against state action which has the effect to deprive of property without due process of law. This [216] court has frequently affirmed that the general taxing systems of the state are not to be presumed lacking in due process of law because of inequalities or objections, so long as arbitrary action is avoided. It is not the purpose of the 14th Amendment to interfere with the discretionary power of the states to raise necessary revenues by imposing taxes and assessments upon property within their jurisdictions.

It is first contended that the complainant is deprived of its property without due process of law, because the special assessment levied upon its property is for the special benefits long since accrued, and that the statute under consideration is retrospective in its operation, thereby disturbing rights which had accrued to and become fixed in the property holders long before the passage of the statute; that the state had no authority because of benefits thus long since conferred to make the assessment in question. But we deem this contention foreclosed by the decision of this court in Seattle v. Kelleher, 195 U. S. 351, 49 L. ed. 232, 25 Sup. Ct. Rep. 44. In that case it was contended that there could be no valid assessment for a certain improvement, because it was levied after the work was completed; but this court met that contention by saying:

"The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration; that is to say, for a public work already done. Bellows v. Weeks, 41 Vt. 590, 599, 600; Mills v. Charleton, 29 Wis. 400, 413, 9 Am. Rep. 578; Hall v. Street Comrs. 177 Mass. 434, 439, 59 N. E. 68. If this were not so it might be hard to justify reassessments. See Norwood v. Baker, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187; Williams v. Albany County, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; Frederick v. Seattle, 13 Wash. 428, 43 Pac. 364; Cline v. Seattle, 13 Wash. 444, 43 Pac. 367; Bacon v. Seattle, 15 Wash. 701, 47 Pac. 1102; Cooley, Taxn. 3d ed. 1280. . . . Of course, it does not matter that this is called a reassessment. A reassessment may [217] be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way. Norwood v. Baker, 172 U. S. 269, 293, 43 L. ed. 443, 452, 19 Sup. Ct. Rep. 187; McNamee v. Tacoma, 24 Wash. 591, 64 Pac. 791; Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444."

The doctrine established by this case is that a subsequent assessment may be levied because of benefits conferred by the former action of the city in improving in front of the lots assessed. As said in the Kelleher Case, "the benefit was there on the ground at the city expense." So far as any Federal constitutional requirement is concerned, the state might exercise its authority to assess because of this special benefit, although that assessment was deferred for some time after the work was done at the public expense. And these considerations suggest the answer to another objection made in this connection, that it is proposed to use the assessments for paving other streets within the city. It is true that the assessments are to go into the general fund provided for such general use. But we are unable to see how the constitutional rights of the complainant are violated, so long as there was as to it a benefit formerly conferred, and still existing, which the property had derived at the public expense. The fact that the city was authorized to use the assessment in creating a public fund, in aid of its scheme to pave other streets of the city, was a public purpose, and a legitimate one, for which funds of the city might be used.

It is further urged, and much stress seems to be laid [218] upon this point, that the complainant and others similarly situated were given no opportunity to be heard as to the amount of benefits conferred upon them, and the proper adjustment of the taxes among property owners. But this question, like the other, is foreclosed by the former decisions of this court. This assessment, and the classification of the property to be improved, were fixed and designated by legislative act. It was declared that the property which had been improved by paving theretofore should, according to the width of the paving in front of the respective properties, be assessed at a certain sum per foot front. We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due

process of law within the meaning of the Federal Constitution. In Spencer v. Merchant, 125 U. S. 345, 356, 31 L. ed. 763, 768, 8 Sup. Ct. Rep. 921, this court, speaking by Mr. Justice Gray, said:

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners."

This case has been followed and approved in subsequent decisions in this court. Parsons v. District of Columbia, 170 U. S. 45, 50, 56, 42 L. ed. 943, 945, 947, 18 Sup. Ct. Rep. 521; French v. Barber Asphalt Paving Co. 181 U. S. 324, 343, 45 L. ed. 879, 889, 21 Sup. Ct. Rep. 625. In the latter case, the former cases in this court were reviewed at length, and Spencer v. [219] Merchant, quoted with approval; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, was commented upon and distinguished. French v. Barber Asphalt Paving Co. supra, was followed and approved in a series of cases in the same volume: Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Wormley v. District of Columbia, 181 U. S. 402, 45 L. ed. 921, 21 Sup. Ct. Rep. 609; Shumate v. Heman, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; Farrell v. West Chicago Park, 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609; French v. Barber Asphalt Paving Co. supra, was referred to with approval in Hibben v. Smith, 191 U. S. 310, 326, 48 L. ed. 195, 201, 24 Sup. Ct. Rep. 88. See also Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Martin v. District of Columbia, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440.

Norwood v. Baker, supra, is much relied upon by the plaintiff in error, and while this court has shown no disposition to overrule that case when limited to the decision actually made by the court, much that is said in it must be read in connection with the subsequent cases in this court already referred to. In Norwood v. Baker, a portion of a person's property, located in a village of Ohio, was condemned for street purposes, and the entire cost of opening the street, including the amount paid for the strip condemned, with the costs and expenses of condemnation, was assessed upon the abutting property owner whose land was condemned. This, it was said in French v. Barber Asphalt Paving Co. supra, was an abuse of the law and an act of confiscation, and not a valid exercise of the taxing power. Taking the decisions in this court together, we think that it results that the legislature of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefited thereby, upon which the assessment is to be made, without first giving an opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.

We do not understand this to mean that there may [220] not be cases of such flagrant abuse of legislative power as would warrant the intervention of a court of equity to protect the constitutional rights of landowners, because of arbitrary and wholly unwarranted legislative action. The constitutional protection against deprivation of property without due process of law would certainly be available to persons arbitrarily deprived of their private rights by such state action, whether under the guise of legislative authority or otherwise. But in the present case there is neither allegation nor proof of such disproportion between the assessment made and the benefit conferred as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject. There can be no question that paving with brick in front of the property of the complainant conferred a substantial benefit, and gave authority for the subsequent legislation which, because of that benefit, original and continuing, warranted an assessment upon the property owner for a confessedly public purpose,—the improvement of the streets of the city.

We are unable to find that the act of the legislature in question, or the manner of its present enforcement, operates to deprive the complainant and others similarly situated of any rights secured to them by

the Federal Constitution. The judgment of the Court of Appeals of Maryland is affirmed.

Mr. Justice Pitney and Mr. Justice McReynolds dissent.

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[221] WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING COMPANY, Appt.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 221-233.)

Appeal — from court of claims — conclusiveness of finding — mutual mistake.

Findings of fact that there was no mutual mistake in the execution of a contract for the construction of a battleship for the United States, and of a release to the government, conformably to the contract, of all claims growing out of the performance of such contract, are conclusive upon the Federal Supreme Court on an appeal from a decree of the court of claims in a suit brought under the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, Comp. Stat. 1913, § 1136), upon the recommendation of the Secretary of the Navy, given pursuant to the act of June 10, 1896 (29 Stat. at L. 374, chap. 399), which, upon the ground that the release included the claim, and that the contract and release were not subject to reformation, dismissed the petition of the contractor for the recovery of damages from the government on account of a delay alleged to be the latter's fault.

[For other cases, see Appeal and Error, 4892-4902, in Digest Sup. Ct. 1908.]

[No. 63.]

Argued November 8, 1915. Decided November 29, 1915.

APPEAL from the Court of Claims to review a judgment which dismissed the petition in an action by the builders of a battleship to recover damages alleged to have grown out of a delay caused by the Federal government. Affirmed.

See same case below, 46 Ct. Cl. 521.

Statement by Mr. Justice Day:

This action was brought in the court of claims to recover damages on account of delay alleged to be the fault of the United States in preventing completion according to contract of the battleship Massachusetts. The court of claims dismissed the petition (46 Ct. Cl. 521).

[222] Large sums were demanded for delays covering other periods than are involved in this appeal, and the case as now presented concerns the right to recover the sum of $27,984.99, being the damages which the court of claims found accrued to the claimant for the period of delay after February 1st, 1896, for the period of three months and twenty-nine days. The court of claims made certain findings of fact, from which it appears that, after the making of the contract, claimant arranged a systematic working program for the construction of the vessel within the contract time, and would have completed the vessel within time had it not been for the failure of the United States to furnish materials to properly carry on the work, which, by the terms of the contract, they had agreed to furnish; that by reason of such failure of the government, the completion of the vessel was delayed for two years, six months, and nine days beyond the contract period; that the armor to be furnished in accordance with said clause was obtained by the United States from other contractors, who, without any fault on the part of the claimant, failed to complete the manufacture thereof in time to deliver the same to the claimants as they had agreed. Omitting the findings covered by the release and contract made on May 26th, 1896, and on February 1st, 1896, and the amount of damages accruing for such delay, as to the sum now in controversy the court found that on November 23d, 1896, after the completion and delivery of the vessel in accordance with the sixth paragraph of the nineteenth clause of the contract, the balance of the amount due thereunder, but held in accordance therewith until the final acceptance of the vessel, was paid to the claimant, and the same was accepted and a release approved by the Secretary of the Navy was entered into by it without any written protest, in the terms following:

Whereas by the eleventh clause of the contract, [223] dated November 18, 1890, by and between the William Cramp & Sons Ship & Engine Building Company, a corporation created under the laws of the state of Pennsylvania, and doing business at Philadelphia, in said state, represented by the president of said corporation, party of the first part, and the United States, represented by the Secretary of the Navy, party of the second part, for the construction of a coast line battleship of about 10,000 tons displacement, which for the purposes of said contract is designated and known as coast line battleship No. 2, it is agreed that a special reserve of sixty thousand dollars ($60,000) shall be held until the vessel has been finally tried, provided that such final trial shall take place within five months

from and after the date of the preliminary acceptance of the vessel; and

Whereas by the sixth paragraph of the nineteenth clause of said contract it is further provided that when all the conditions, covenants, and provisions of said contract shall have been performed and fulfilled by and on the part of the party of the first part, said party of the first part shall be entitled, within ten days after the filing and acceptance of its claims, to receive the said special reserve, or so much thereof as it may be entitled to, on the execution of a final release to the United States in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of said contract; and

Whereas the final trial of said vessel was completed on the 24th day of October, 1896; and

Whereas all the conditions, covenants, and provisions of said contract have been performed and fulfilled by and on the part of the party of the first part;

Now, therefore, in consideration of the premises, the sum of $57,536.60, being the balance of the aforesaid special reserve to which the party of the first part is entitled, being to me, in hand, paid by the United States, [224] represented by the Secretary of the Navy, the receipt whereof is hereby acknowledged, the William Cramp & Sons Ship & Engine Building Company, represented by me, Charles H. Cramp, president of said corporation, does hereby, for itself, and its successors and assigns, and its legal representatives, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum and sums of money, accounts, reckonings, claims, and demands whatsoever, in law or in equity, for or by reason of, or on account of, the construction of said vessel under the contract aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of the William Cramp & Sons Ship & Engine Building Company this 23d day of November, A. D. 1896.

The Wm. Cramp & Sons Ship & Engine Building Company,
Chas. H. Cramp, President.

(Seal.)
Attest:
Theodore W. Cramp,
Assistant Secretary.

The court sets forth the act of June 10, 1896,[1] referring certain claims to the Secretary of the Navy for investigation and report, and, in part, the report of the Secretary, made December 9th, 1896, as follows:

"I have considered carefully the nature of these claims [225] and the circumstances out of which they arose, and while not attempting to pass on the merits of the same, or to determine the amount, if any, that should be allowed on account of the matters mentioned, the fact exists that there was delay in the completion of the contracts beyond the time prescribed therein, and that such delay was, in some measure, at least, due to failure on part of the government to obtain and furnish the contractors the armor for the vessels as required, and in my judgment the interests of justice demand that they should be referred to the court of claims, which can consider these matters with more deliberation and care than could be devoted to them by the committees of the two Houses of Congress . . .

"It will be observed that the contractors claim relief from the binding force of these agreements on the ground that the same were entered into by them under duress."

After consideration, the court finds the items of cost and expense during the period of delay now under consideration, three months and twenty-nine days, after February 1st, 1896, to amount to the sum of $27,984.99, as already stated, and further finds:

"The claimant company submits for the consideration of the court the evidence of the then Secretary of the Navy and the president of the claimant company, who signed the contract on behalf of their respective principals, along with certain other testimony, taken since the decision in the case of the Indiana, to prove that at the time of the signing of the contract as aforesaid it was not within the minds of the parties so signing said contract that the language of paragraph six of the nineteenth clause of said contract, to wit: 'On the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract,' should embrace claims for unliquidated [226] damages of the character herein sued for, and that in so far as the language of said final release includes such unliquidated claims, it was inserted by mistake, inadvertence, or accident, and did not express the true intent of the parties, and that the same should be so reformed as to exclude such claims.

[1] The Secretary of the Navy is hereby authorized and directed to examine claims against the government which may be presented to him by contractors for the building of the hulls or machinery of naval vessels under contracts completed since Janu-

"The court, after due consideration of the evidence aforesaid as well as the evidence adduced on behalf of the defendants, finds that there was no mutual mistake between the parties in the execution of the contract or the releases thereunder; that the language of said contract and releases expressed the intention and purpose of the United States as previously agreed upon, though the contracting party on behalf of the claimant company may have mistaken its legal rights thereunder.

"Upon the foregoing findings of fact the court finds the ultimate facts, so far as they are questions of fact: (1) that at the time of the execution of the releases set forth in finding V. the claimant company was not, by reason of the acts or delays of the government, under duress; and (2) that there was no mutual mistake between the parties in the execution of the contract or the final release thereunder, as the same expressed the true intent and purpose of the United States, and the failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or their officers, and that therefore the same are not the subject of reformation."

As a conclusion of law, the court decided on the authority of United States v. William Cramp & Sons Ship & Engine Bldg. Co. 206 U. S. 118, 51 L. ed. 983, 27 Sup.

Mr. **Joseph Gilfillan** argued the cause and filed a brief for appellant:

This court is not limited to the findings and the conclusions of the court of claims.

United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; Harvey v. United States, 105 U. S. 671, 26 L. ed. 1206; United States v. Clark, 96 U. S. 37, 24 L. ed. 696.

Without admitting verbal evidence to change the meaning of written words, the law permits verbal evidence to show what was the subject-matter upon which the words of the written instrument were to operate.

Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Brick v. Brick, 98 U. S. 514, 25 L. ed. 256; Cabrera v. American Colonial Bank, 214 U. S. 224, 53 L. ed. 974, 29 Sup. Ct. Rep. 623.

When reference is made to the binding character of a finding of fact made by a master or a court, it means that there is evidence upon which the finding can rest. That is to say, the master or the court, having had an opportunity to both hear and see the witnesses, can determine on which side the truth lies; but there must be some evidence on which to rest the master's finding. If there is in effect no evidence to support his finding, then the finding has no binding force and the court will reverse such finding as a matter of course. It is only in the case of conflicting testimony that the finding of the master or the court is entitled to the weight that is usually accredited to it.

Grauel v. Wolfe, 185 Pa. 83, 39 Atl. 819.

Assistant Attorney General **Thompson** argued the cause and filed a brief for appellee:

The release comprehended all claims.

United States v. William Cramp & Sons Ship & Engine Bldg. Co. 206 U. S. 118, 127, 51 L. ed. 983, 986, 27 Sup. Ct. Rep. 676.

The language of the release clearly expressed the intention of the contracting parties, and, being responsive to the terms of the contract, eliminates questions of mutual mistake or duress.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 8 Wall. 276, 290, 19 L. ed. 349, 353; William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 216 U. S. 494, 54 L. ed. 587, 30 Sup. Ct. Rep. 392.

[227] After making the foregoing statement Mr. Justice **Day** delivered the opinion of the court:

The contract in this case and the release above set forth are in the form shown in United States v. William Cramp & Sons Ship & Engine Bldg. Co. 206 U. S. 118, 51 L. ed. 983, 27 Sup. Ct. Rep. 676, and, except for the considerations to be later dealt with, the present case is ruled by that unless relief in equity can be had, for it was there held that a release executed in the matter of the contract for the battleship Indiana included all claims which grew out of the performance of the contract, although not arising from the actual construction of the vessel. In the subsequent case of William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 216 U. S. 494, 54 L. ed. 587, 30 Sup. Ct. Rep. 392, the case in 206 U. S. was distinguished be-

ary first, eighteen hundred and ninety-one, where it is alleged that such contractors have been subjected to loss and damage through delays in the work under said contracts which were not the fault of said contractors, but were due to the action of the government, and to report to the next session of Congress the result of said investigation, and whether said claims are, in his opinion, subjects for the jurisdiction of the court of claims or for the action of Congress upon the same. 29 Stat. at L. chap. 399, p. 374.

cause of the different form of release executed in that case, which contained a proviso that it should not include claims arising under the contract other than those which the Secretary of the Navy had jurisdiction to entertain.

As the recital of facts definitely shows, the court of claims found, after consideration of the evidence adduced upon behalf of the claimant and the defendant, that there was no mutual mistake between the parties in the execution of the contract and release, and that the contract and release expressed the intention and purpose of the United States, as previously agreed upon, though the contracting party on behalf of the claimant company had mistaken its legal rights. As ultimate facts, the court found, so far as the same were questions of fact, that there was no mutual mistake between the parties in the execution of the contract or the final release; that the same expressed the true intent and purpose of the United States, and that the failure of the officers of the claimant company to apprehend the legal effect thereof was not the fault of the United States or its officers, and was not the subject of reformation. If we are governed by the findings of fact in this, as in other cases [228] coming from the court of claims, these findings conclude the question of fact as to whether the testimony warranted a reformation of the contract upon equitable principles.

The record contains a stipulation, signed by the Assistant Attorney General and counsel for the claimant, in which it is recited that whereas one of the questions raised and decided by the judgment of the court of claims is the right of the claimant to equitable relief through the reformation of the contract in suit, and the reformation of certain releases, and that evidence was introduced in behalf of both parties, touching the facts upon which the claimant founded its claim for equitable relief, subject to the defendant's objection, and because the record was very voluminous and contained the report of many proceedings not relevant to the right to equitable relief, certain evidence bearing upon that point was stipulated into the record. The stipulation concluded: "Providing, however, that on appeal recourse shall be had to the record of the proceedings and evidence next hereinbefore mentioned, for no purpose whatsoever, except for the consideration and determination of the question with respect to the claimant's right to the equitable relief aforesaid; it being understood and agreed that the findings of fact filed by the court May 29, 1911, shall not be affected in any other manner or for any other purpose by the said proceedings and evidence."

In view of this state of the record, we are met with the question whether, in cases coming from the court of claims, of the character of the one now under consideration, the findings of fact are conclusive, as in other cases, or whether it is the duty of this court to determine for itself from the evidence sent up whether the claimant is entitled to equitable relief necessary to the establishment of his claim. The cases relied upon which it is contended make it the duty of this court to independently [229] consider the evidence are Harvey v. United States, 105 U. S. 671, 26 L. ed. 1206, and United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650, which we shall notice later on.

In this case the Secretary of the Navy, as it appears from the recital of the facts, recommended that action be brought in the court of claims, and it was accordingly instituted in that court. The court of claims was given jurisdiction under the act of March 3, 1887 (chap. 359, § 1, 24 Stat. at L. 505, Comp. Stat. 1913, § 1136), of all claims "founded . . . upon any contract, expressed or implied, with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." By the rules of this court, the record from the court of claims is required to contain a transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case, and a finding by the court of claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them. These facts are to be the ultimate facts established by the evidence, and not the evidence upon which the ultimate facts are based. Burr v. Des Moines R. & Nav. Co. 1 Wall. 99, 102, 17 L. ed. 561, 562.

In the case of District of Columbia v. Barnes, 197 U. S. 146, 49 L. ed. 699, 25 Sup. Ct. Rep. 401, it was held, under an act of Congress permitting parties to submit the justice of their claims against the United States for work done in the District of Columbia to the adjudication of a competent court, that equitable jurisdiction was thereby conferred upon the court of claims; sufficiently, at least, to order the reformation of a written contract between the claimant and the District, and to

award a money judgment on the contract so reformed. In that case it was said that the findings of fact [230] would not be reviewed in this court, but were regarded as conclusive here, and that this court would determine the questions of law properly brought to its attention upon such findings.

In United States v. Milliken Imprinting Co. 202 U. S. 168, 50 L. ed. 980, 26 Sup. Ct. Rep. 572, which was a suit in the court of claims praying for the reformation of a contract, and for damages for breach of the same as reformed, this court held that the court of claims, under the act of March 3, 1887, had jurisdiction to reform the contract as a basis of a judgment for money damages. In United States v. Sisseton Indians, 208 U. S. 561, 52 L. ed. 621, 28 Sup. Ct. Rep. 352, where a suit was brought under a special act of Congress, giving the court of claims jurisdiction to hear testimony and render final judgment, this court held that it would not go behind findings of fact made by the court of claims, citing McClure v. United States, 116 U. S. 145, 29 L. ed. 572, 6 Sup. Ct. Rep. 321, and District of Columbia v. Barnes, supra. In the first of these cases, McClure v. United States, a motion was made in this court to order the court of claims to transmit to this court all the evidence upon which the case was heard and determined, and, in default of sending up such evidence, to make certain findings. The suit was brought under a special act of Congress, referring the claims of one Daniel McClure to the court of claims, with jurisdiction to hear and determine the same, and, if the court should be satisfied that moneys charged against said McClure as Assistant Paymaster General were not in fact received by him, or that other just and equitable grounds existed for credits claimed by him, to make a decree, setting forth the amount to which McClure was entitled, and that an appeal should be allowed to either party as in other cases. This court, after setting forth the statutory authority of this court to make rules and regulations, and the rules of this court requiring findings of fact, declined to make the order, and held that when Congress passes a special statute [231] allowing a suit to be brought in the court of claims, with the right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary in the special act. The court reviewed the case of Harvey v. United States, supra, and stated that it was under a special statute authorizing the court of claims to proceed in the adjustment of questions between the claimants and the United States as a court of equity jurisdiction, and, according to the principles of equity jurisprudence, reform such contract and render such judgment as justice and right between the claimants and the government might require. This court said that the appeal given to this court in the Harvey Case, under that particular statute, was an appeal in equity, which would bring up for review the facts as well as the law, according to equity practice. In the Old Settlers Case, supra, the action was brought under a special act of Congress. In that case it was held that it was the intention of Congress by such special act to confer upon the court of claims the unrestricted latitude of a court of equity, stating an account, distributing a fund, and framing a decree, and that to that statute the doctrine of the Harvey Case applied, and this court proceeded to examine the evidence, after stating that it also had the advantage of the findings of the court of claims.

The present case was brought under the jurisdiction conferred upon the court of claims as in other cases. It is true that the same was brought upon suggestion of the Secretary under the act of 1896, requiring the Secretary to report whether, in his judgment, Congress should act or the case should be referred to the court of claims. In cases within the general jurisdiction of the court of claims, it has jurisdiction to reform a contract for the purpose of determining whether the claim if established [232] is a valid one against the United States. United States v. Milliken Imprinting Co. supra. There is no good reason which authorizes this court in such cases to undertake a consideration of voluminous records and conflicting testimony to determine a matter which is committed to the jurisdiction of the court of claims in exercising the authority conferred by Congress upon that court, and which is specifically within the rules of this court, made under authority of Congress, requiring the court of claims to certify findings of fact and conclusions of law. The court of claims was established for the purpose of considering the right of claimants to recover against the United States; and when it finds facts upon matters within its authority, that should be conclusive under the rules unless Congress otherwise provides. It follows that upon the facts found the claimant was not entitled to recover.

Nor do we find any room for the applica-

tion in this case of the doctrine laid down in United States v. Clark, 96 U. S. 37, 24 L. ed. 696, in which it is held that where the court certifies the evidence, and it appears that there is none to warrant its legal conclusion, a question of law is presented which may be determined here. In this case we are of opinion that there was ample testimony to warrant the conclusion of the court of claims, as stated in its findings. It certainly cannot be said that there was no supporting testimony, so as to make the question one of law, and not of fact. It does not appear that either of the parties understood that the contract or release should be reduced to writing in any other form than as it was actually written. There was no mistake in the form of the instrument. United States v. Milliken Imprinting Co. 202 U. S. supra, page 177, 50 L. ed. 984, 26 Sup. Ct. Rep. 572. The testimony of the former Secretary of the Navy and of the Secretary in office at the time the release was signed, to the effect that it was not believed that it would cover claims for [233] damages for delay, if competent for any purpose whatsoever, certainly did not show that mutual mistake of the parties which, upon well-established principles of equity jurisprudence, requires the reformation of the contract, and certainly no such special circumstances were developed of fraud, duress, or oppression, as would necessarily require relief against a mistake of law.

We find no error in the judgment of the Court of Claims, and the same is affirmed.

Mr. Justice McKenna dissents from the opinion and judgment in this case. In his opinion, the court of claims, in view of the statute of June 10th, 1896 [29 Stat. at L. 361, chap. 399], authorizing and directing the Secretary of the Navy to examine the claims here involved, and to report to Congress the result of his investigation, and whether such claim was, in his opinion, subject to the jurisdiction of the court of claims or for the action of Congress, implied the intent of Congress that claims of this character should be considered upon broad equitable grounds. Thus considered, Mr. Justice McKenna thinks the claimant entitled to recover for the delay resulting from the fault of the government, notwithstanding the form in which the final receipt was drawn and executed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

[234] GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Appt.,

v.

WELLS FARGO & COMPANY. (No. 277.)

GEORGE G. JOHNSON, as Treasurer of the State of South Dakota, Appt.,

v.

GEORGE C. TAYLOR,[1] Individually and as President of the American Express Company. (No. 278.)

(See S. C. Reporter's ed. 234-244.)

Taxes — uniformity — measuring value by gross income.

1. Making gross earnings within the state the controlling factor in fixing the value for taxation of the property of express companies, as was done by the state board of equalization and assessment in the administration of S. D. Laws 1907, chap. 64, as amended by Laws 1909, chap. 162, violates the provisions of S. D. Const. art. 11, § 2, specifically requiring that all taxes levied and assessed upon corporate property shall be as near as may be by the same methods as are provided for the assessment of taxes on individual property, where individuals and corporations other than railroad, telephone, telegraph, express, and sleeping car companies are taxed according to the value of their property without regard to income.

[For other cases, see Taxes, I. b, 1, in Digest Sup. Ct. 1908.]

Injunction — against illegal tax — fraud or mistake — continuing violation of constitutional right.

2. A Federal court has jurisdiction in equity of a bill to enjoin the collection of state taxes which alleges not only that the assessment is unwarranted by the law, but that the manner of making the assessment amounts to fraud upon complainants' constitutional rights, or such gross mistake as amounts to fraud,—especially where it also appears that the tax for the year preceding had been similarly enjoined by a decree from which no appeal had been taken.

[For other cases, see Injunction, I. k; Equity, I. d, 2, in Digest Sup. Ct. 1908.]

[Nos. 277 and 278.]

[1] Death of James C. Fargo suggested, and appearance of George C. Taylor, individually and as president of the American Express Company, filed and entered October 12, 1915, as the party appellee herein.

NOTE.—As to taxation of express companies—see notes to State v. Duluth Gas & Water Co. 57 L.R.A. 64, and Western U. Teleg. Co. v. Taggart, 60 L.R.A. 687.

On injunction to restrain the collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

On constitutional equality in relation to corporate taxation—see note to Bacon v. State Tax Comrs. 60 L.R.A. 321.

Argued October 12 and 13, 1915. Decided November 29, 1915.

TWO APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which, reversing decrees of the District Court for the District of South Dakota, remanded the case to the latter court with instructions to enter decrees restraining the collection of certain state taxes. Affirmed.

See same case below, L.R.A.1916C, 522, 130 C. C. A. 528, 214 Fed. 180.

The facts are stated in the opinion.

Mr. Clarence C. Caldwell, Attorney General of South Dakota, and Mr. L. T. Boucher, argued the cause, and, with Mr. Royal C. Johnson, former Attorney General, and Mr. M. H. O'Brien, filed a brief for appellant:

The rule announced by the circuit court of appeals that the assessing board, in fixing the valuation of the plaintiff's property for taxation, could not consider the plaintiff's income in the state, but was confined to a finding of the value of the property in money by finding the amount that can be realized from it by a sale of it within a reasonable time, would seem to be not only somewhat harsh, but would impose upon an assessment board a duty not always possible to perform.

State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185–224, 41 L. ed. 965–978, 17 Sup. Ct. Rep. 604; Pittsburg C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Western U. Teleg. Co. v. Taggert, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 464; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 281, 53 L. ed. 186, 29 Sup. Ct. Rep. 50; Fayerweather v. Rich, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Cleveland, C. C. & St. L. R. Co. v. Bachus, 154 U. S. 445, 38 L. ed. 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Adams Exp. Co. v. Poe, 64 Fed. 9; California & O. Land Co. v. Gowen, 48 Fed. 771; Maish v. Arizona, 164 U. S. 599, 41 L. ed. 567, 17 Sup. Ct. Rep. 193; Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Missouri v. Dockery, 191 U. S. 170, 48 L. ed. 133, 24 Sup. Ct. Rep. 53.

On the question of whether injunction is the proper remedy in any event, the court's attention is called to Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Snyder v. Marks, 109 U. S. 193, 27 L. ed. 903, 3 Sup. Ct. Rep. 157; Taylor v. Secor, 92 U. S. 575, 23 L. ed. 669; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941.

When a state board of assessment and equalization, state tax commission, or by whatever name the body may be called in its day, upon which has been conferred the final power of assessment and equalization, has determined the value of property within the state, in the absence of fraud or an unconstitutional law, the determination of that board on the question of value is, of necessity, final; and no power exists in the courts to review or in any manner interfere with or modify that finding of fact.

State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; State ex rel. American Exp. Co. v. State Board, 3 S. D. 338, 53 N. W. 192; Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 51 L. ed. 636, 27 Sup. Ct. Rep. 326.

To be able to find fault with the law is not to demonstrate its invalidity.

Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441.

The statute in question is not obnoxious to § 21 of art. 3 of the state Constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title.

People v. Parvin, 2 Cal. Unrep. 788, 14 Pac. 783; Wickhem v. Alexandria, 23 S. D. 556, 122 N. W. 597; Stuart v. Kirley, 12 S. D. 255, 81 N. W. 147; Bekker v. White River Valley R. Co. 28 S. D. 84, 132 N. W. 797; Dunbar v. Frazer, 78 Ala. 538; State v. McCracken, 42 Tex. 384; Henrico County v. Richmond, 106 Va. 282, 117 Am. St. Rep. 1001, 55 S. E. 683; State ex rel. Whitson v. Algood, 87 Tenn. 163, 10 S. W. 310; Lewis v. Dunne, 86 Am. St. Rep. 270, note; Bobel v. People, 173 Ill. 25, 64 Am. St. Rep. 64, 50 N. E. 322; Crookston v. Polk County, 79 Am. St. Rep. 460, note; Newark v. Mt. Pleasant Cemetery Co. 58 N. J. L. 171, 33 Atl. 396.

Not only may the subject be as comprehensive as the legislative discretion may choose to make it, but the statute relating to it may include every matter germane to

and in furtherance of the general subject or object expressed in the title.

Barksdale v. Laurens, 58 S. C. 413, 36 S. E. 661; Memphis v. American Exp. Co. 102 Tenn. 336, 52 S. W. 172; Prison Asso. v. Ashby, 93 Va. 667, 25 S. E. 893; People ex rel. Maloney v. Kirk, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830.

The doctrine that perfect equality of taxation is, in practice, beyond the reach of human endeavor, has been subscribed to generally by the Federal and state courts throughout the United States.

Bacon v. State Tax Comrs. 126 Mich. 22, 60 L.R.A. 324, 85 N. W. 307.

Neither the mere illegality of the tax complained of, nor its injustice nor irregularity, of themselves, give the right to an injunction in a court of equity.

State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Hannewinkle v. Georgetown, 15 Wall. 548, 21 L. ed. 232; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; Cooley, Taxn. 2d ed. 760–772; Union P. R. Co. v. Weld County, 133 C. C. A. 392, 217 Fed. 540.

While fraud, accident, or mistake are, in a general way, grounds for the exercise of equity jurisdiction, they are not necessarily grounds for enjoining the collection of a state or county tax by a Federal court.

Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941.

Messrs. Clarence C. Caldwell and L. T. Boucher also filed a separate brief for appellant:

Injunction should not lie, because plaintiff had an adequate remedy at law, and should not be permitted to resort to the equity side of the court.

Cooley, Taxn. p. 772; St. Anthony & D. Elevator Co. v. Bottineau County, 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; Frost v. Flick, 1 Dak. 126, 46 N. W. 508; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; Chicago & N. W. R. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458; Schurmeier v. St. Paul & P. R. Co. 8 Minn. 113, Gil. 88, 83 Am. Dec. 770; Odlin v. Woodruff, 22 L.R.A. 699, note; Whiting v. Boston, 106 Mass. 89; Milwaukee v. Koeffler, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372; Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79; Bank of Kentucky v. Stone, 88 Fed. 383; Baltimore v. Tefferman, 4 Gill. 425, 45 Am. Dec. 145.

The gross earnings tax law is valid.

McHenry v. Alford, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242; Missouri River, Ft. S. & G. R. Co. v. Morris, 7 Kan. 210; Francis v. Atchison, T. & S. F. R. Co. 19 Kan. 303; State ex rel. Poe v. Jones, 51 Ohio St. 492, 37 N. E. 945; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, 165 U. S. 221, 41 L. ed. 695, 17 Sup. Ct. Rep. 305.

Messrs. Charles O. Bailey and Charles W. Stockton argued the cause, and, with Mr. John H. Voorhees, filed a brief for appellee:

While all other property is taxed upon the basis of the requirements for the year in which the tax is imposed, telegraph, telephone, sleeping car, and express companies are required to pay a tax based upon the average tax requirements throughout the state upon other property for the preceding year. This constitutes a distinct violation of pretty nearly all of the requirements of the South Dakota Constitution respecting uniformity and equality in assessment and taxation.

Pingree v. Auditor General (Pingree v. Dix) 120 Mich. 95, 44 L.R.A. 679, 78 N. W. 1025; Re Assessment & Collection of Taxes, 4 S. D. 6, 54 N. W. 818; Fox's Appeal, 112 Pa. 337, 4 Atl. 149.

The entire theory of the levy and distribution of the tax is repugnant to the plain provisions of the South Dakota Constitution.

Chattanooga v. Nashville, C. & St. L. R. Co. 7 Lea, 561.

Each taxpayer of the state of South Dakota is entitled to a legal assessment and levy of taxes before he can be required to pay the amount levied, and it is immaterial that a legal assessment and levy might yield substantially the same tax as that produced by the illegal methods of assessment and levy.

Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537.

There is no question involved in this case of any assessment upon the so-called unit system, such as was sustained by the supreme court in Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305.

The conclusion reached by the board shows a result enormously in excess of that warranted by any of the factors which they were at liberty to use in their calculations, and that circumstance is proof of such misconduct on the part of the board as to deprive its action of any weight whatever.

State v. London & N. W. American Mortg. Co. 80 Minn. 277, 83 N. W. 339.

Mr. John G. Milburn also argued the cause, and, with Messrs. Charles O. Bailey and John H. Voorhees, filed a brief for appellee.

Mr. Justice Day delivered the opinion of the court:

These cases were argued at the same time and may be considered together. They are appeals from the decision of the circuit court of appeals of the eighth circuit, by [237] which the present appellant, as treasurer of the state of South Dakota, was enjoined from assessing certain taxes levied against the appellees by the state board of assessment and equalization of the state of South Dakota, for the year 1910. The bills, brought for the purpose of enjoining the collection of such taxes, were dismissed in the district court (205 Fed. 60), which decrees were reversed in the circuit court of appeals, and decrees entered remanding the case to the district court with instructions to enter decrees for the appellees, restraining the collection of the taxes (L.R.A.1916C, 522, 130 C. C. A. 528, 214 Fed. 180).

Under the law of South Dakota, Wells Fargo & Company made a statement showing that its gross earnings within the state for the year ending April 30, 1910, were $131,096.28, and that the value of its office furniture, fixtures, and real estate was $18,473.98. The board assessed the value of the property of Wells Fargo & Company at $289,877, and imposed a tax of 28 mills on the dollar, making a total tax of $8,116.55. Similarly, the board assessed the value of the American Express Company at $193,260, and levied a tax of $5,411.28. The bills averred a tender of taxes upon the returns, and charged that the assessments made were in violation of the state Constitution, and, if enforced, would have the effect to take the property of the express companies without due process of law, in violation of the Federal Constitution.

The Constitution of the state of South Dakota, as the same was in force at the time of these assessments, provided (article 11, § 2), as follows:

"All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its [238] property. And the legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property."

From an analysis of this section, it appears that taxes to be valid must be uniform upon all real and personal property; that the legislation providing for the assessment and collection of taxes must be such that every person and corporation may be taxed in proportion to the value of his, her, or its property; and that the general laws which provide for the assessing of taxes on corporation property shall be, as near as may be, by the same methods as are provided for the assessing and levying of taxes on individual property.[1]

While this Constitution was in full force and effect, the legislature passed an act providing for the assessment of taxes upon express and sleeping car companies (chap. 64, Laws of South Dakota, 1907, as amended by chap. 162 of the Laws of 1909). In § 16 of this act, express companies are required to transmit statements to the auditor of state, showing the number of employees engaged by the company in the state, and the number in each county; [239] the number of offices maintained within the state, and in each county; the value of all office furniture, fixtures, and real estate owned in the state; the number of miles of railroad over which it conducted its business, and the number of miles in each county; the number of express cars owned by the company and used within the state, and the number of such express cars leased and controlled, but not owned, by such company, and used within the state, or operated under lease or contract in any manner; the gross earnings of the total business of such company transacted within the state for the year ending April 30th preceding, and the value of all the property of such company used in the state. Section 17 of the act makes provision for assessing the property of express and sleeping car companies, and requires the board of assessment and equalization to take into consideration the gross earnings of the company within the state for the

[1] This constitutional provision was in force at the time the taxes in question were assessed, but was changed by the amendment of 1912, which provides:

"All taxes shall be uniform on all property and shall be levied and collected for public purposes only. The value of each subject of taxation shall be so fixed in money that every person and corporation shall pay a tax in proportion to the value of his, her or its property. Franchises and licenses to do business in the state, gross earnings and net income, shall be considered in taxing corporations and the power to tax corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party. The legislature shall provide by general law for the assessing and levying of taxes on all corporate property, as near as may be by the same methods as are provided for assessing and levying of taxes on individual property."

year ending the 30th of April preceding, statements made by the company and by the Board of Railway Commissioners, and any and all other matters necessary to enable them to make a just and equitable assessment of the property in the same ratio as the property of individuals, and provides that the statement and information received shall be laid before the board of assessment and equalization, which board shall review such statement or information, and may change the valuation given, or add to the statement any property omitted therefrom, and the board shall levy a tax upon such property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge, and other local taxes levied upon other property for the preceding year.

There is testimony in the record on the part of the state treasurer, tending to show that the express companies did not comply with the law as to the making of their returns for the year 1910; that in making the assessment upon the property of the companies within the [240] state, the state auditor, and, as he believed, the other members of the state board, considered the reports and annual statements of the companies, the reports of the railway companies, the reports and records of the railway commissioners, the contracts for express privileges of the express companies in the state, the earnings of the companies in the state, the various lines of business done by the companies in the state, the length of the companies' systems in the state, the number of their offices, the bulk and value of their fugitive property in the state, not reported in the annual statement, the total value of the property, tangible and intangible, in the state, the amount of money which, in the judgment of the auditor and other members of the board, must have been necessary to carry on the various lines of the companies' business in the state, and all other facts which he or the other members of the board could obtain, tending to throw light upon the value of the companies' property.

On the other hand, the court of appeals reaches the conclusion from the testimony that the express companies doing business in the state in 1909 and 1910 were under contracts with the railroad companies to pay to the latter from 45 per cent to 55 per cent of their gross earnings from the transportation of express business over their lines, and that as the amounts paid to the railroad companies by the respective express companies were approximately one half of the amounts of their gross earnings from these railroads in South Dakota, the amounts so paid furnished a measure of the gross earnings of the respective companies, and finds that the board of assessment and equalization, in making the assessment, adopted practically the same percentage of the amounts paid to the railroad companies by each of the express companies as a basis of assessment of the companies respectively. The court reached the conclusion that there was but one rational explanation of this fact, which was that the [241] board measured the assessment of the companies by the amounts they had paid to the railroad companies respectively; that is to say, by their gross earnings from their transportation business over the railroads. Otherwise, the court concluded, it would be incredible that the board could have estimated the taxable value of these companies so that the estimates would come within one one hundred and sixtieth of the same percentage of the respective amounts which the express companies had paid to the railway companies. The court of appeals further held that this uniform relation of the assessments of the three principal express companies doing business in the state to the respective amounts paid to the railroad companies was more persuasive than the testimony of many witnesses as to the things which were taken into consideration by the board in determining the amount of the assessments.

It is enough to say upon this point that, in our opinion, the record does show that the payment to the railroad companies, if not the only basis of the assessments made by the board, was the principal factor in fixing the value of the property of the express companies for taxation in the state, and the question arises, Was such administration of the statute contrary to the requirement of the South Dakota Constitution, already quoted, requiring all taxation to be in proportion to the value of the property assessed, and corporation property to be assessed, as near as may be, by the same methods as are provided for assessing the value of individual property? It appears that the South Dakota statutes, other than those relating to railroads, telephone, telegraph, express, and sleeping car companies, do not authorize a valuation which considers gross income, and that individuals and other corporations are taxed according to the value of their property, without reference to the income derived therefrom. In other words, property owned by other corporations and individuals is [242] assessed for what it is fairly worth, and a valuation for taxation is not fixed by a method which gives controlling effect to the amount of the gross income derived therefrom. We

concur with the court of appeals that such procedure is in violation of the provision of the South Dakota Constitution, specifically requiring that all taxes levied and assessed upon corporation property shall be as near as may be by the same methods as are provided for the assessment of taxes upon individual property.

The stringent provisions of the Constitution of South Dakota, then in force, required the adoption of a rule of valuation, as near as might be, of like character in assessing individual and corporate property in the state, and here, the record shows, the valuation of the property of the express companies was based principally upon their gross incomes, determined by the method already described. Such administration of the statute would be illegal, although the law upon its face be unobjectionable. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

It is said that this conclusion is not consistent with the decision of the supreme court of South Dakota, construing its own Constitution with final authority, in State ex rel. American Exp. Co. v. State Board, 3 S. D. 338, 53 N. W. 192. In that case, while the method of making assessments and valuations by the state board was considered, and the court refused to interfere with such assessments under the circumstances shown, there was no discussion or decision of the constitutionality of the act when administered as in this case. In that case the constitutionality of the act does not seem to have been raised. In Re Opinion of Judges, 34 S. D. 650, 147 N. W. 729, the judges of the supreme court of the state declined to give an opinion to the governor as to the constitutionality of the law in question.

In Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, the so-called Nichols law, which had been sustained by the supreme court of the state of Ohio, was sustained by this [243] court as against an attack thereon under the 14th Amendment to the Federal Constitution. In that case, the manner of taxation was entirely different from the one now under consideration. The law permitted the taking into consideration of the value of the property as a unit, and then ascertaining and assessing the proportion thereof within the state of Ohio, and it was held that such proportionate taxation did not violate the 14th Amendment to the Federal Constitution. Another case greatly relied upon by appellant is United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211, in which a statute of the state of Minnesota which undertook to tax express companies upon their property employed within the state, measured by the gross receipts within the state, from which certain deductions were made, was attacked as in violation of the commerce clause of the Federal Constitution, as the receipts which were the basis of the tax were derived in part from interstate transportation. In that case, the law was specifically authorized by the Constitution of the state, as a means of reaching a proper valuation of the express companies' property within the state, in lieu of all other taxes. There was no contention in the case that the method used resulted in an excessive valuation. The tax was sustained, as against the attack under the commerce clause, upon the ground that, so far as interstate commerce receipts were referred to, they were in part the measure of a tax within the legislative power of the state, and not in any just sense a burden upon interstate commerce.

We reach the conclusion that the circuit court of appeals did not err in holding this tax as in fact levied and assessed to be in violation of the Constitution of the state.

The contention is made that there was no ground for equity jurisdiction, and that therefore the bill should have been dismissed. This court has frequently held that a bill will not lie in the Federal courts to enjoin the collection [244] of state taxes where a plain, adequate, and complete remedy at law has been given to recover back illegal taxes, and the attack upon the assessment is based upon the sole ground that the same is illegal and void. See Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941, where many of the previous cases in this court are reviewed. But in the present case, it was alleged not only that the assessment was unwarranted by the law, but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies, or such gross mistake as would amount to fraud, thus averring a distinct and well-recognized ground of equity jurisdiction. It also appears that the tax of 1909 had been enjoined similarly, and that from the decree in that case no appeal had been taken. Such continuing violation of constitutional rights might afford a ground for equitable relief. See Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 157, 158, 25 L. ed. 903-905; Stanley v. Albany County, 121 U. S. 535, 550, 30 L. ed. 1000, 1003, 7 Sup. Ct. Rep. 1234; Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767, 24 Sup. Ct. Rep. 498; Taylor v. Louis-

ville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350.

We find no error in the judgment of the Circuit Court of Appeals, and the same is affirmed.

HENRY W. O'NEILL and Cornelius K. Hefferman, Plffs. in Err.,
v.
JACOB F. LEAMER, John T. Daley, Fred Bartels, et al.

(See S. C. Reporter's ed. 244–254.)

Error to state court — scope of review — non-Federal question.

1. The propriety of a statutory delegation of authority to an inferior state court in the matter of the formation of a drainage district is a state question not open for review in the Federal Supreme Court on writ of error to the highest state court.

[For other cases, see Appeal and Error, 2152–2163, in Digest Sup. Ct. 1908.]

Courts — jurisdiction — political question — republican form of government.

2. The guaranty to each state in U. S. Const. art. 4, § 4, of a republican form of government, cannot be invoked to invalidate in the courts the proceedings in connection with the organization and management of a drainage district.

[For other cases, see Courts, I. e, 2, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — due process of law.

3. A contention that an appropriation of land for a drainage district was essentially for a private purpose, and hence contrary to U. S. Const., 14th Amend., as amounting to a deprivation of property without due process of law, presents a Federal question which will support a writ of error from the Federal Supreme Court to a state court, where the latter court denied the right so asserted.

[For other cases, see Appeal and Error, 1898–1913, in Digest Sup. Ct. 1908.]

Eminent domain — public or private use — reclamation of swamp lands.

4. The power of eminent domain was not exercised for private purposes, contrary to U. S. Const., 14th Amend., by condemnation proceedings instituted by a drainage district organized conformably to Neb. Laws 1905, chap. 161, and Laws 1909, chap. 147, which provide that in a proceeding initiated by a majority in interest of the owners in any contiguous body of swamp or overflowed lands for the purpose of having such land reclaimed and protected from the effects of water, the district court for the proper county may declare the drainage district as defined to be a public corporation of the state, although the fact that any proposed district is to contain 160 acres or more of wet or overflowed lands is made by the statute sufficient cause for declaring the public utility of the improvement, where the highest state court has not sustained the act as applicable to any case in which it was considered, upon a judicial examination of the facts, that the undertaking served private interest alone, and the district in question embraces a large area with many proprietors, and the enterprise was judicially declared, after contest, to be a public utility, and conducive to the public convenience, health, and welfare.

[For other cases, see Eminent Domain, I. d, in Digest Sup. Ct. 1908.]

[No. 33.]

Argued October 26 and 27, 1915. Decided November 29, 1915.

IN ERROR to the Supreme Court of the State of Nebraska to review a decree which affirmed a decree of the District Court of Dakota County, in that state, dismissing a suit to enjoin the construction of a drainage ditch. Affirmed.

See same case below, 93 Neb. 786, 142 N. W. 112.

The facts are stated in the opinion.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 72 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

As to what constitutes a taking of private property for public use—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; D. M. Osborne & Co. v. Missouri P. R. Co. 37 L. ed. U. S. 156; Sweet v. Rechel, 40 L. ed. U. S. 188; and Backus v. Fort Street Union Depot Co. 42 L. ed. U. S. 853.

On drainage of private lands as public purpose for which power of eminent domain may be exercised—see notes to Re Tuthill, 49 L.R.A. 781; and Henderson v. Lexington, 22 L.R.A.(N.S.) 163.

As to right to take property for irrigating or draining private lands—see note to Nash v. Clark, 1 L.R.A.(N.S.) 208.

On institution of drainage proceeding by organization of drainage district—see notes to State ex rel. Utick v. Polk County, 60 L.R.A. 169; and Waterbury v. Platt Bros. & Co. 60 L.R.A. 229.

Mr. William V. Allen argued the cause, and, with Mr. M. D. Tyler, filed a brief for plaintiffs in error:

The motion to dismiss or affirm should be denied.

Hecker v. Fowler, 1 Black, 95, 96, 17 L. ed. 45; Sparrow v. Strong, 3 Wall. 97, 105, 18 L. ed. 49, 50, 2 Mor. Min. Rep. 320; Blythe v. Hinckley, 180 U. S. 333, 338, 45 L. ed. 557, 561, 21 Sup. Ct. Rep. 390; American Sugar Ref. Co. v. Louisiana, 179 U. S. 88, 91, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 257, 54 L. ed. 179, 184, 30 Sup. Ct. Rep. 78; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 228, 232, 41 L. ed. 979, 982, 983, 17 Sup. Ct. Rep. 581; Semple v. Hagar, 4 Wall. 431, 435, 18 L. ed. 402, 403; Lynch v. DeBernal, 131 U. S. 94, appx. and 19 L. ed. 395; Mandelbaum v. Nevada, 8 Wall. 311, 19 L. ed. 479; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 576, 585, 28 L. ed. 1084, 1086, 1088, 5 Sup. Ct. Rep. 681; Eureka Lake & Y. Canal Co. v. Superior Ct. 116 U. S. 410. 418, 29 L. ed. 671, 674, 6 Sup. Ct. Rep. 429; Kaukauna Water Power v. Green Bay & M. Canal Co. 142 U. S. 254, 269, 282, 35 L. ed. 1004, 1009, 1014, 12 Sup. Ct. Rep. 173; Central of Georgia R. Co. v. Wright, 166 Fed. 157; Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 142, 155, 17 L. ed. 571, 575, 580; Furman v. Nichol, 8 Wall. 44–64, 19 L. ed. 370–378; Satterlee v. Matthewson, 2 Pet. 380, 409, 410, 7 L. ed. 458, 467, 468; Chambers v. Baltimore & O. R. Co, 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; Hunter v. Pittsburgh, 207 U. S. 161, 176, 52 L. ed. 151, 158, 28 Sup. Ct. Rep. 40; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 46, 48, 54 L. ed. 921, 925, 926, 47 L.R.A. (N.S.) 84, 30 Sup. Ct. Rep. 676; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 251, 7 L. ed. 412, 414; Crowell v. Randell, 10 Pet. 368, 398, 9 L. ed. 458, 470; Murdock v. Memphis, 20 Wall. 590, 642, 22 L. ed. 429, 446; Murray v. Charleston, 96 U. S. 432, 442, 443, 449, 24 L. ed. 760–762, 764; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 68, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; Dewey v. Des Moines, 173 U. S. 193, 200, 43 L. ed. 665, 667, 19 Sup. Ct. Rep. 379; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 296, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Powell v. Brunswick County, 150 U. S. 433, 440, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; Sayward v. Denny, 158 U. S. 180, 184, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; Home for Incurables v. New York, 187 U. S. 155, 157, 47 L. ed. 117, 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 309, 47 L. ed. 480, 484, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Montana ex rel. Haire v. Rice, 204 U. S. 291, 299, 51 L. ed. 490, 494, 27 Sup. Ct. Rep. 281; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 704, 57 L. ed. 1031, 1033, 33 Sup. Ct. Rep. 703; Armstrong v. Athens County, 16 Pet. 281, 285, 10 L. ed. 965, 966; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 565, 580, 50 L. ed. 596, 602, 604, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 520, 50 L. ed. 845, 850, 851, 26 Sup. Ct. Rep. 518; Cincinnati, P. B. S. & P. Pocket Co. v. Bay, 200 U. S. 179, 182, 50 L. ed. 428, 432, 26 Sup. Ct. Rep. 208; Arrowsmith v. Harmoning, 118 U. S. 194, 196, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; Commonwealth Bank v. Griffith, 14 Pet. 56, 58, 10 L. ed. 352, 353; Home Ins. Co. v. Augusta, 93 U. S. 116, 123, 23 L. ed. 825, 826; Bunn, United States Courts, pp. 19–21; Harding v. Illinois, 196 U. S. 78, 84, 49 L. ed. 394, 396, 25 Sup. Ct. Rep. 176.

This court has jurisdiction to review a decision of a state court in a case in which the validity of a state statute is drawn in question as repugnant to the Federal Constitution, where the decision was in favor of its validity.

Craig v. Missouri, 4 Pet. 410, 426, 429, 430, 7 L. ed. 903, 910, 911; Byrne v. Missouri, 8 Pet. 40, 42, 8 L. ed. 859, 860; Worcester v. Georgia, 6 Pet. 515, 541, 8 L. ed. 483, 494; Edwards v. Elliott, 21 Wall. 532–558, 22 L. ed. 487–492; Daniels v. Tearney, 102 U. S. 415–422, 26 L. ed. 187–189; Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 112, 116, 129, 30 L. ed. 342, 345, 346, 350, 7 Sup. Ct. Rep. 108; McPherson v. Blacker, 146 U. S. 1, 22, 42, 36 L. ed. 869, 873, 879, 13 Sup. Ct. Rep. 3; Sully v. American Nat. Bank, 178 U. S. 289, 297, 44 L. ed. 1072, 1076, 20 Sup. Ct. Rep. 935.

A decision of the Federal question in terms is not essential. If a decision of such question was necessarily involved in the judgment, it is not a matter of importance that the state court avoided all reference to it.

Chapman v. Goodnow (Chapman v. Crane) 123 U. S. 540, 31 L. ed. 235, 8 Sup Ct. Rep. 211; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 652, 655, 660, 41 L. ed. 1149, 1151–1153, 17 Sup. Ct. Rep. 709; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 533, 534, 46 L. ed. 673, 674, 676, 22 Sup. Ct. Rep. 446; Scott v. McNeal, 154 U. S. 34, 45, 38

L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 493, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968; Huntington v. Attrill, 146 U. S. 657, 681, 689, 36 L. ed. 1123, 1133, 1135, 13 Sup. Ct. Rep. 224; Ohio L. Ins. & T. Co. v. DeBolt, 16 How. 416, 425, 432, 433, 14 L. ed. 997, 1001, 1003, 1004.

To justify the conclusion that a pleading is frivolous, it must be not only without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection, and indicates that its interposition was in bad faith.

Cook v. Warren, 88 N. Y. 38; Youngs v. Kent, 46 N. Y. 672; Lerdall v. Charter Oak L. Ins. Co. 51 Wis. 426, 8 N. W. 283.

This being a case in which analysis and exposition are necessary to determine the validity of the act involved, the writ of error cannot be said to be frivolous.

Louisville & N. R. Co. v. Melton, 218 U. S. 36, 48, 52, 54 L. ed. 921, 926, 927, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676.

The act in question authorizes the taking of private property for a private purpose, and is therefore void.

Lake Erie & W. R. Co. v. Hancock County, 63 Ohio St. 23, 57 N. E. 1009; Chicago & E. R. Co. v. Keith, 67 Ohio St. 279, 60 L.R.A. 525, 65 N. E. 1020; Donnelly v. Decker, 58 Wis. 467, 46 Am. Rep. 637, 17 N. W. 389; Re Ryers, 72 N. Y. 1, 28 Am. Rep. 88; Re Theresa Drainage Dist. 90 Wis. 301, 63 N. W. 288; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; McQuillen v. Hatton, 42 Ohio St. 204; State ex rel. Shubert v. Rockford, 102 Minn. 442, 120 Am. St. Rep. 640, 114 N. W. 245; Reeves v. Wood County, 8 Ohio St. 333; Kinnie v. Bare, 68 Mich. 625, 36 N. W. 673; Anderson v. Hill, 54 Mich. 477, 20 N. W. 556; Wilcox v. Paddock, 65 Mich. 23, 31 N. W. 612; Atty. Gen. ex rel. Alexander v. McLear, 146 Mich. 45, 109 N. W. 28; Gifford Drainage Dist. v. Shroer, 145 Ind. 572, 44 N. E. 636; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918; 14 Cyc. 1025; People ex rel. Pulman v. Henion, 64 Hun, 471, 19 N. Y. Supp. 488; Gilbert v. Foote, cited in White v. White, 5 Barb. 483; Woodruff v. Fisher, 17 Barb. 224; Chaplin v. Highway Comrs. 129 Ill. 651, 22 N. E. 484; Re Penfield, 3 App. Div. 30, 37 N. Y. Supp. 1056; Re Chili, 5 Hun, 116; Chesbrough v. Putnam & Paulding Counties, 37 Ohio St. 508; State ex rel. Witte v. Curtis, 86 Wis. 140, 56 N. W. 475; Cooley, Const. Lim. ed. 1903, p. 768; Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 130; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 202, 203, 50 L. ed. 150, 152, 153, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; 1 Lewis, Em. Dom. 3d ed. §§ 257, 258; Nichols, Em. Dom. 1909, p. 274; Jenal v. Green Island Draining Co. 12 Neb. 163, 10 N. W. 547; Rutherford's Case, 72 Pa. 82, 13 Am. Rep. 657; Anderson v. Kerns Draining Co. 14 Ind. 199, 77 Am. Dec. 65; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Nickey v. Stearns Ranchos Co. 126 Cal. 150, 58 Pac. 459; People ex rel. Butler v. Saginaw County, 26 Mich. 29; Atty. Gen. v. Eau Claire, 37 Wis. 401; Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 362, 22 N. E. 782; Smith v. Atlantic & G. W. R. Co. 25 Ohio St. 91; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A.(N.S.) 638, 107 N. W. 405, 7 Ann. Cas. 1182; 2 Farnham, Waters, 1914, § 170, p. 903, § 171, pp. 917, 918, § 179, p. 951, § 181, p. 956; Re Drainage along Pequest River, 41 N. J. L. 181; Cole v. Dooley, 137 Mich. 419, 100 N. W. 562; Webb v. Lucas, 125 Minn. 403, 147 N. W. 274; Cypress Pond Draining Co. v. Hooper, 2 Met. (Ky.) 350; State, Kean, Prosecutor, v. Driggs Drainage Co. 45 N. J. L. 91; Commercial Nat. Bank v. Iola, 9 Kan. 689, 2 Dill. 353, Fed. Cas. No. 3,061; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; Scuffletown Fence Co. v. McAllister, 12 Bush, 312; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 45; 1 Lewis, Em. Dom. 3d ed. § 312, p. 589; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Parkersburg v. Brown, 106 U. S. 487, 504, 27 L. ed. 238, 245; Cole v. LaGrange, 113 U. S. 1-9, 28 L. ed. 896-899, 5 Sup. Ct. Rep. 416; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226-263, 41 L. ed. 979-994, 17 Sup. Ct. Rep. 581; West River Bridge Co. v. Dix, 6 How. 507, 547, 12 L. ed. 535, 552; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254-282, 35 L. ed. 1004-1014, 12 Sup. Ct. Rep. 173; Osborne v. Adams County, 106 U. S. 181-183, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116-142, 51 L. ed. 399-411, 27 Sup. Ct. Rep. 202.

The legislature cannot make a private purpose a public one by mere fiat.

Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 829; State ex rel. Schubert v. Rockford, 102 Minn. 442, 120 Am. St. Rep. 640, 114 N. W. 245; Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; Denver R. Land & Coal Co. v. Union P. R. Co. 34 Fed. 386.

Whether the use is public or private is a judicial question, to be determined by the court.

Re Niagara Falls & W. R. Co. 108 N.

Y. 385, 15 N. E. 429; Pocantico Waterworks Co. v. Bird, 130 N. Y. 258, 29 N. E. 246; Logan v. Stogsdale, 123 Ind. 372, 8 L.R.A. 58, 24 N. E. 135; Washington Water Power Co. v. Waters, 186 Fed. 572; Allen v. Jay, 60 Me. 139, 11 Am. Rep. 185; Tyler v. Beacher, 44 Vt. 651, 8 Am. Rep. 398; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 47; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 829.

To constitute a public use it is necessary that the general public be to some extent entitled to control the property appropriated, or have a right to a fixed and definite use of it, not as a mere matter of favor or by permission of the owner, but as a matter of right.

Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A (N.S.) 648, 107 N. W. 405, 7 Ann. Cas. 1182; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379.

A use which may be monopolized or absorbed by a few, and from which the general public may and must alternatively be excluded, is in no sense a public use.

Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894.

If the benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right.

Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453.

Not only must the purpose for which the land is taken be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use.

Board of Health v. Van Hoesen, supra; Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L.R.A. 111, 43 N. W. 469; Re Burns, 155 N. Y. 23, 49 N. E. 246; Pocantico Waterworks Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Re New York, L. & W. R. Co. 99 N. Y. 24, 1 N. E. 27; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 42; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A 368, 60 Am. St. Rep. 818, 46 Pac. 790; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591.

The following legislative acts have been held unconstitutional and void as promoting a private purpose:

State ex rel. Bowen v. Adams County, 15 Neb. 568, 20 N. W. 96 (bonds to aid a steam gristmill); Getchell v. Benton, 30 Neb. 870, 47 N. W. 468 (bonds to aid a beet sugar mill); Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 670, 20 L. ed. 455, 463 (bonds of municipality to pay manufacturing company); Hanson v. Vernon, 27 Iowa, 47, 1 Am. Rep. 215 (tax to aid in construction of a railroad); Osborne v. Adams County, 106 U. S. 181, 183, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; Osborne v. Adams County, 109 U. S. 1, 2, 27 L. ed. 835, 3 Sup. Ct. Rep. 150 (bonds to aid a steam gristmill); Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586 (authorizing a municipal corporation to issue bonds to buy stock in a private corporation); Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 42 (authorizing a corporation formed for manufacturing, mining, or other chemical purposes to acquire land by eminent domain); Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 56 L.R.A. 329, 83 Am. St. Rep. 354, 83 N. W. 625 (providing for the payment of bonds to sugar beet growers); Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68 (to treat habitual drunkards at a private institution); Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208 (money for the benefit of an insolvent railroad); Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142 (to purchase and distribute fuel to inhabitants of a municipality); Underwood v. Wood, 93 Ky. 177, 15 L.R.A. 825, 19 S. W. 405 (for payment of tuition of pupils to attend private academies); Re Barre Water Co. 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 109 (to distribute water power to private consumers); Bush v. Orange County, 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121 (to raise money to pay drafted men serving in the Union Army or their heirs); Parkersburg v. Brown, 106 U. S. 487, 491, 27 L. ed. 238, 240, 1 Sup. Ct. Rep. 442; Cole v. LaGrange, 113 U. S. 1, 9, 28 L. ed. 896, 898, 5 Sup. Ct. Rep. 416; Dodge v. Mission Twp. 54 L.R.A. 242, 46 C. C. A. 661, 107 Fed. 832; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Coates v. Campbell, 37 Minn. 498, 35 N. W. 366 (bonds to aid manufacturers); Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39 (bonds to aid sufferers from Boston fire); Patty v. Colgan, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133 (aid to flood sufferers); Lucas County v. State (Davies v. State) 75 Ohio St. 135, 7 L.R.A. (N.S.) 1196, 78 N. E. 955 (annuities for the blind); State ex rel. Garrett v. Froehlich, 118 Wis. 129, 61 L.R.A. 345, 99 Am. St. Rep. 985, 94 N. W. 50 (bounty to private inebriate hospital); State ex rel. Garth v.

Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245 (bounty to students attending state university); Kingman v. Brockton, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998 (aid in erection of building for Grand Army post); State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99 (furnishing seed grain to farmers); William Deering & Co. v. Peterson, 75 Minn. 113, 77 N. W. 568 (appropriation to purchase seed grain for those without crops); Deal v. Mississippi County, 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24 (bounties to growers of trees); Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130 (taking of railway light of way for private elevator); Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051 (free tickets to stock shippers); Harp v. Choctaw, O. & G. R. Co. 118 Fed. 169 (compelling building of spur track to coal mine); Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 102 N. W. 80, 105 N W. 716; Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 56 L.R.A. 329, 83 Am. St. Rep. 354, 83 S. W. 625; Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 455 (bounty for growers of sugar beets).

The constitutional validity of a statute is to be tested not by what has been done under it, but by what may, by its authority, be done.

Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289; Gilman v. Tucker, 128 N. Y. 200, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160-172, 38 L. ed. 398-401, 14 Sup. Ct. Rep. 506.

A mere legislative declaration of the purpose of the act is not binding, and cannot conceal its real object.

Lochner v. New York, 198 U. S. 45-76, 49 L. ed. 937-949, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Webster v. Susquehanna Pole Line Co. 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 46 L.R.A. (N.S.) 1201, 102 N. E. 619.

The application and hearing were strictly *ex parte*, and in no sense due process of law.

Wilber v. Reed, 84 Neb. 767, 122 N. W. 53; People ex rel. Stephens v. Tallman, 36 Barb. 222; Brooklyn v. Franz, 87 Hun, 54, 33 N. Y. Supp. 869; Seifert v. Brooks, 34 Wis. 443; State ex rel. Flint v. Fond du Lac, 42 Wis. 287; Pennoyer v. Neff, 95 U. S. 714-748, 24 L. ed. 565-578; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 466, 33 L. ed. 970, 985, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

A flooding of land is a taking within the meaning of the law of eminent domain.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 182, 20 L. ed. 557, 561; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Williams v. United States, 104 Fed. 50; Nichols, Em. Dom. ed. 1909, § 61; Manigault v. Springs, 199 U. S. 473, 484, 50 L. ed. 274, 280, 26 Sup. Ct. Rep. 127; King v. United States, 59 Fed. 9.

The rule in Nebraska is that the damages must be paid, or the payment thereof secured, before the property is taken.

Republican Valley R. Co. v. Fink, 18 Neb. 85, 24 N. W. 439; Hull v. Chicago, B. & Q. R. Co. 21 Neb. 374, 32 N. W. 162; Zimmerman v. Kearney County, 33 Neb. 622, 50 N. W. 1126; Livingston v. Johnson County, 42 Neb. 280, 60 N. W. 555; Hodges v. Seward County, 49 Neb. 668, 68 N. W. 1027; Lewis v. Lincoln, 55 Neb. 4, 75 N. W. 154; Chicago, B. & Q. R. Co. v. Douglas County, 1 Neb. (Unof.) 250, 95 N. W. 339; Hogsett v. Harlan County, 4 Neb. (Unof.) 312, 97 N. W. 316.

The taking is ordinarily the formal act of some responsible body, consisting of the passing of a vote or the filing of some documents, and the time and extent of the taking are thus definitely fixed; but, in the absence of a formal taking, actual authorized physical interference with the property marks the *punctum temporis*.

Nichols, Em. Dom. 1909 ed. p. 206, § 179.

The land to be appropriated must be identified with as much certainty as is required in a conveyance.

Warren v. Brown, 31 Neb. 18, 47 N. W. 633; Rice v. Danville, L. & T. P. Road Co. 7 Dana, 81; 15 Cyc. 855, 857; St. Louis & S. F. R. Co. v. Southwestern Teleph. & Teleg. Co. 58 C. C. A. 198, 121 Fed. 282; Re Marsh, 71 N. Y. 317; Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271; Re New York C. & H. R. R. Co. 70 N. Y. 192; Re Amsterdam Water Comrs. 96 N. Y. 357; Bell Teleph. Co. v. Parker, 187 N. Y. 303, 79 N. E. 1008.

The state cannot, by the violation of its Constitution, impart vitality to the act and make it due process of law.

Minor v. Happersett, 21 Wall. 162-178, 22 L. ed. 627-631; Re Duncan (Duncan v. McCall) 139 U. S. 449-462, 35 L. ed. 219-224, 11 Sup. Ct. Rep. 573; Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204-210, 20 L. ed. 112-114; Hall v. DeCuir, 95 U. S. 485-517, 24 L. ed. 547-557; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661-670, 20 L. ed. 757-760.

This tribunal is not bound by the state decisions.

Bunn, United States Courts, 1914, pp. 99, 100; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 159, 41 L. ed. 369, 389,

17 Sup. Ct. Rep. 56; Chicago, B. & Q. R. Co. v. Illinois, 200 Ill. 561-601, 50 L. ed. 596-612, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Hughes, Fed. Proc. 1913, p. 535; Loveland, App. Jurisdiction, 1911, § 333, p. 714; Taylor, Jurisdiction & Procedure of U. S. Sup. Ct. 1905, pp. 362, 363.

No man can be coerced into corporate relations with others, and to assume and perform the duties and burdens of that relation.

Dartmouth College v. Woodward, 4 Wheat. 518, 708, 4 L. ed. 629, 676; 1 Morawetz, Priv. Corp. 1886, § 24; Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Gardner v. Hamilton Mut. Ins. Co. 33 N. Y. 421; Marshall, Corp. 1902, § 195, pp. 495, 496; Re North Milwaukee, 93 Wis. 616, 33 L.R.A. 638, 67 N. W. 1033; Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 8 L.R.A. 106, 23 Pac. 405; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023.

It is elementary that land cannot be taken under the power of eminent domain, unless it is thereafter to be devoted to the use of the public independently of the will of the person or corporation taking it.

Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 380; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894.

Statutes which make private interest the test have been held void in the following cases:

Gaylord v. Sanitary Dist. 204 Ill. 576, 63 L.R.A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655-670, 22 L. ed. 455-463; Parkersburg v. Brown, 106 U. S. 487-504, 27 L. ed. 238-245, 1 Sup. Ct. Rep. 442; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226-263, 41 L. ed. 979-994, 17 Sup. Ct. Rep. 581; Cole v. LaGrange, 113 U. S. 1-9, 28 L. ed. 896-899, 5 Sup. Ct. Rep. 416; West River Bridge Co. v. Dix, 6 How. 507-550, 12 L. ed. 535-552; Missouri P. R. Co. v. Nebraska, 164 U. S. 403-417, 41 L. ed. 489-495, 17 Sup. Ct. Rep. 130; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254-282, 35 L. ed. 1004-1014, 12 Sup. Ct. Rep. 173; Minneapolis General Electric Co. v. Minneapolis, 194 Fed. 215; Shasta Power Co. v. Walker, 149 Fed. 570, 19 L.R.A.(N.S.) 725, 87 C. C. A. 660, 160 Fed. 859; Osborne v. Adams County, 106 U. S. 181-183, 27 L. ed. 129, 1 Sup. Ct. Rep. 168; The Liberty Bell, 23 Fed. 843; Cleveland Electric R. Co. v. Cleveland, 204 U. S. 116-142, 51 L. ed. 399-411, 27 Sup. Ct. Rep. 202; Sutherland-Innes Co. v. Evart, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 604; Parks v. Wyandotte County, 61 Fed. 440; St. Louis & C. R. Co. v. Thomas, 34 Fed. 774; Weidenfeld v. Sugar Run R. Co. 48 Fed. 615; Imperial Water Co. v. Holabird, 116 C. C. A. 526, 197 Fed. 4; Ottawa v. Carey, 108 U. S. 110-124, 27 L. ed. 669-675, 2 Sup. Ct. Rep. 361; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Re Jacobs, 98 N. Y. 99, 50 Am. Rep. 636; Williams v. Duanesburgh, 66 N. Y. 129; Inspiration Consol. Copper Co. v. New Keystone Copper Co. 16 Ariz. 257, 144 Pac. 277; Cozard v. Kanawha Hardwood Co. 139 N. C. 283, 1 L.R.A.(N.S.) 969, 111 Am. St. Rep. 779, 51 S. E. 932; Miller v. Pulaski, 109 Va. 137, 22 L.R.A.(N.S.) 552, 69 S. E. 880; Alfred Phosphate Co. v. Duck River Phosphate Co. 120 Tenn. 260, 22 L.R.A.(N.S.) 701, 113 S. W. 410; Howard Mills Co. v. Schwartz Lumber & Coal Co. 77 Kan. 599, 18 L.R.A.(N.S.) 356, 95 Pac. 559; State ex rel. Tacoma Industrial Co. v. White River Power Co. 39 Wash. 648, 2 L.R.A.(N.S.) 842, 82 Pac. 150, 4 Ann. Cas. 987; Sutter County v. Nichols, 152 Cal. 688, 15 L.R.A.(N.S.) 616, 93 Pac. 872, 14 Ann. Cas. 900; Pere Marquette R. Co. v. United States Gypsum Co. 154 Mich. 290, 22 L.R.A.(N.S.) 181, 117 N. W. 733; Kansas City v. Hyde, 196 Mo. 498, 7 L.R.A.(N.S.) 639, 113 Am. St. Rep. 766, 96 S. W. 201; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Rockingham County Light & P. Co. v. Hobbs, 72 N. H. 531, 66 L.R.A. 581, 58 Atl. 46; Clark v. Mitchell County, 69 Kan. 542, 66 L.R.A. 965, 77 Pac. 284; Logan v. Stogsdale, 123 Ind. 372, 8 L.R.A. 58, 24 N. E. 135; Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559; Board of Health v. Van Hoesen, 87 Mich. 533, 14 L.R.A. 114, 49 N. W. 894; Avery v. Vermont Electric Co. 75 Vt. 235, 59 L.R.A. 817, 98 Am. St. Rep. 818, 54 Atl. 179; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 2 L.R.A. 680, 8 S. E. 453; St. Louis, I. M. & S. R. Co. v. Petty, 57 Ark. 359, 20 L.R.A. 434, 21 S. W. 884; Kyle v. Texas & N. O. R. Co. 3 Tex. App. Civ. Cas. (Willson) 518, 4 L.R.A. 275; Re Barre Water Co. 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 105; Brewster v. J. & J. Rogers Co. 169 N. Y. 73, 58 L.R.A. 495, 62 N. E. 164; Wisconsin Water Co. v. Winans, 85 Wis. 26, 20 L.R.A. 662, 39 Am. St. Rep. 813, 54 N. W. 1003; Opinion of Justices, 204 Mass. 607, 27 L.R.A.(N.S.) 483, 91 N. E. 405; Neitzel v. Spokane International R. Co. 65 Wash. 100, 36 L.R.A.(N.S.) 522, 117 Pac. 864; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 46 L.R.A.(N.S.) 1196, 102 N. E. 619; Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41; Pennsylvania Mut. L. Ins. Co. v. Philadelphia, 242 Pa. 47, 49 L.R.A.(N.S.) 1062,

88 Atl. 904; State ex rel. Springfield Invest. Co. v. Superior Ct. 78 Wash. 679, 51 L.R.A.(N.S.) 987, 139 Pac. 601; Anderson v. Smith-Powers Logging Co. 71 Or. 276, L.R.A.1916B, 1089, 139 Pac. 736; State ex rel. Shropshire v. Superior Ct. 51 Wash. 386, 99 Pac. 3; Northern Light & P. Co. v. Stacher, 13 Cal. App. 404, 109 Pac. 896; State ex rel. Clark v. Superior Ct. 62 Wash. 612, 114 Pac. 444; Bradley v. Pharr, 45 La. Ann. 426, 19 L.R.A. 647, 12 So. 618; State v. Hazelton & L. R. Co. 40 Ohio St. 504; State ex rel. Luedinghaus v. Superior Ct. 72 Wash. 480, 130 Pac. 752; Jeter v. Vinton-Roanoke Water Co. 114 Va. 769, 76 S. E. 921, Ann. Cas. 1914C, 1029; Re Splitrock Cable Road Co. 128 N. Y. 408, 28 N. E. 506; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 42; Barton v. Riverside Water Co. 155 Cal. 509, 23 L.R.A. (N.S.) 331, 101 Pac. 790; Garrison v. North Pasadena Land & Water Co. 163 Cal. 235, 124 Pac. 1009; San Joaquin & K. River Canal & Irrig. Co. v. Stevenson, 164 Cal. 221, 128 Pac. 924; Re Niagara Falls & W. R. Co. 121 N. Y. 319, 24 N. E. 452; Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 36 L.R.A. 55, 60 Am. St. Rep. 105, 70 N. W. 68; Opinion of Justices, 155 Mass. 598, 15 L.R.A. 809, 30 N. E. 1142; Bush v. Orange County, 159 N. Y. 212, 45 L.R.A. 556, 70 Am. St. Rep. 538, 53 N. E. 1121; Baltimore & E. S. R. Co. v. Spring, 80 Md. 510, 27 L.R.A. 72, 31 Atl. 208; Lucas County v. State (Davies v. State) 75 Ohio St. 114, 7 L.R.A.(N.S.) 1196, 78 N. E. 955; State ex rel. Garth v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Patty v. Colgan, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133; Coates v. Campbell, 37 Minn. 498, 35 N. W. 366; Kingman v. Brockton, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998; William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568; Deal v. Mississippi Co. 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24; Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 102 N. W. 80, 105 N. W. 716; Michigan Sugar Co. v. Auditor General, 124 Mich. 674, 56 L.R.A. 329, 83 Am. St. Rep. 354, 83 N. W. 625; Atchison, T. & S. F. R. Co. v. Campbell, 61 Kan. 439, 48 L.R.A. 251, 78 Am. St. Rep. 328, 59 Pac. 1051; Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454; State ex rel. Bowen v. Adams County, 15 Neb. 569, 20 N. W. 96; Getchell v. Benton, 30 Neb. 870, 47 N. W. 468; Albright v. Sussex County Lake & Park Commission, 71 N. J. L. 303, 69 L.R.A. 768, 108 Am. St. Rep. 749, 57 Atl. 398, 2 Ann. Cas. 49; Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; Wyandotte County v. Abbott, 52 Kan. 148, 34 Pac. 416; Huber v. Merkel, 117 Wis. 355, 62 L.R.A. 589, 98 Am. St. Rep. 933, 94 N. W. 354.

A statute declaring a corporation essentially private to be public, and a purpose essentially private to be a public purpose, is unconstitutional and void.

Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 52, 31 Am. Dec. 313; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Pennsylvania Mut. L. Ins. Co. v. Philadelphia, 242 Pa. 47, 49 L.R.A.(N.S.) 1062, 88 Atl. 904.

A legislature cannot make a private purpose public by declaring it to be such, or by authorizing the exercise of the power of eminent domain for any use which the courts may determine not to be a public use.

Webster v. Susquehanna Pole Line Co. 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; State ex rel. Wausau Street R. Co. v. Bancroft, 148 Wis. 124, 38 L.R.A.(N.S.) 526, 134 N. W. 339.

A statute having a double purpose, one which is public and the other private, is void as to the latter; a statute granting a power which may be used for a public or a private purpose at the option of the grantee is void.

Atty. Gen. v. Eau Claire, 37 Wis. 437.

Dissenting landowners are rendered incapable of making a protest or of uttering a syllable against the enterprise. That, too, renders the act void.

Ferbrache v. Drainage Dist. 23 Idaho, 85, 44 L.R.A.(N.S.) 543, 128 Pac. 553, Ann. Cas. 1915C, 43.

No particular formula is held necessary to present a Federal question, but it is sufficient if, from the record, it reasonably appears that the question was brought to the attention of the state court, and decided adversely to the plaintiff in error.

Daniels v. Tearney, 102 U. S. 415, 418, 422, 26 L. ed. 187–189; Cornell v. Green, 163 U. S. 75, 76, 41 L. ed. 76, 77, 16 Sup. Ct. Rep. 969.

Where a proceeding is instituted in which it is sought to exercise the power to condemn property for both public and private uses indiscriminately, that is, where the purposes stated in the petition are part public and part private,—the right to proceed must be denied.

Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A.(N.S.) 646, 107 N. W. 405, 7 Ann. Cas. 1182.

The legislature cannot authorize the creation of a corporation the primary purpose of which is strictly private, and by calling it a public corporation clothe it with duties that are in no sense public, but confessedly private, and by that means violate the fundamental law of the state, and

clothe it with the power of eminent domain, and make that binding upon the citizen, and upon the Federal courts. Wherever an attempt is made, as in this case, to do so, this court has jurisdiction to declare that the state tribunal so misconstrued its own law as to violate the right of the individual citizen under the 14th Amendment.

Hall v. DeCuir, 95 U. S. 485, 499, 517, 24 L. ed. 547, 552, 558; Delmas v. Merchants' Mut. Ins. Co. 14 Wall. 661, 665, 670, 20 L. ed. 757, 759, 760; Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 210, 20 L. ed. 112, 114; Olcott v. Fond du Lac County, 16 Wall. 678, 688, 698, 21 L. ed. 382, 386, 389.

It is elementary law (and this is the line of demarcation between a public and private use), that the public use that authorizes the exercise of the right of eminent domain is a public governmental use; that is, a use for some governmental purpose or object as distinguished from a private use, or a use which would be beneficial to a number of persons in promoting their private interests, or in enhancing the value of their estates. A public use must be clearly distinguished from a popular use, or a use which promotes the private interests of many persons.

Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Connecticut College v. Calvert, 89 Conn. 421, 48 L.R.A.(N.S.) 493, 88 Atl. 633; Varner v. Martin, 21 W. Va. 534; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 52, 31 Am. Dec. 313; Sutherland-Innes Co. v. Evart, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450; Salisbury Land & Improv. Co. v. Com. 215 Mass. 371, 46 L.R.A.(N.S.) 1196, 102 N. E. 619.

Mr. R. E. Evans argued the cause, and, with Mr. A. C. Strong, filed a brief for defendants in error:

There is nothing in the Constitution of the United States or in any Amendment thereof which forbids the legislature of a state or territory to exercise judicial functions.

Satterlee v. Matthewson, 2 Pet. 380, 413, 7 L. ed. 458, 469; Baltimore & S. R. Co. v. Nesbit, 10 How. 395, 400, 13 L. ed. 469, 471; Dryer v. Illinois, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253.

The state court has held that the Peabody act is not in violation of the state Constitution because of the provision referring to the courts the determination of these questions.

Neal v. Vansickel, 72 Neb. 105, 100 N. W. 200; Barnes v. Minor, 80 Neb. 191, 114 N. W. 146; Drainage Dist. v. Richardson County, 86 Neb. 363, 125 N. W. 796; O'Neill v. Leamer, 93 Neb. 791, 142 N. W. 112; Drainage Dist. v. Chicago, B. & Q. R. Co. 96 Neb. 2, 146 N. W. 1055.

The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act, and such act does not violate the 14th Amendment of the Constitution.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 178, 41 L. ed. 369, 395, 17 Sup. Ct. Rep. 56.

Neither the United States Constitution nor its Amendments were designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having this object in view, must often be had in certain districts, such as for the draining of marshes and irrigating arid plains. Regulations for these purposes may press with more or less weight upon one than upon the other, but they are designed not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The inhibitions of the Constitution of the United States upon the impairment of the obligation of contract or the deprivation of property without due process or the equal protection of the laws are not violated by the exercise of legislative power in securing public safety, health, and morals.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 565, 567, 571, 38 L. ed. 269, 272–274, 14 Sup. Ct. Rep. 437.

The manner in which a state may provide for the creation of a corporation will be binding upon the Supreme Court of the United States.

Hancock v. Louisville & N. R. Co. 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. Rep. 969; Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 117, 23 L. ed. 67, 69.

The creation of an entity with power to act as a corporation, although it is not so called, is sufficient.

Secombe v. Milwaukee & St. P. R. Co. supra.

The 14th Amendment does not deprive a state of the power to determine what duties may be performed by local officers, or

whether they be appointed or elected by the people.

Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103.

It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government, which, under § 4 of article 4 of the Constitution, the United States is bound to guarantee to every state in this Union. And whatever the supreme court of a state holds that, under the true construction of its Constitution and statutes, the courts of that state have jurisdiction over such matters, the Federal courts can neither deny the correctness of the construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.

Forsyth v. Hammond, 166 U. S. 506, 519, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665.

Neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution.

Davidson v. New Orleans, 96 U. S. 97, 105, 106, 24 L. ed. 616, 620.

The manner of voting provided by the Peabody act violates no provision of the Constitution of the United States or any Amendment thereof.

United States v. Cruikshank, 92 U. S. 542, 555, 23 L. ed. 588, 592; Minor v. Happersett, 21 Wall. 162, 178, 22 L. ed. 627, 631; United States v. Harris, 106 U. S. 629, 637, 27 L. ed. 290, 293, 1 Sup. Ct. Rep. 601; Pope v. Williams, 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; Taylor v. Beckham, 178 U. S. 548, 571, 44 L. ed. 1187, 1198, 20 Sup. Ct. Rep. 890, 1009; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; Swafford v. Templeton, 185 U. S. 487, 491, 46 L. ed. 1005, 1007, 22 Sup. Ct. Rep. 783; Luther v. Borden, 7 How. 1, 41, 12 L. ed. 581, 598; State ex rel. Crosby v. Cones, 15 Neb. 444, 19 N. W. 682; Alfalfa Irrig. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086; O'Neill v. Leamer, 93 Neb. 786, 142 N. W. 112.

To justify the United States Supreme Court in taking jurisdiction, the Federal question must be specifically set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner.

Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

To give the Supreme Court jurisdiction of a writ of error to a state court, it must appear by the record that a Federal question was raised.

Inglee v. Coolidge, 2 Wheat. 363, 4 L. ed. 261; Fisher v. Cockerell, 5 Pet. 248, 8 L. ed. 114; Crawford v. Branch Bank, 7 How. 279, 12 L. ed. 700; Parmelee v. Lawrence, 11 Wall. 36, 20 L. ed. 48; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Phœnix Ins. Co. v. The Treasurer (Phœnix Ins. Co. v. Gardiner) 11 Wall. 204, 20 L. ed. 112; Crowell v. Randall, 10 Pet. 368, 9 L. ed. 458; Choteau v. Marguerite, 12 Pet. 507, 9 L. ed. 1174; Coons v. Gallaher, 15 Pet. 18, 10 L. ed. 645; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Taylor v. Morton, 2 Black, 481, 17 L. ed. 277; The Victory, 6 Wall. 382, 18 L. ed. 848; Gibson v. Choteau, 8 Wall. 314, 19 L. ed. 317; Cockroft v. Vose, 14 Wall. 5, 20 L. ed. 875; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499.

The Supreme Court has no jurisdiction to review the judgment of a state court on writ of error, unless it affirmatively appears from the record that a question giving the Supreme Court jurisdiction was made by the pleadings, and passed upon by the court.

Commercial Bank v. Buckingham, 5 How.

317, 12 L. ed. 169; Gray v. Coan, 154 U. S. 589, and 38 L. ed. 1088, 14 Sup. Ct. Rep. 1168; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The jurisdiction of this court to review the proceedings of state courts is limited to specific instances of denials of Federal rights specially set up in and denied by the state courts.

Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220; Kiernan v. Portland, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 310.

A Federal question not specifically set up or claimed in a state court cannot be considered on writ of error from the Supreme Court of the United States to the state court, merely because another Federal question not connected with it was raised in the state court.

Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; Dewey v. Des Moines, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

The enforcement of the provision in article IV., § 4, of the Federal Constitution, that the United States shall guarantee to every state in the Union a republican form of government, depends upon political and governmental action through the powers conferred on the Congress, and not through those conferred on the courts.

Marshall v. Dye, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224.

A drainage district properly organized, and whose purpose or use is public, is of the same character as school districts, road districts, townships, villages, etc., and is termed or known as a public corporation. Such corporations are sometimes termed quasi municipal corporations.

Beach v. Leahy, 11 Kan. 23; Fourth School Dist. v. Wood, 13 Mass. 193; Harris v. School Dist. 28 N. H. 61; Mittman v. Farmer, Ann. Cas. 1915C, 29, note.

But, whatever the designation, the function is a public one.

A corporation is private, as distinguished from public, unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power.

Piqua State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416.

Every declaration of the supreme court of Nebraska has been that these drainage districts are public corporations.

State ex rel. Harris v. Hanson, 80 Neb. 738, 115 N. W. 294, 117 N. W. 412; Barnes v. Minor, 80 Neb. 189, 114 N. W. 146; O'Neill v. Leamer, 93 Neb. 789, 142 N. W. 112; Whedon v. Wells, 95 Neb. 520, 145 N. W. 1007; Drainage Dist. v. Chicago, B. & Q. R. Co. 96 Neb. 1, 146 N. W. 1055; White v. Papillian Drainage Dist. 96 Neb. 242, 147 N. W. 218.

Drainage of lands is for a public purpose.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 705, 28 L. ed. 569, 571, 4 Sup. Ct. Rep. 663; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 252, 7 L. ed. 412, 414; Wurts v. Hoagland, 114 U. S. 606, 609, 612, 29 L. ed. 229-231, 5 Sup. Ct. Rep. 1086; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 162-175, 41 L. ed. 369, 390-394, 17 Sup. Ct. Rep. 56; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 585, 586, 50 L. ed. 596, 606, 607, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Laguna Drainage Dist. v. Charles Martin Co. 144 Cal. 209, 77 Pac. 933; Heick v. Voight, 110 Ind. 279, 11 N. E. 306; Poundstrone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L.R.A. 353, 62 N. E. 201; Cleveland, C. C. & St. L. R. Co. v. Polecat Drainage Dist. 213 Ill. 83, 72 N. E. 684; Sisson v. Buena Vista County, 128 Iowa, 442, 70 L.R.A. 440, 104 N. W. 454; Talbot v. Hudson, 16 Gray, 417; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; Norfleet v. Cromwell, 70 N. C. 634, 16 Am. Rep. 787; Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779.

Courts will give great weight to the legislative declaration that a purpose is public, implied from giving the right of eminent domain for such purpose, and such declaration, in the absence of proof to the contrary, is sufficient.

Long Sault Development Co. v. Kennedy, 158 App. Div. 398, 143 N. Y. Supp. 454.

The fact that private individuals will be benefited does not prevent the use from being a public one if the many are benefited, or the public are interested.

Jeter v. Vinton-Roanoke Water Co. 114 Va. 769, 76 S. W. 921, Ann. Cas. 1914C, 1029; O'Neill v. Leamer, 93 Neb. 786, 142 N. W. 112.

The words "due process of law" are intended to convey the same meaning as the

words "by the law of the land" in Magna Charta.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372.

The phrase "due process of law" refers to the state's own process.

Re Mahon, 34 Fed. 525.

The term "due process of law," when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass on their subject-matter; and, if that involves merely a determination of the personal liability of defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Davidson v. New Orleans, 96 U. S. 97, 105, 106, 24 L. ed. 616, 620.

Due process of law is its regular administration, through the courts of justice, by a timely and regular course of proceedings to judgment and execution. As a rule it includes parties, regular pleadings, and a trial, according to the settled course of proceedings.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 273, 15 L. ed. 372.

It does not require a trial by jury.

United States v. Ferreira, 13 How. 40, 14 L. ed. 42.

Jurisdiction of the subject-matter is power to deal with general abstract questions in empowering the court to determine each issue within the scope of its authority according to its own view of the law and the evidence. Whether its decision is right or wrong, each judgment or decision so rendered is final and conclusive upon the parties to it unless reviewed by writ of error or appeal, or impeached for fraud.

Foltz v. St. Louis & S. F. R. Co. 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 318; Insley v. United States, 150 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

The acts of a municipal corporation cannot be said to be wanting in the due process of law guaranteed by the Constitution of the United States or the 14th Amendment, if such acts, when done or ratified by the state, would not be inconsistent with that Amendment.

Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 50 L. ed. 361, 26 Sup. Ct. Rep. 249.

Law in its regular course of administration through a court of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

The state may provide that the decision of the appraiser in a condemnation proceeding shall be final, and it is due process of law.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Shoemaker v. United States, 147 U. S. 282, 305, 37 L. ed. 170, 188, 13 Sup. Ct. Rep. 361; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 515, 46 L. ed. 298, 305, 22 Sup. Ct. Rep. 95.

In the exercise of the right of eminent domain, inquiry as to the amount of compensation, provided for in some appropriate way before some properly constituted tribunal, constitutes due process of law.

A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 568, 571, 42 L. ed. 853, 858, 859, 18 Sup. Ct. Rep. 445.

It is firmly established that when parties have been fully heard in regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of its property without due process of law, within the 14th Amendment to the Constitution of the United States.

Bonner v. Gorman, 213 U. S. 91, 53 L. ed. 711, 29 Sup. Ct. Rep. 483.

In summing up the essentials of due process of law in condemnation cases, this court has said that all that is essential is that in some approved way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and that when this has been provided there is that due process of law which is required by the Federal Constitution.

Appleby v. Buffalo, 221 U. S. 532, 55 L. ed. 842, 31 Sup. Ct. Rep. 699.

Where there is no constitutional provision prescribing the tribunal before which condemnation proceedings shall be brought, the legislative power has authority to designate it.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 382, 28 L. ed. 173, 185, 4 Sup. Ct. Rep. 48; United States v. Jones, 109 U. S. 513, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346.

The statute providing for the condemnation of a railway right of way has been before the supreme court of Nebraska for construction, and that court has held that all persons interested in the land to be affected are owners and necessary parties.

State v. Missouri P. R. So. 75 Neb. 9, 105 N. W. 983.

The same court has held that notice to the owners is necessary.

Trester v. Missouri P. R. Co. 33 Neb. 185, 49 N. W. 1110.

The question of whether or not sufficient notice has been given is one for the determination of the state court, when the action is brought under the state statute.

Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294.

In the proceeding to condemn, the landowner may be heard before the county judge, not as to value, but as to other matters he may desire to litigate, material to the condemnation.

Freemont, E. & M. Valley R. Co. v. Matthews, 39 Neb. 101, 57 N. W. 987.

Being a constitutional exercise of legislative power, and providing a suitable remedy by trial in the regular course of justice, to recover compensation for injury to the land of plaintiffs, it has not deprived them of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Head v. Amoskeag Mfg. Co. 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The decision by the state court that a particular formality is or is not essential under a state statute presents no Federal question, if the statute as thus construed is sufficient to provide due process of law.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

There is no limitation on the power of the legislature in this respect if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.

Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 23 L. ed. 67; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 570, 42 L. ed. 853, 859, 8 Sup. Ct. Rep. 445; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 41 L. ed. 979, 984, 17 Sup. Ct. Rep. 581.

Due process of law does not require notice and a hearing on the appointment of the tribunal to assess the benefits and damages resulting from a drain.

Bemis v. Guirl Drainage Co. 182 Ind. 36, 105 N. E. 496; Taylor v. Drainage Dist. — Iowa, —, L.R.A.1916B, 1193, 148 N. W. 1040.

Want of notice to the landowner of the hearing on the necessity of taking the land does not constitute deprivation of due process.

Water Comrs. v. Johnson, 86 Conn. 151, 41 L.R.A.(N.S.) 1024, 84 Atl. 727; Water Comrs. v. Palmer, — Conn. —, 84 Atl. 736.

The construction by a state court of the law of the state as authorizing the court to try and determine, in a condemnation proceeding, an adverse claim of the plaintiff therein, to an interest in the property sought to be condemned, is conclusive on the Supreme Court of the United States, on a writ of error to that court.

Hooker v. Los Angeles, 188 U. S. 314, 47 L. ed. 488, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

The assignment that the act of the legislature of Nebraska under which this drainage district was organized is in violation of the Constitution of Nebraska, when the supreme court of that state has held it constitutional, presents no Federal question.

Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Medberry v. Ohio, 24 How. 413, 16 L. ed. 739; Porter v. Foley, 24 How. 415, 16 L. ed. 740; Congdon v. Goodman, 2 Black, 574, 17 L. ed. 257; Withers v. Buckley, 20 How. 84, 15 L. ed. 816; Jackson ex dem. Hart v. Lamphire, 3 Pet. 280, 7 L. ed. 679; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458.

And such decision, when made by the state court, is conclusive on the Federal courts.

Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; Mobile Transp. Co. v. Mobile, 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170; Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Merchants' & N. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; McCain v. Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct.

Rep. 437; Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105.

Ordinarily the provisions of the 14th Constitutional Amendment, relating to due process of law, do not apply where the legislature of a state has performed its duties by providing for proceedings which answer the constitutional requirement, and where the fault is either with the court or officers.

Storti v. Massachusetts, 183 U. S. 138, 46 L. ed. 120, 22 Sup. Ct. Rep. 72.

A decision of the highest court of the state, made on the settled pre-existing rules of general jurisprudence of the state, cannot be brought to the Supreme Court of the United States.

Bank of West Tennessee v. Citizens' Bank, 14 Wall. 9, 20 L. ed. 514.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a Federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law.

French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76.

The Supreme Court of the United States has no jurisdiction of a case brought up from the highest court of a state, on the record of which it appears that the decision of the state court turned upon the construction, and not upon the validity, of the statute of a state.

Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938.

State courts have sole jurisdiction, in cases which turn entirely on the validity or interpretation of state laws, and this court has no appellate power over their judgments.

Congdon v. Goodman, 2 Black, 574, 17 L. ed. 257.

Decisions of a state court of last resort construing a state statute will be followed by United States courts.

Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Missouri, K. & T. R. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

The construction of a statute by the highest court of the state forms a rule of decision for the Federal court.

M'Keen v. Delancy, 5 Cranch, 22, 3 L. ed. 25; Polk v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; M'Cormick v. Sullivan, 10 Wheat. 192, 6 L. ed. 300; Bell v. Morrison, 1 Pet. 351, 7 L. ed. 174; D'Wolf v. Rabaud, 1 Pet. 476, 7 L. ed. 227; Davis v. Mason, 1 Pet. 503, 7 L. ed. 239; Waring v. Jackson, 1 Pet. 570, 7 L. ed. 266; Fullerton v. Bank of United States, 1 Pet. 604, 7 L. ed. 280; Ross v. Doe, 1 Pet. 655, 7 L. ed. 302; Gardner v. Collins, 2 Pet. 58, 7 L. ed. 347; Beach v. Viles, 2 Pet. 675, 7 L. ed. 559; M'Cluny v. Silliman, 3 Pet. 270, 7 L. ed. 676; United States v. Morrison, 4 Pet. 124, 7 L. ed. 804; Henderson v. Griffin, 5 Pet. 151, 8 L. ed. 79; Hinde v. Vattier, 5 Pet. 398, 8 L. ed. 168; Ross v. M'Lung, 6 Pet. 283, 8 L. ed. 400; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Brashear v. West, 7 Pet. 608, 8 L. ed. 801; Harpending v. Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029; Kinney v. Clark, 2 How. 76, 11 L. ed. 185; Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030; Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355; Leffiingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Richmond v. Smith, 15 Wall. 429, 21 L. ed. 200; Carroll County v. United States, 18 Wall. 71, 21 L. ed. 771; Aicardi v. Alabama, 19 Wall. 635, 22 L. ed. 215; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

The established rule is that the Federal courts are to administer the laws of the states in cases where they apply; and the uniform practice has been to consider a judicial interpretation placed upon a statute the same as if incorporated within the language of the statute itself.

Olcott v. Fond du Lac County, 2 Biss. 368, Fed. Cas. No. 10,479.

The state has full control over procedure in its courts, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

Maxwell v. Dow, 176 U. S. 581, 585, 607, 44 L. ed. 597, 598, 606, 20 Sup. Ct. Rep. 448, 494.

When the question is whether, under the Constitution and laws of a state, a company is legally organized as a corporation, the decision of the supreme court of the state, settling the question in the affirmative, will be accepted as conclusive.

Secombe v. Milwaukee & St. P. R. Co. 23 Wall. 108, 23 L. ed. 67; Mooney v. Humphrey, 12 Fed. 612; Fitzgerald v. Missouri P. R. Co. 45 Fed. 812.

The Supreme Court has no jurisdiction to re-examine the judgment of a state court

unless the record shows affirmatively, or by fair implication, that a Federal question necessary for the determination of the cause is involved.

Williams v. Norris, 12 Wheat. 117, 6 L. ed. 571; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Mills v. Brown, 16 Pet. 525, 10 L. ed. 1055; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Citizens' Bank v. Board of Liquidation, 98 U. S. 140, 25 L. ed. 114; Boughton v. American Exch. Nat. Bank, 104 U. S. 427, 26 L. ed. 765.

This court has no jurisdiction to re-examine the judgment of a state court where a Federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case.

Hurley v. Street, 14 Wall. 85, 20 L. ed. 786; McManus v. O'Sullivan, 91 U. S. 578, 23 L. ed. 390; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366.

In order to bring a case from a state court to this court for review, it is necessary that the record should show that the point giving jurisdiction to this court was raised and decided in the court below.

Crowell v. Randell, 10 Pet. 368, 9 L. ed. 458; Choteau v. Marguerite, 12 Pet. 507, 9 L. ed. 1174; Coons v. Gallaher, 15 Pet. 18, 10 L. ed. 645; Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169; Grand Gulf R. & Bkg. Co. v. Marshall, 12 How. 165, 13 L. ed. 938; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 605; Hoyt v. Shelden (Hoyt v. Thompson) 1 Black, 518, 17 L. ed. 65; Taylor v. Morton, 2 Black, 481, 17 L. ed. 277; The Victory, 6 Wall. 382, 18 L. ed. 848; Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317; Cockroft v. Vose, 14 Wall. 5, 20 L. ed. 875; Detroit City R. Co. v. Guthard, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; Endowment Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 490.

The facts giving the Supreme Court jurisdiction to review the decision of a state court must appear on the record, or be necessarily implied therefrom.

Miller v. Nicholls, 4 Wheat. 311, 4 L. ed. 578; Satterlee v. Matthewson, 2 Pet. 380, 7 L. ed. 458; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105; The Victory, 6 Wall. 382, 18 L. ed. 848; Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760.

The United States Supreme Court will not review the judgment of a state court on the ground of a denial by the latter court of a right under a statute of the United States, unless the record shows, either by words or by clear and necessary intendment therefrom, that the right was specifically claimed, or a definite issue as to the possession of the right is distinctly deducible from the record, without any adverse decision of which the judgment could not have been rendered.

Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

In determining whether the United States Supreme Court has jurisdiction under § 25 of the Judiciary act, nothing outside the record certified to the court can be taken into consideration.

Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; Walker v. Villavaso, 6 Wall. 124, 18 L. ed. 853.

The petition for the allowance of a writ of error forms no part of the record of the court below; and this court has no jurisdiction to determine a Federal question presented in such petition, but not disclosed by the record sent here from the state court.

Warfield v. Chaffe, 91 U. S. 690, 23 L. ed. 383.

A general statement that the judgment violates the Federal Constitution, or the rights of the party thereunder, or that it is without due process of law, will not raise a Federal question, even though the judgment be a final one, reviewable by the Federal Supreme Court on writ of error, under U. S. Rev. Stat. § 709, especially where such statement appears only in the specifications of error.

Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

When the allegation that the suit arises under the Federal Constitution is palpably unfounded, it does not constitute even color for the jurisdiction for the United States circuit court.

McClain v. Des Moines, 174 U. S. 168, 181, 43 L. ed. 936, 941, 19 Sup. Ct. Rep. 644; Gring v. Ives, 222 U. S. 365, 56 L. ed. 235, 32 Sup. Ct. Rep. 167; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 50 L. ed. 101, 107, 26 Sup. Ct. Rep. 727; Fayerweather v. Ritch, 195 U. S. 276, 299, 49 L. ed. 193, 210, 25 Sup. Ct. Rep. 58; Goodrich v. Ferris, 214 U. S. 71, 79, 53 L. ed. 914, 918, 29 Sup. Ct. Rep. 580.

The presumption is that the purpose is a public one.

Heick v. Voight, 110 Ind. 279, 11 N. E. 306; Hartwell v. Armstrong, 19 Barb. 166; McDaniel v. Columbus, 91 Ga. 462, 17 S. E. 1011.

Mr. Justice Hughes delivered the opinion of the court:

Under the laws of Nebraska (Laws 1905, chap. 161; Laws 1909, chap. 147; Cobbey's Anno. Stat. §§ 5561-5597; Rev. Stat. 1913, §§ 1797 et seq.) the district court of the state made an order organizing "Drainage District No. 2 [246] of Dakota County." The lands embraced within the district lay to the southeast of the village of Jackson, and consisted of about 7,000 acres of swamp lands upon which were discharged the waters of Elk creek, coming from the northwest. It was recited in the order that the drainage of these lands would be "a public utility," and would "be conducive to the public convenience, health, and welfare." Plans were adopted which involved the construction of a ditch across lands of the plaintiffs in error for the purpose of carrying the waters of the creek to Jackson lake. These were lands which did not receive the flood waters of the creek, but were situated northeast of Jackson and outside the drainage district. The defendants in error, who had been chosen as supervisors of the drainage district, instituted condemnation proceedings in the county court for the purpose of making the necessary appropriation, and awards were made.

This action was then begun by the plaintiffs in error (and another) in the state court to enjoin the construction of the ditch. The plaintiffs assailed the Nebraska statute as repugnant to the state Constitution, and further averred that to permit the defendants to construct the ditch would deprive the plaintiffs of their property without due process of law and deny to them the equal protection of the laws, in violation of the 14th Amendment. It was alleged that the enterprise was "wholly private and in the exclusive pecuniary interest of the so-called corporators" of the drainage district. The trial court made special findings, in substance, as follows: That the drainage district had been legally organized; that the defendants had been constituted its supervisors; that, in conformity with the statute, the drainage district had been declared by the district court, upon due notice to all interested parties, as required, to be a public corporation of the state; that the district had employed competent civil engineers who had made a complete plan, which [247] had been presented and duly confirmed, for draining, reclaiming, and protecting the lands in the district from overflow; that the route and ditch, thus approved, provided the most feasible and the safest method for taking care of the waters of the creek; that the description of the ditch, as shown, was a "definite and accurate description of a proper right of way" through the lands of plaintiffs and others; that having failed to agree with the plaintiffs as to the value of the right of way and the damages which would result from the construction and maintenance of the proposed ditch, the defendants as supervisors had applied to the county judge in the manner provided by law for the appointment of appraisers, who, having been duly appointed, and having entered upon their duties and viewed the premises, had fixed the value of the right of way and the damages to each of the plaintiffs at sums stated and had duly reported accordingly; that the outlet of the proposed ditch in Jackson lake was formerly the channel of the Missouri river at a low stage, and that by way of this lake there was an adequate and direct outlet for the water of the creek into that river without overflowing the plaintiffs' lands; and that the defendants had not claimed the right to enter upon these lands until the award of the appraisers should have been paid to the county judge for the benefit of the parties respectively. It was thereupon adjudged that when the awards were paid the temporary injunction which had been issued should be dissolved and the action dismissed. This judgment was affirmed by the supreme court of the state. 93 Neb. 786, 142 N. W. 112.

With many of the questions discussed in argument this court is not concerned. It has been held that under the state law the drainage district was a public corporation, duly organized, and was entitled to exercise the power of eminent domain. The propriety of the delegation of authority to the district court in the matter of the formation [248] of the drainage district is a state question. The attempt to invoke § 4 of article 4 of the Federal Constitution is obviously futile (Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224), and the objection as to suffrage qualifications in connection with the organization and management of the district, sought to be based on the 15th Amendment, is likewise wholly devoid of substance. It is also manifest that the state provided a tribunal for the determination of the compensation due to the plaintiffs by reason of the appropriation in question. Constitution of Nebraska, art. 1. § 21; Laws of 1905, chap. 161, § 12; Cobbey's Anno. Stat. §§ 10,517 et seq.; Rev. Stat. 1913, §§ 5940 et seq. Appraisers were appointed, and the plaintiffs had due notice of hearing; they had full opportunity to be heard, to present any relevant question, and to complain of any irregularity or error. The questions of fact as to the definite location of the ditch, the value of the right of way, and the extent of

the damage to the property affected, which would be sustained through construction and operation, were the subject of determination in an appropriate proceeding[1] See United [249] States v. Jones, 109 U. S. 513, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346; A. Backus Jr. & Sons v. Ft. Street Union Depot Co. 169 U. S. 557, 568, 569, 42 L. ed. 853, 858, 859, 18 Sup. Ct. Rep. 445; Hooker v. Los Angeles, 188 U. S. 314, 318, 47 L. ed. 487, 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Appleby v. Buffalo, 221 U. S. 524, 532, 55 L. ed. 838, 842, 31 Sup. Ct. Rep. 699; McGovern v. New York, 229 U. S. 363, 370, 371, 57 L. ed. 1228, 1231, 1232, 46 L.R.A.(N.S.) 391, 33 Sup. Ct. Rep. 876. It is said that no notice to the plaintiffs was required or given of the application for the appointment of appraisers. As to this, however, no question of Federal right appears to have been raised or decided in the supreme court of the state, nor do we intimate that such a claim would have had basis, if made. It is plain that with respect to none of these matters is there any question for our review. Appleby v. Buffalo, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699.

The defendants in error have moved to dismiss upon the ground that there is no Federal question whatever presented by the record. But we think that the plaintiffs sufficiently raised the question whether the appropriation was essentially for a private purpose, and hence contrary to the 14th Amendment, as amounting to a deprivation of property without due process of law, and that their contention as to their Federal right in this respect was denied by the state court. In this view, jurisdiction attaches (Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 417, 41 L. ed. 489, 495, 17 Sup. Ct. Rep. 30; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 251, 252, 49 L. ed. 462, 467, 468, 25 Sup. Ct. Rep. 251; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 [250] U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 377, 51 L. ed. 231, 236, 27 Sup. Ct. Rep. 72; Hairston v. Danville & W. R. Co. 208 U. S. 598, 605, 606, 52 L. ed. 637, 639, 640, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522), and we pass to the consideration of the statutory plan.

The provisions of the statute are elaborate, but the principal features may be briefly outlined. In a proceeding initiated by a majority in interest of the owners "in any contiguous body of swamp or overflowed lands," for the purpose of having such land reclaimed and protected from the effects of water, the district court for the proper county may declare the drainage district as defined to be a public corporation of the state. To this end, the initiating proprietors must file articles of association, giving the name of the proposed district, the number of years it is to continue, its extent, which must not be less than 160 acres, and an appropriate description of parcels and owners. Provision is made for summons to nonsigning owners of lands averred to be benefited, and for the hearing of objections to the organization. Property not benefited may be excluded from the district. If the organization is approved by the court, the clerk, within a time specified, is to call a meeting of the owners of the lands within the district for the election of a board of five supervisors, to be composed of such proprietors, and a majority of whom must be resi-

[1] With respect to the rights of the plaintiffs under the state law, the state court said: "The plaintiffs contend that the condemnation proceedings were void because they do not condemn and take certain lands of the plaintiff O'Neill which would be flooded by the waters of the ditch. If the plaintiffs' lands, other than those taken by the condemnation proceedings, are damaged by this improvement, the law affords them a remedy, including the right of appeal to the court of last resort. The statute provides that 'the same proceedings for condemnation of such right of way shall be had in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations; the payment of damages and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act.' Section 12. The law is well settled in such case by many decisions of this court. When the remedy at law is adequate, the prosecution of the work cannot be delayed by injunction. . . . It is objected that the application for condemnation did not describe and locate the proposed ditch with sufficient accuracy. . . . The drawings, which the appraisers had, showed the exact location of the proposed ditch. There is nothing to indicate that the appraisement of damages was in any way affected by any supposed uncertainty as to the location. The county court had power to correct any irregularities in the method of appraisement. If, by reason of the difference in the statute from that construed in Trester v. Missouri P. R. Co. 33 Neb. 171, 49 N. W. 1110, that case is not to be regarded as decisive of the case at bar upon this point, which we do not decide, it seems clear that the application was sufficiently definite to give the county court jurisdiction of the proceedings. Errors, if any, not affecting the jurisdiction of the court, should have been corrected in that court or upon appeal." 93 Neb. pp. 789, 790.

dent within the county or counties in which the district is situated; each owner is to have one vote for each acre owned. Under the direction of this board, which has defined authority and compensation, a topographical survey is to be made of the district, the various tracts and properties are to be classified according to benefits, which are to be assessed, and each parcel within the district is to bear its share of the entire cost and expenses incurred in making the improvements in proportion to benefits. A drain commissioner is to be appointed, who, subject to the board's control, is to have general superintendence [251] of works under contracts awarded. If it appears that lands not embraced within the district will be benefited, proceedings may be had to bring them in. Condemnation of lands, easements, or franchises, within or without the district, for the purpose of constructing the necessary ditches, dykes, etc., may be had. Provision is made for the hearing of objections to the proposed classification and assessments, and aggrieved objectors may appeal from the decision of the board of supervisors to the district court. Tax levies upon the properties assessed are provided for, and the board is authorized to issue bonds of the district under stated conditions. Any person owning lands within the district which is separated from the ditch or water course for which it has been assessed may secure access to it across intervening lands by resort to a described proceeding. The treasurer of the county in which the district, or the largest part of it, is situated, is made "*ex officio* treasurer" of the district for the purpose of collecting and disbursing the taxes or assessments laid under the act.

The plaintiffs in error contend that the plan is simply one for the private advantage of the property owners, and they direct special attention to the provision of the statute that the fact that the district is to contain 160 acres or more of wet or overflowed lands shall be sufficient cause for declaring the "public utility" of the improvement. But we do not find that the supreme court of the state has sustained the act as applicable to any case in which it was considered, upon a judicial examination of the facts, that the undertaking served private interests alone. On the contrary, we assume it to be the law of Nebraska that property may be taken in the furtherance of reclamation projects only where it is found that the public welfare is involved. Acts with a different purpose have been held unconstitutional. Jenal v. Green Island Draining Co. 12 Neb. 163, 10 N. W. 547; Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559. [252] With respect to the act here in question the state court has emphatically declared that the enterprises which it contemplates are those distinctly of a public character. In Drainage Dist. v. Richardson County, 86 Neb. 355, 125 N. W. 796, where the county was required to contribute on account of special benefits accruing to its highways within a drainage district organized under the statute, the supreme court of Nebraska said upon this point: "That question was decided by this court in the case of Neal v. Vansickle, 72 Neb. 105, 100 N. W. 200. It was there said: 'That the districts contemplated by the act are intended to be of a purely public and administrative character is evident as well from the title as from the body of the law itself. Its officers are chosen by popular election and their powers, duties, compensation, and terms of service are prescribed by the statute. The sources of its income are predetermined, as are also the uses to which it may be applied; and the county treasurer is made the custodian of its funds, and his disbursement of them regulated as in case of other public moneys. In our opinion, it is too late in the day to contend that the irrigation of arid lands, the straightening and improvement of water courses, the building of levees and the drainage of swamp and overflowed lands for the improvement of the health and comfort of the community, and the reclamation of waste places and the promotion of agriculture, are not all and every of them subjects of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties, and functions.' . . . We see no reason at this time to depart from that opinion, and therefore this contention must be considered foreclosed so far as this court is concerned."

See also Barnes v. Minor, 80 Neb. 189, 114 N. W. 146; State ex rel. Harris v. Hanson, 80 Neb. 724, 742, 115 N. W. 294, 117 N. W. 412. These decisions were deemed to be controlling in the present case. 93 Neb. pp. 788, 789, 142 N. W. 112.

[253] We find no ground for a contrary view as to the nature of the authorized enterprise. We have repeatedly said that the provisions of the 14th Amendment, embodying fundamental conceptions of justice, cannot be deemed to prevent a state from adopting a public policy for the irrigation of arid lands or for the reclamation of wet or overflowed lands. States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitu-

tion which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Hairston v. Danville & W. R. Co. 208 U. S. 598, 605, 606, 52 L. ed. 637, 639, 640, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522. It has been held that it is not necessary that the state power should rest simply upon the ground that the undertaking is needed for the public health; there are manifestly other considerations of public advantage in providing a general plan of reclamation by which wet lands throughout the state may be opened to profitable use. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 163, 41 L. ed. 369, 390, 17 Sup. Ct. Rep. 56. Nor is the statutory scheme to be condemned because it contemplates improvements in districts. Drainage districts may be established as well as school districts. All lands within the established district which require drainage are to enjoy the benefits of the plan. See 2 Lewis Em. Dom. 3d ed. p. 571. Nor is it an objection that private property within the district, which is established in execution of the public policy, will be benefited; and it is clearly not improper that the cost and expense should be apportioned according [254] to benefits. Fallbrook Irrig. Dist. v. Bradley, supra.

In the present instance, the record shows that the drainage district, as organized, embraces a large area with many proprietors, and that after contest in the original proceeding the district court made its deliberate order that the enterprise would be a public utility and conducive to the "public convenience, health, and welfare." Nothing appears to warrant a different conclusion. Neither in the statutory provisions as construed by the state court nor in their application in the particular case is there basis for finding that the plaintiffs in error have been deprived of their property without due process of law. Rather must it be said that the ruling as to the authority of the state to make the condemnation for the prescribed purpose has, from the standpoint of the Federal Constitution, abundant support in the decisions of this court. Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; Fallbrook Irrig. Dist. v. Bradley, supra; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174.

Judgment affirmed.

LOUIS HOUCK and Mary H. G. Houck, His Wife; Charles J. Juden and C. G. Cox, Plffs. in Err.,

v.

LITTLE RIVER DRAINAGE DISTRICT, John H. Himmelberger, et al.

(See S. C. Reporter's ed. 254-267.)

Constitutional law — due process of law — assessing drainage expenses by acreage within district.

1. The levy of the maximum tax of 25 cents per acre to defray preliminary expenses, conformably to Mo. Rev. Stat. 1909, § 5538, upon all the lands within a drainage district duly organized by a court order under legislative authority, does not take, without due process of law, contrary to U. S. Const., 14th Amend., the property of the owners of land within the district which may not be benefited by the completed drainage plans.

[For other cases, see Constitutional Law, 561-581, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxation for public improvement — retrospective statute.

2. Taxing for preliminary expenses the property within a drainage district, conformably to Mo. Rev. Stat. 1909, § 5538, does not take property without due process of law, contrary to U. S. Const., 14th Amend., because this section was enacted after the district was organized, where the

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Note.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to persons and property liable for expense of drainage—see notes to Heffner v. Cass & Morgan Counties, 58 L.R.A. 353, and Billings Sugar Co. v. Fish, 26 L.R.A. (N.S.) 973.

Generally, as to what laws are *ex post facto*—see notes to Anderson v. O'Donnell, 1 L.R.A. 632; State v. Cooler, 3 L.R.A. 181; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; Otoe County v. Baldwin, 28 L. ed. U. S. 331; Re Medley, 33 L. ed. U. S. 835; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

statute which was in force at the time of the formation of the district (Mo. Laws 1905, § 8252) contemplated liability to taxation to defray the preliminary expenses as well as the ultimate cost of the improvements if made, since these preliminary outlays must be regarded as incident to the organization, for which the legislature was competent to provide in the exercise of its taxing power.

[For other cases, see Constitutional Law, 561–581, 993–1000, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — charter of public corporation.

3. The charter of a drainage district as a public corporation does not constitute a contract with its members that the laws it was created to administer will not be changed.

[For other cases, see Constitutional Law, 1081–1087, in Digest Sup. Ct. 1908.]

[No. 35.]

Argued October 27 and 28, 1915. Decided November 29, 1915.

IN ERROR to the Supreme Court of the State of Missouri to review a decree which affirmed a decree of the Circuit Court of Cape Girardeau County, in that state, dismissing the petition in a suit to restrain the collection of a tax. Affirmed.

See same case below, 248 Mo. 373, 154 S. W. 739.

The facts are stated in the opinion.

Messrs. Benson C. Hardesty and Giboney Houck argued the cause, and, with Mr. Thomas D. Hines, filed a brief for plaintiffs in error:

What may be done under Mo. Rev. Stat. 1909, § 5538, construed in connection with all the Missouri drainage laws, is the constitutional test to be applied, and plaintiffs in error are neither estopped nor barred from challenging this law.

Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289, State, Agens, Prosecutor, v. Newark, 37 N. J. L. 420, 18 Am. Rep. 729; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 94, 139 S. W. 330; Charles v. Marion, 98 Fed. 166; Moss v. Whitzel, 108 Fed. 582; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; Davidson v. New Orleans, 96 U. S. 97, 104, 105, 24 L. ed. 616, 619, 620; Cooley, Const. Lim. **356, 357; 2 Story, Const. Cooley's ed. § 1956; Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S. W. 12; Violett v. Alexandria, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Ohlmann v. Clarkson Saw Mill Co. 222 Mo. 62, 28 L.R.A.(N.S.) 432, 133 Am. St. Rep. 506, 120 S. W. 1155; Gist v. Rackliffe-Gibson Constr. Co. 224 Mo. 369, 123 S. W. 921; Ross v. Wright County, 128 Iowa, 436, 1 L.R.A.(N.S.) 431, 104 N. W. 506.

The avowed purpose and only possible legal purpose of this section is a public one, and involves the taking of private property for public use.

Morrison v. Morey, 146 Mo. 563, 48 S. W. 629; Mound City Land & Stock Co. v. Miller, 170 Mo. 258, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Egyptian Levee Co. v. Hardin, 27 Mo. 496, 72 Am. Dec. 276; St. Louis use of Creamer v. Oeters, 36 Mo. 456; Kansas City use of Coates v. Ridenour, 84 Mo. 259; St. Joseph v. Anthony, 30 Mo. 537; Independence v. Gates, 110 Mo. 374, 19 S. W. 728; St. Louis v. Rankin, 96 Mo. 497, 9 S. W. 910; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600.

Due process of law requires compensation for private property taken for public use.

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 695, 41 L. ed. 1168, 17 Sup. Ct. Rep. 718; Corrigan v. Gage, 68 Mo. 541; Albright v. Fisher, 164 Mo. 68, 64 S. W. 106; St. Louis v. St. Louis Theatre Co. 202 Mo. 699, 100 S. W. 627; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 241, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

If the drainage plan should fail, there can then be no compensation of the character contemplated by due process of law.

Kiley v. Cranor, 51 Mo. 542, 14 Cyc. 1059; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Kansas City v. O'Connor, 82 Mo. App. 655; Chicago v. Blair, 149 Ill. 310, 24 L.R.A. 412, 36 N. E. 829; New York L. Ins. Co. v. Prest, 71 Fed. 817; Pettit v. Duke, 10 Utah, 311, 37 Pac. 568; Owensboro v. Sweeney, 129 Ky. 607, 18 L.R.A.(N.S.) 181, 130 Am. St. Rep. 477, 111 S. W. 364; Stevens v. Port Huron, 149 Mich. 536, 113 N. W. 291, 12 Ann. Cas. 603; Kalamazoo v. Crawford, 154 Mich. 58, 117 N. W. 572, 16 Ann. Cas. 110; Washington Ice Co. v. Chicago, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378; Kansas City v. St. Louis & S. F. R. Co. 230 Mo. 369, 28 L.R.A.(N.S.) 669, 130 S. W. 273; Hutt v. Chicago, 132 Ill. 352, 23 N. E. 1010; Waukegan v. Burnett, 234 Ill. 460, 84 N. E. 161; Chicago v. Kemp, 240 Ill. 56, 88 N. E. 284; Lindblad v. Normal, 224 Ill.

362, 79 N. E. 675; Holdom v. Chicago, 169 Ill. 109, 48 N. E. 164; State, Kellogg, Prosecutor, v. Elizabeth, 40 N. J. L. 274; Title Guarantee & T. Co. v. Chicago, 162 Ill. 505, 44 N. E. 832; Re Park Avenue Sewers, 169 Pa. 433, 32 Atl. 574; Edwards v. Chicago, 140 Ill. 440, 30 N. E. 350; Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63; Wistar v. Philadelphia, 80 Pa. 505, 21 Am. Rep. 112; Re Market Street, 49 Cal. 546; Hanscom v. Omaha, 11 Neb. 37, 7 N. W. 739; Chamberlain v. Cleveland, 34 Ohio St. 551; Hartford v. West Middle Dist. 45 Conn. 462, 29 Am. Rep. 687; Cooley, Taxn. 416, chap. 20, ¶ 1; Cooley, Taxn. 2d ed. 606, ¶ 1; Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 416, 18 Am. Rep. 729; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; McCormack v. Patchin, 53 Mo. 36, 14 Am. Rep. 440; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; 2 Dill. Mun. Corp. 4th ed. p. 934, ¶ 761; Mobile County v. Kimball, 102 U. S. 691, 703, 704, 26 L. ed. 238, 241, 242; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; Bauman v. Ross, 167 U. S. 548, 589, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Parsons v. District of Columbia, 170 U. S. 54, 42 L. ed. 947, 18 Sup. Ct. Rep. 521; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163; Corrigan v. Gage, 68 Mo. 541; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

Even if the drainage plan should succeed, still no compensation can result so far as concerns the large area of plaintiffs' lands necessarily condemned for public use, and which same area is assessed with this tax.

Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S. W. 12; Hanscom v. Omaha, 11 Neb. 37, 7 N. W. 739; Chamberlain v. Cleveland, 34 Ohio St. 551; Hartford v. West Middle Dist. 45 Conn. 462, 29 Am. Rep. 687; Re Park Avenue Sewers, 169 Pa. 433, 32 Atl. 574; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

The Missouri supreme court erred in adjudging that said § 5538 is not retrospective so as to violate due process of law.

State ex rel. Board of Education v. Haben, 22 Wis. 660; Pawlet v. Clark, 9 Cranch, 332, 3 L. ed. 749; Terrett v. Taylor, 9 Cranch, 50, 3 L. ed. 653; Charles River Bridge v. Warren Bridge, 11 Pet. 603, 9 L. ed. 846; Walla Walla v. Walla Walla Water Co. 172 U. S. 9, 43 L. ed. 345, 19 Sup. Ct. Rep. 77; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; St. Louis use of Creamer v. Clemens, 52 Mo. 144; State ex rel. Haeussler v. Greer, 78 Mo. 188; Fisher v. Patton, 134 Mo. 53, 33 S. W. 451, 34 S. W. 1096; Re Pell, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; State ex rel. Pittman v. Adams, 44 Mo. 570; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Leete v. State Bank, 115 Mo. 201, 21 S. W. 788; Westervelt v. Gregg, 12 N. Y. 202, 62 Am. Dec. 160; Norris v. Beyea, 13 N. Y. 273; Holmes v. Holmes, 4 Barb. 295; Ryder v. Hulse, 24 N. Y. 372; Sperry v. Haslam, 57 Ga. 412; Dunn v. Sargent, 101 Mass. 336; Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Fisk v. Jefferson, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; Louisiana ex rel. Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648; Hall v. Wisconsin, 103 U. S. 5, 26 L. ed 302; Gordon v. Appeal Tax Ct. 3 How. 133, 11 L. ed. 529.

The Missouri supreme court erred in adjudging that said section does not impair the obligation of contracts.

State ex rel. Mulholland v. Smith, 141 Mo. 1, 41 S. W. 906; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Eureka Lake & Y. Canal Co. v. Superior Ct. 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

Messrs. Robert B. Oliver, Jr., and Robert B. Oliver, argued the cause, and, with Mr. Allen Laws Oliver, filed a brief for defendants in error:

The general assembly of Missouri has the legal and constitutional right to create drainage and levee districts and to fix their territorial limits, and may also determine the amount of the assessment against each tract of land within the district. It also has the right to delegate these powers to any agency of the state created by it.

Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 111, 139 S. W.

330; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Columbia Bottom Levee Co. v. Meier, 39 Mo. 57; Morrison v. Morey, 146 Mo. 561, 48 S. W. 629; Mound City Land & Stock Co. v. Miller, 170 Mo. 251, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Meier v. St. Louis, 180 Mo. 408, 79 S. W. 955; Heman v. Wabash R. Co. 206 Mo. 179, 12 L.R.A.(N.S.) 112, 121 Am. St. Rep. 649, 104 S. W. 67, 12 Ann. Cas. 630; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103; Cleveland, C. C. & St. L. R. Co. v. Porter, 210 U. S. 177, 52 L. ed. 1012, 28 Sup. Ct. Rep. 647; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471.

It is within the power of the legislature of Missouri to charge the property within the special assessment district at a level rate, with the cost of improvements, and apportion the same either according to the front-foot rule, or according to the area (acreage) rule, or according to special benefits derived. In either event it acts within constitutional limits.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 109, 139 S. W. 330; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; Prior v. Buehler & C. Constr. Co. 170 Mo. 448, 71 S. W. 205; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso. 231 Mo. 589, 132 S. W. 657; Pleadwell v. Missouri Glass Co. 151 Mo. App. 51, 131 S. W. 941; Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co. 211 Mo. 534, 111 S. W. 86; Munson v. Atchafalaya Basin Levee Dist. 43 La. Ann. 15, 8 So. 906; Wallace v. Shelton, 14 La. Ann. 503; Caton v. Western Clay Drainage Dist. 87 Ark. 8, 112 S. W. 145; Sheley v. Detroit, 45 Mich. 431, 8 N. W. 52; Creamer v. Allen, 3 Mo. App. 548; Cooley, Taxn. 1st ed. p. 454.

The legislature of Missouri has the legal and constitutional right to apportion the costs of the improvements upon the property in the Little River Drainage District according to the frontage or area rule without judicial inquiry as to the value of benefits the property assessed would receive, and the exercise of such a power will not constitute the taking of private property without due process of law under either the state or Federal Constitution.

Briscoe v. Rudolph, 221 U. S. 547, 55 L. ed. 848, 31 Sup. Ct. Rep. 679; Spencer v. Merchant, 125 U. S. 345, 356, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934; Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Shumate v. Heman, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; Wormley v. District of Columbia, 181 U. S 402, 45 L. ed. 921, 21 Sup. Ct. Rep. 609; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Heman v. Allen, 156 Mo. 534, 57 S. W. 559; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683; Smith v. Worcester, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40; Heman v. Gilliam, 171 Mo. 264, 71 S. W. 163; St. Charles ex rel. Budd v. Deemar, 174 Mo. 122, 73 S. W. 469; Meier v. St. Louis, 180 Mo. 408, 79 S. W. 955; Ross v. Gates, 183 Mo. 347, 81 S. W. 1107; Barber Asphalt Paving Co. v. Munn, 185 Mo. 565, 83 S. W. 1062; People ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L.R.A. 372, 62 N. E. 662; Arnold v. Knoxville, 115 Tenn. 210, 3 L.R.A.(N.S.) 837, 90 S. W. 469, 5 Ann. Cas. 881; Cooley, Taxn. 1st ed. pp. 36–40; Prior v. Buehler & C. Constr. Co. 170 Mo. 439, 71 S. W. 205; Gilsonite Roofing Co. v. St. Louis Fair Asso. 231 Mo. 589, 132 S. W. 657; Ross v. Wright County, 128 Iowa, 427, 1 L.R.A.(N.S.) 437, 104 N. W. 506; Page & J. Taxn. §§ 123, 728; Fruin-Bambrick Constr. Co. v.

St. Louis Shovel Co. 211 Mo. 532, 111 S. W. 86.

The constitutional provision prohibiting the taking of private property for public use without compensation is a limitation of the exercise by the state of the right of eminent domain, and not a limitation on the taxing power of the state.

Little Tarkio Drainage Dist. v. Richardson, 237 Mo. 71, 139 S. W. 576; Keith v. Bingham, 100 Mo. 306, 13 S. W. 683; Heman v. Schulte, 166 Mo. 409, 66 S. W. 163; St. Louis v. Buss, 159 Mo. 12, 59 S. W. 969; Dill. Mun. Corp. 3d ed. § 738; 25 Am. & Eng. Enc. Law pp. 18–20; Page & J. Taxn. § 110.

It is the settled law in Missouri that special assessments for local improvements are referable to the taxing power of the state.

Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co. 211 Mo. 531, 111 S. W. 86; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934, 181 U. S. 324, 339, 45 L. ed. 879, 887, 21 Sup. Ct. Rep. 625; St. Joseph use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Cooley, Taxn. 1st ed. pp. 430, 431.

The legislative determination of the benefits derived, or the necessity and advisability of a local assessment, is conclusive and final, and is not subject to judicial review.

French v. Barber Asphalt Paving Co. 181 U. S. 324, 338, 339, 45 L. ed. 879, 887, 888, 21 Sup. Ct. Rep. 625, 158 Mo. 534, 54 L.R.A. 492, 58 S. W. 934; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Chadwick v. Kelley, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Prior v. Buehler & C. Constr. Co. 170 Mo. 451, 71 S. W. 205; Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Dec. 276; St. Joseph v. O'Donoghue, 31 Mo. 345; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Northern P. R. Co. v. Seattle, 46 Wash. 674, 12 L.R.A.(N.S.) 121, 123 Am. St. Rep. 955, 91 Pac. 244; Smith v. Worcester, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; Cooley, Taxn. 1st ed. p. 446.

A legislative finding of benefits will be presumed after an assessment has been authorized. Both courts and legislature take notice of the topography of the state, and that wet, swampy, and overflowed lands will be rendered more habitable and productive, and that the public health will be benefited, by removing water which causes unhealthy conditions.

Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 111, 139 S. W. 330; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 432, 49 L. ed. 819, 821, 25 Sup. Ct. Rep. 466; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; Fruin-Bambrick Constr. Co. v. St. Louis Shovel Co. 211 Mo. 524, 111 S. W. 86; Prior v. Buehler & C. Constr. Co. 170 Mo. 439, 71 S. W. 205; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A.(N.S.) 286, 97 Pac. 1099; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216; Smith v. Worcester, 182 Mass. 232, 59 L.R.A. 728, 65 N. E. 40; Cooley, Taxn. 1st ed. pp. 430, 450.

The act of the legislature in levying assessments for a definite sum against each lot or acre of land for special improvements is conclusive alike of the necessity of the work and of its benefits to the property assessed; and the legislature, in so doing, is not compelled to give notice to the parties resident within the district, or to give a hearing before itself or one of its committees, or any other tribunal, on the question of whether the property so included within the district is in fact benefited.

Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Parsons v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; Chadwick v. Kelley, 187 U. S. 540, 546, 47 L. ed. 293, 295, 23 Sup. Ct. Rep. 175; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466; Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Cooley, Taxn. 2d ed. p. 149; Hammett v. Philadelphia, 65 Pa. 155, 3 Am. Rep. 615; State v. Robert P. Lewis Co. (Ramsey County v. Robert P. Lewis Co.) 82 Minn. 400, 53 L.R.A. 421, 85 N. W. 207,

86 N. W. 611; Jones & P. Taxn. §§ 123, 728.

Questions not clearly raised in the court below will not be considered in this court, and an assignment of errors cannot be availed of to import questions into this case which are not shown by the record to have been raised and passed on below.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21; Ansbro v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 653, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Henkel v. Cincinnati, 177 U. S. 171, 44 L. ed. 721, 20 Sup. Ct. Rep. 573; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Zadig v. Baldwin, 166 U. S. 485, 488, 41 L. ed. 1087, 1088, 17 Sup. Ct. Rep. 639; Keokuk & H. Bridge Co. v. Illinois, 175 U. S. 626, 633, 44 L. ed. 299, 302, 20 Sup. Ct. Rep. 205; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; Cornell v. Green, 163 U. S. 75, 80, 41 L. ed. 76, 78, 16 Sup. Ct. Rep. 969; Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; Marvin v. Trout, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; Loeber v. Schroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934.

There is no contract between the state and the individual of the state with respect to the taxing power of the state. The imposition of a tax or an assessment is a governmental act to which the contract clause of the Constitution of the United States has no application.

Cape Girardeau County Ct. v. Hill (County Ct. v. United States) 118 U. S. 68, 72, 30 L. ed. 73, 75, 6 Sup. Ct. Rep. 951; Cooley, Taxn. 1st ed. pp. 13, 484; Page & J. Taxn. § 166; Gray, Limitations of Taxing Power, § 1830; Burroughs, Taxn. § 105, p. 253; State ex rel. Hayes v. Snyder, 139 Mo. 553, 41 S. W. 216.

The creation of a public corporation by the state creates no contract between the state and the corporation; nor between the state and the individual members of the corporation; nor between the members themselves. A contract within the meaning of § 10, art. 1, of the Constitution of the United States, is one based on mutual assent and consideration.

Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 29 L. ed. 936, 3 Sup. Ct. Rep. 211; Louisiana v. Pilsbury, 105 U. S. 285, 26 L. ed. 1093; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; Gray, Const. Lim. § 968; Sedgw. Stat. & Const. Law, 2d ed. pp. 581, 599, 600, 603.

A legislative act changing or altering the character of a public corporation is not an impairment of a contract, either as to the corporation or its constituent members.

Hunter v. Pittsburgh, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; East Hartford v. Hartford Bridge Co. 10 How. 511, 535, 538, 13 L. ed. 518, 528, 529; Williamson v. New Jersey, 130 U. S. 189, 200, 32 L. ed. 915, 919, 9 Sup. Ct. Rep. 453; Cape Girardeau County Ct. v. Hill (County Ct. v. United States) 118 U. S. 68, 72, 30 L. ed. 73, 75, 6 Sup. Ct. Rep. 951; Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S. W. 12; State ex rel. Compton v. Charlton Drainage Dist. 192 Mo. 520, 90 S. W. 722.

The incorporation of the Little River Drainage District, and the imposition of obligations upon the land included therein to bear its proportionate share of burdens imposed, were contemporaneous. The legislature by this section only fixed the maximum amount of the assessment authorized by it, and apportioned it uniformly upon each acre in the drainage district.

State ex rel. McWilliams v. Bates, 235 Mo. 262, 138 S. W. 482; Northern P. R. Co. v. Pierce County, 51 Wash. 12, 23 L.R.A. (N.S.) 286, 97 Pac. 1099; French v. Barber Asphalt Paving Co. 181 U. S. 324, 332, 333, 338, 45 L. ed. 879, 885–887, 21 Sup. Ct. Rep. 625.

The legislature, in enacting § 5538, expressly authorized the board of supervisors of the drainage district to levy an assessment of not to exceed 25 cents per acre on all lands in the district, to pay for the organization and the preliminary surveys; hence, plaintiffs' lands, like all other lands in the district, are subject to this assessment.

St. Louis v. United R. Co. 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630; Sedgw. Stat. & Const. Law, 2d ed. p. 599.

No one can have a vested right which he can claim to be exempt from the lawful exercise of the state's police power.

Mugler v. Kansas, 123 U. S. 656, 659, 31 L. ed. 209, 210, 8 Sup. Ct. Rep. 273; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 753, 28 L. ed. 585, 587, 4 Sup. Ct. Rep. 652; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 94, 139 S. W. 330.

Mo. Rev. Stat. 1909, § 5538, does not abridge the privileges and immunities of citizens of the United States.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619.

This section does not deny the equal protection of the laws.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619.

Nor does this section deprive any person of his property without due process of law, or take private property for public use without compensation.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Den ex dem Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

Should any doubt arise about the constitutionality of this section of the Missouri statute, the doubt should be resolved in favor of the state.

State ex rel. McWilliams v. Bates, 235 Mo. 293, 138 S. W. 482; State ex rel. Marshall v. Bugg, 224 Mo. 554, 123 S. W. 827.

The police power of a state embraces regulations designed to promote public convenience, public health, public morals, and public safety. Any law providing for the reclamation of swamp lands is an exercise of the police power of the state, and not prohibited by the 14th Amendment to the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 94, 139 S. W. 330.

Mr. Justice **Hughes** delivered the opinion of the court:

The plaintiffs in error, owners of several thousand acres embraced within the Little River Drainage District, of Missouri, brought this suit to restrain the collection of a tax of 25 cents per acre levied generally upon the lands within the district for the purpose of paying its preliminary expenses. The district was organized in 1907 under the provisions of article 3, chapter 122, Revised Statutes of Missouri, 1899, as amended by the act of April 8, 1905. Its board of supervisors appointed engineers who made surveys and recommended a plan of drainage. Upon the adoption of this plan, in November, 1909, commissioners were appointed for the purpose of viewing the tracts within the district and assessing benefits and damages. Pending the proceedings of these commissioners, the tax in question was levied under the act of June 1, 1909, now § 5538 of the Revised Statutes of Missouri, 1909, which provides as follows:

"Sec. 5538. Levy of 25 cents per acre may be made for preliminary work.—As soon as any drainage district shall have been organized under order of the circuit court, and a board of supervisors are elected and qualified, such board of supervisors shall have the power [260] and authority to levy upon each acre of land in the district, not to exceed 25 cents per acre, as a level rate, to be used for purpose of paying expenses of organization, for topographical and other surveys, for plans of drainage, for expenses of assessing benefits and damages and other incidental expenses which may be necessary, before entering upon the main work of drainage. Any district which may have proceeded without such levy may, if in the opinion of its board of supervisors it be desirable to do so, make such level assessment for such purpose, and if such items of expense have already been paid in whole or in part from other sources, the surplus shall be paid into the general fund of the district, and such levy may be made although the work proposed may have failed or have been found impractical."

The amended petition averred in substance that as to the plaintiffs all the proceedings had been in invitum; that the lands in the district varied in value; that no benefits had accrued or would accrue to the plaintiffs' lands either from the expenditure of the moneys sought to be raised by the tax, or from the carrying out of the proposed plan; that a large portion of the lands in the district, and those of the plaintiffs in large part, were to be condemned for a right of way for ditches and catch basins; and that the tax had been levied against every acre within the district, as a level tax, without regard either to relative value or to benefits, or to the fact that portions of the lands would be damaged and other portions would be taken by condemnation, or that a large extent of territory, if added to the district, as had been proposed, would receive the benefit of the

tax without being charged with any part. The levy of the tax, and the act authorizing it, were assailed as being contrary to the Constitution of the state of Missouri, and also to the provision of the 14th Amendment prohibiting deprivation of property without due process of law.

[261] Upon demurrer to the petition, the parties stipulated that the sole question to be determined was whether § 5538 (supra) was constitutional. The trial court held it to be valid and dismissed the petition. After affirmance in the supreme court of Missouri, division one, the cause was transferred (in view of the Federal question) to the court in banc, where the judgment was finally affirmed, the opinion of division one being adopted. 248 Mo. 373, 154 S. W. 739.

In considering the contention thus presented under the 14th Amendment, it must be taken to be established that the district had been organized validly for a public purpose. It had been incorporated pursuant to the judgment of the circuit court, as in the act provided, and this judgment had been affirmed upon appeal. Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 94, 139 S. W. 330. In the opinion of the court in that proceeding, the tracts were described as forming "a contiguous body of land from 1 to 11 miles in width, extending in a southerly direction for a distance of about 90 miles from Cape Girardeau on the north, to the boundary line between Missouri and Arkansas. Streams and water courses heading in the higher adjacent territory carry their waters to these low lands, where, because of insufficient channels, the waters overflow and render much of the land uncultivable and uninhabitable." Id. p. 103. The district is, indeed, a conspicuous illustration of the class of enterprises which have been authorized in order to secure the recognized public advantages which will accrue from reclaiming and opening to cultivation large areas of swamp or overflowed lands. Egyptian Levee Co. v. Hardin, 27 Mo. 495, 72 Am. Rep. 276; Columbia Bottom Levee Co. v. Meier, 39 Mo. 53; Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; State ex rel. Compton v. Chariton Drainage Dist. 192 Mo. 517, 90 S. W. 722; Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S. W. 892; Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S. W. 12; Little River Drainage Dist. v. St. Louis, M. & S. E. R. Co. 236 Mo. 94, 139 S. W. 330. It [262] was constituted a political subdivision of the state for the purpose of performing prescribed functions of government. Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 60 L.R.A. 190, 94 Am. St. Rep. 727, 70 S. W. 721; State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S. W. 892. These drainage districts, as the supreme court of the state has said, exercise the granted powers within their territorial jurisdiction "as fully, and by the same authority, as the municipal corporations of the state exercise the powers vested by their charters." 248 Mo. p. 383.

In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the state might have defrayed the entire expense out of state funds raised by general taxation, or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. Mobile County v. Kimball, 102 U. S. 691, 703, 704, 26 L. ed. 238, 241, 242. It was equally within the power of the state to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state Constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment; that is, it may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. Hagar v. Reclamation Dist. 111 U. S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 353, 356, 31 L. ed. 763, 766, 767, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 167, 168, 41 L. ed. 369, 391, 392, 17 Sup. Ct. Rep. 56; Bauman v. Ross, 167 U. S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Parsons v. District of Columbia, 170 U. S. 45, 52, 42 L. ed. 943, 946, 8 Sup. Ct. Rep. 521; Williams v. [263] Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1049, 18 Sup. Ct. Rep. 617; Norwood v. Baker, 172 U. S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Paving Co. 181 U. S. 324, 343, 45 L. ed. 879, 889, 21 Sup. Ct. Rep. 625; Wight v. Davidson, 181 U. S. 371, 379, 45 L. ed. 900, 904, 21 Sup. Ct. Rep. 616; Wagner v. Leser, decided this day [239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66].

The legislature, in this instance, fixed the object and character of the tax, and pre-

scribed the maximum rate. The authority to levy the tax for preliminary expenses was to follow upon the organization of the district. The plaintiffs in error urge that the determination at the time the district was organized was merely preliminary and tentative with respect to the lands to be included, and that assessments according to ascertained benefits for the purpose of meeting the cost of works and improvements are reserved for subsequent proceedings, upon notice, after surveys have been made and the plan of drainage has been definitely adopted. See Rev. Stat. (Mo.) §§ 5511 to 5519. It is true that the elaborate inquiry which is to follow the organization of the district may show the advisability of bringing in other lands (Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S. W. 12), and the statute undoubtedly does postpone the assessment of the cost of works and improvements until the plan of drainage has been decided upon and benefits have been determined accordingly. But none the less the organization of the district takes effect when it is duly constituted by the judgment of the court. The owners whose lands are embraced in the district as proposed, and who have not signed the articles, are summoned and their objections to the organization and to the inclusion of their lands are heard. As a public corporation, with defined membership, the district, when established, is empowered to go forward with the expert investigations and surveys which, of necessity, must precede the adoption of a complete scheme. The outcome of these studies cannot be absolutely predicted; they may even result in the abandonment of the project. But probable feasibility has been shown, and the district, in consequence, [264] organized. The preliminary work must then be done and its cost must be met. It is work undertaken by the district. The owners of the included lands) with one vote for each acre) elect the district officers (supervisors), who are to proceed with the surveys, etc., in the manner detailed. In the present case, the district was created upon an adequate showing of basis (236 Mo. p. 138), and it is not disputed that the plaintiffs in error received the notice to which they were entitled (Rev. Stat. [Mo.] 1909, § 5497; Laws of Missouri, 1905, § 8252). They were thus apprised of whatever legal consequences attached to the formation of the district with their lands in it. The present question, therefore, cannot properly be regarded as one of notice. The imposed burden, if it be in its nature a lawful one, is an incident to the organization which they had abundant opportunity to contest. It is apparent that when the district was duly organized it had the same footing as if it had been created by the legislature directly; and if the legislature could have established this district by direct act, and then constitutionally imposed upon the lands within the district the ratable tax in question to pay the expenses of organization and for preliminary work, it cannot be doubted that the legislature had power to impose the same tax upon the district as organized under the judgment of the court.

The ultimate contention, then, is that the plaintiffs in error cannot be subjected to this preliminary tax of 25 cents an acre because their lands, as they insist, will not be benefited by the plan of drainage. In authorizing the tax, it is said, the legislature has departed from the principle of benefits, and the tax is asserted to be pro tanto an uncompensated taking of their property for public use. But the power of taxation should not be confused with the power of eminent domain. Each is governed by its own principles. Mobile County v. Kimball, supra; Bauman v. Ross, 167 U. S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Wight v. Davidson, 181 U. S. 371, 379, 45 L. ed. 900, 904, 21 Sup. Ct. Rep. 616; [265] People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266; Cooley, Taxn. p. 430; Lewis, Em. Dom. 3d ed. §§ 4, 5. A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same. The power of segregation for taxing purposes has every-day illustration in the experiences of local communities, the members of which, by reason of their membership, or the owners of property within the bounds of the political subdivision, are compelled to bear the burdens both of the successes and of the failures of local administration. When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners. Davidson v. New Orleans, 96 U. S. 97, 106, 24 L. ed. 616, 620; Walston v. Nevin, 128 U. S. 578, 582, 32 L. ed. 544, 546, 9 Sup. Ct. Rep. 192; Spencer v. Merchant, 125 U. S. 345, 353, 356, 31 L. ed. 763, 766, 767, 8 Sup. Ct. Rep. 921; Bauman v. Ross, 167 U. S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct.

Rep. 966; French v. Barber Asphalt Paving Co. 181 U. S. 324, 343, 45 L. ed. 879, 889, 21 Sup. Ct. Rep. 625; Wight v. Davidson, 181 U. S. 371, 379, 45 L. ed. 900, 904, 21 Sup. Ct. Rep. 616. And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power. Wagner v. Leser, 239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66. We find no such arbitrary action here. It was not necessary to base the preliminary tax upon special benefits accruing from a completed plan. It cannot be denied that the preliminary work had peculiar relation to the district. The initial inquiry, whatever its result, was for the purpose of securing the reclamation of the lands of which the district was [266] comprised. In this inquiry, all the owners were interested. Whether the expense of ascertaining the best method of reclamation should subsequently be reimbursed when final assessments were laid according to benefits ascertained to result from the execution of the final plan presents a question of policy, and not of power. These outlays for organization and preliminary surveys could well be considered specially to concern the district, as constituted, as highways or public buildings or plans for the same (whether consummated or abandoned) could be said to concern counties or towns. Further, it would seem to be clear that the state could appropriately provide for meeting the preliminary expense when it was incurred, and could determine the manner of apportionment according to the interests deemed to be affected as they existed at the time. And in this view, it is not material to consider whether the area of the district might subsequently be extended, or what particular lands within it would be appropriated for ditches, reservoirs, etc., if a plan of drainage were adopted and carried out. To say that the tax could not be laid except as a result of such an inquiry would be to assert in effect that as a preliminary tax it could not be laid at all. We know of no such limitation upon the state power. And assuming that the lands within the district, as organized, could be taxed for the purpose stated, there was manifestly nothing arbitrary in the fixing of the prescribed rate per acre.

It is further objected that the levy of the tax amounts to a deprivation of property without due process of law because of the restrospective character of the legislation,—the section in question having been passed after the district was organized. As to this, it is sufficient to say that the statute which was in force at the time of the formation of the district contemplated liability to taxation to defray the preliminary expenses as well as the ultimate cost of the improvements if made (Laws of Missouri 1905, § 8252); [267] and these preliminary outlays must be regarded as incident to the organization for which the legislature was competent to provide in the exercise of its taxing power. Seattle v. Kelleher, 195 U. S. 351, 359, 49 L. ed. 232, 235, 25 Sup. Ct. Rep. 44; Wagner v. Leser, supra.

The plaintiffs in error have also urged that § 5538 is invalid under § 10, article I., of the Federal Constitution upon the ground that it impairs the obligation of contract. This contention was not presented by the amended petition and was not deemed by the supreme court of the state, division one, to be within the stipulation upon which the case was tried. 248 Mo. 382, 394. Upon the motion to transfer the case to the court in banc, the question under the contract clause was raised, but the court in banc simply adopted the opinion of division one. Ibid. In that opinion, however, after referring to the stipulation, the court proceeded to observe that the charter of the district, as a public corporation, did not constitute a contract with its members that the laws it was created to administer would not be changed. If this can be considered to be a decision of the question, we see no reason to disturb it. Laramie County v. Albany County, 92 U. S. 307, 310, 23 L. ed. 552, 554; New Orleans v. New Orleans Water-works Co. 142 U. S. 79, 89, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; Worcester v. Worcester Consol. Street R. Co. 196 U. S. 539, 551, 49 L. ed. 591, 596, 25 Sup. Ct. Rep. 327; Seattle v. Kelleher, supra.

Judgment affirmed.

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[268] J. F. BAILEY, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, Appt.,

v.

BAKER ICE MACHINE COMPANY.

(See S. C. Reporter's ed. 268-276.)

Sale — on condition — absolute sale with mortgage back.

1. A contract of conditional sale, not one of absolute sale with a chattel mortgage back securing the deferred instalments of purchase price, is what the parties must have intended by a contract governed by the Kansas laws, which provides for the retention in the vendor of the title to the

NOTE.—On conditional-sale contract executed prior to, but filed within, the four months period as a voidable preference—see note to Big Four Implement Co. v Wright, 47 L.R.A.(N.S.) 1223.

property sold until full payment is made, although it requires the vendee to keep the property insured for the vendor's benefit, and in case of default in payment not only to return the property, but to compensate the vendor for its use and any damage to it, and reserves to the vendor the right to file a mechanics' lien for materials and labor furnished under the contract.

[For other cases, see Sale, I. d, in Digest Sup. Ct. 1908.]

Bankruptcy — preference — diminishing estate.

2. An act on the part of the bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate, is what is meant by the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9644), § 60b, as amended by the act of June 25, 1910 (36 Stat. at L. 838, chap. 412, Comp. Stat. 1913, § 9644), which declares that a transfer by a bankrupt of any of his property shall be voidable by the trustee if it be made or recorded, when recording is required, within four months before the petition in bankruptcy is filed, and the bankrupt is insolvent, and the transfer then operates as a preference.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

Bankruptcy — preference — conditional sale.

3. A contract of conditional sale which was not recorded until after the conditional purchasers had become insolvent did not operate as a preferential transfer by them, within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9644), § 60b, as amended by the act of June 25, 1910 (36 Stat. at L. 838, chap. 412, Comp. Stat. 1913, § 9644), which declares that a transfer by a bankrupt of any of his property shall be voidable by the trustee if it be made or recorded, when recording is required, within four months before the petition in bankruptcy is filed, and the bankrupt is insolvent, and the transfer then operates as a preference.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

Bankruptcy — lien of trustee — when attaching.

4. The trustee in bankruptcy takes the status of a creditor holding a lien as of the time when the petition in bankruptcy is filed, under the provision of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 9631), § 47a, cl. 2, as amended by the act of June 25, 1910 (36 Stat. at L. 838, chap. 412, Comp. Stat. 1913, § 9631), that a trustee in bankruptcy "as to all property in the custody, or coming into the custody, of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings."

[For other cases, see Bankruptcy, VII., in Digest Sup. Ct. 1908.]

[No. 42.]

Argued November 2, 1915. Decided November 29, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the District of Kansas, sustaining the action of a referee in bankruptcy in denying the petition of a conditional vendor to have the property sold delivered to it by the trustee in bankruptcy of the conditional purchasers. Affirmed.

See same case below, 126 C. C. A. 425, 209 Fed. 603.

Statement by Mr. Justice Van Devanter:

[269] By a contract in writing, made at Omaha, Nebraska, October 14, 1911, between the Baker Ice Machine Company and Grant Brothers, the former agreed to deliver and install upon the premises of the latter at Horton, Kansas, an ice making and refrigerating machine for the sum of $5,940, to be paid partly in cash and partly in deferred instalments evidenced by interest-bearing notes. It was specially stipulated that the title to the machine should be and remain in the Baker Company until full payment of the purchase price; that the machine should not be deemed a fixture to the realty prior to full payment; that in the meantime Grant Brothers should keep the machine in good order and keep it insured for the benefit of the Baker Company; that if default was made in the payment of the purchase price, the Baker Company should have the right to resume possession and take the machine away; and that, in the event this right was exercised, the company should be reimbursed for all expenses incurred under the contract, should be compensated for any damage done to the machine in the meantime, and should be allowed a rental for its use equal to 6 per cent per annum upon the purchase price from the date of the installation to that of the resumption of possession. And it was further stipulated that the Baker Company should have the right to file a mechanics' lien for the materials and labor furnished under the contract, and that no notice of a purpose to file such a lien, other than that afforded by this stipulation, would be required.

The machine was installed in February, 1912, the cash payment was made and notes were given for the balance of the purchase price, all as contemplated by the contract. A partial payment upon two of the notes brought the total payments up to $3,200.14, and nothing more was paid. May 15, 1912, but not before, the contract was filed for

record in the county register's office. At that time Grant Brothers were insolvent, and if the contract [270] operated as a transfer of the machine from them to the Baker Company, all the elements of a preferential transfer, in the sense of the bankruptcy act, were present.

July 11, 1912, within four months after such filing, Grant Brothers presented to the district court for the district of Kansas their voluntary petition in bankruptcy, and on the next day were adjudged bankrupts. Possession of the machine, which had remained with them up to that time, was then passed to the trustee in bankruptcy. Shortly thereafter, the balance of the purchase price being due and unpaid, the Baker Company intervened in the bankruptcy proceeding, asserted that it owned the machine and was entitled to the possession in virtue of the contract, and applied for an order directing that the possession be surrendered to it. Upon a hearing before the referee the application was denied, and upon a petition for review his action was sustained by the district court. An appeal to the circuit court of appeals resulted in a reversal of the decree, with a direction that the machine be delivered to the Baker Company unless, within a time to be named, the trustee pay the balance of the purchase price. 126 C. C. A. 425, 568, 209 Fed. 603, 844.

During the pendency of the controversy, as now appears, the machine was sold for $2,800, pursuant to an order of the referee, requested by the parties, whereby the proceeds were to take the place of the machine and be disposed of according to the final decision.

Mr. **Edwin A. Krauthoff** argued the cause, and, with Messrs. Charles Curtis, William S. McClintock, and Arthur L. Quant, filed a brief for appellant:

The national bankruptcy act is to be construed as a law passed in aid of and from the point of commerce.

Browning v. Waycross, 233 U. S. 16, 23, 58 L. ed. 828, 832, 34 Sup. Ct. Rep. 578; Crenshaw v. Arkansas, 227 U. S. 389, 400, 57 L. ed. 565, 569, 33 Sup. Ct. Rep. 294; Davis v. Virginia, 236 U. S. 697, 699, 59 L. ed. 795, 797, 35 Sup. Ct. Rep. 479; Dozier v. Alabama, 218 U. S. 128, 54 L. ed. 967, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Gleason v. Thaw, 236 U. S. 558, 560, 59 L. ed. 717, 719, 35 Sup. Ct. Rep. 287; Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Williams v. United States, Fidelity & G. Co. 236 U. S. 549, 554, 555, 59 L. ed. 713, 716, 717, 35 Sup. Ct. Rep. 289.

The right of a trustee in bankruptcy as a lien creditor is treated as a question of local law.

Dale v. Pattison, 234 U. S. 399, 404, 58 L. ed. 1370, 1374, 52 L.R.A.(N.S.) 754, 34 Sup. Ct. Rep. 785; Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509.

The local law applicable is that of Kansas, the place of performance and situs of the property.

McGarry v. Nicklin, 55 Am. St. Rep. 48, note; Beggs v. Bartels, 73 Conn. 132, 84 Am. St. Rep. 152, 46 Atl. 874; Bradley v. Kingman Implement Co. 79 Neb. 144, 112 N. W. 346; Hart v. Barney & S. Mfg. Co. 7 Fed. 549; Lanston Monotype Mach. Co. v. Curtis, 140 C. C. A. 89, 224 Fed. 403; Re Legg, 96 Fed. 326; 1 Loveland, Bankr. 4th ed. § 406, p. 837; Re Nuckols, 201 Fed. 439; Pittsburgh Locomotive & Car Works v. State Nat. Bank, Fed. Cas. No. 11,198; Potter Mfg. Co. v. Arthur, 136 C. C. A. 589, 220 Fed. 845, Ann. Cas. 1916A, 1268; Re Wall, 207 Fed. 995; Re O'Callaghan, 225 Fed. 133; John Deere Plow Co. v. Mowry, 137 C. C. A. 539, 222 Fed. 3.

An unrecorded contract of conditional sale is void as against a creditor levying on property prior to recording.

Re Fish Bros. Wagon Co. 26 L.R.A.(N.S.) 433, 90 C. C. A. 427, 164 Fed. 553; Geppelt v. Middle West Stone Co. 90 Kan. 539, 135 Pac. 573; Paul v. Lingenfelter, 89 Kan. 871, 132 Pac. 1179.

Prior to June 25, 1910, a trustee in bankruptcy was not a lien creditor.

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481.

The amendment of June 25, 1910, is not retroactive.

Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509; Holt v. Henley, 232 U. S. 637, 58 L. ed. 767, 34 Sup. Ct. Rep. 459.

The amendment of June 25, 1910, is to be construed in the light of the evil to be remedied, and in such a way as to manifest the spirit of the amendment.

Bingham v. Birmingham, 103 Mo. 345, 15 S. W. 533; Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; 1 Kent, Com. p. 462; People ex rel. Peake v. Columbia County, 43 N. Y. 130; Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705.

Under the amendment of June 25, 1910, a trustee in bankruptcy has a status as if he were a creditor holding a lien; it is not necessary that there be a creditor actually holding a lien.

Crucible Steel Co. v. Holt, 98 C. C. A. 101, 174 Fed. 127, 224 U. S. 262, 56 L. ed.

756, 32 Sup. Ct. Rep. 414; Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 187, 59 L. ed. 907, 909, 35 Sup. Ct. Rep. 509; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Augusta Grocery Co. v. Southern Moline Plow Co. 130 C. C. A. 444, 213 Fed. 786; Re Bazemore, 189 Fed. 236; Black, Bankr. § 316, p. 753; Re Calhoun Supply Co. 189 Fed. 537; Sattler v. Slonimsky, 199 Fed. 592; Collier, Bankr. 10th ed. by Gilbert, pp. 659–662b; Cooper Grocery Co. v. Park, 134 C. C. A. 64, 218 Fed. 43; Re Dancy Hardware & Furniture Co. 198 Fed. 336; Re Franklin Lumber Co. 187 Fed. 281; Re Farmers' Supply Co. 196 Fed. 990; Re Gaglione, 200 Fed. 81; Re Gehris-Herbine Co. 188 Fed. 502; Re Geiver, 193 Fed. 128; Re Groezinger, 199 Fed. 935; Re Hammond, 188 Fed. 1020; Re Hartdagen, 189 Fed. 546; Re J. S. Appel Suit & Cloak Co. 198 Fed. 322; Kraver v. Abrahams, 29 Am. Bankr. Rep. 365; Re Kreuger, 199 Fed. 367; 1 Loveland, Bankr. 4th ed. § 372, pp. 765, 768, 777; Meier & F. Co. v. Sabin, 130 C. C. A. 605, 214 Fed. 231; Re Merry, 201 Fed. 369; Re Nelson, 191 Fed. 233; Re Nuckols, 201 Fed. 437; Re O'Brien, 215 Fed. 129; Re Pacific Electric & Automobile Co. 224 Fed. 220; Pacific State Bank v. Coats, 123 C. C. A. 634, 205 Fed. 618, Ann. Cas. 1913E, 846; Re Palmer, 218 Fed. 74; Re Pittsburgh-Big Muddy Coal Co. 132 C. C. A. 81, 215 Fed. 703; 2 Remington, Bankr. 2d ed. pp. 944, 960, 961, 1022, 1023, 1081, 1105, 1123, §§ 1138, 1143, 1207, 1241, 1270; Re Riehl, 200 Fed. 455; Re Smith, 198 Fed. 876; Sturdivant Bank v. Schade, 115 C. C. A. 140, 195 Fed. 188; T. L. Smith Co. v. Orr, 139 C. C. A. 517, 224 Fed. 71; Townsend v. Ashepoo Fertilizer Co. 128 C. C. A. 613, 212 Fed. 97; Re Vandewater & Co. 219 Fed. 627; Re Whatley Bros. 199 Fed. 326.

A trustee's status as lien creditor relates to a date anterior to the recording of the instrument, which, by delay in recording, was, for that reason, while unrecorded, void as to creditors.

Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509; York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Bank of North America v. Pennsylvania Motor Car Co. 235 Pa. 198, 83 Atl. 622; Cornelius v. Boling, 18 Okla. 469, 90 Pac. 874; Williams v. German-American Trust Co. 135 C. C. A. 257, 219 Fed. 507; Re T. H. Bunch Commission Co. 225 Fed. 243.

In cases where an earlier date is unimportant, the date has been fixed as of the filing of the petition.

Massachusetts Bonding & Ins. Co. v. Kemper, 136 C. C. A. 593, 220 Fed. 850; Potter Mfg. Co. v. Arthur, 136 C. C. A. 589, 220 Fed. 483, Ann. Cas. 1916A, 1268; Re Williamsburg Knitting Mill, 190 Fed. 871.

Also of adjudication.

Millikin v. Second Nat. Bank, 124 C. C. A. 148, 206 Fed. 14.

Some cases hold that the right of the trustee as a lien creditor does not antedate the petition.

Big Four Implement Co. v. Wright, 47 L.R.A.(N.S.) 1223, 125 C. C. A. 577, 207 Fed. 535; Re Farmers' Co-Op. Co. 202 Fed. 1005; Hart v. Emmerson-Brantingham Co. 203 Fed. 60.

The question is not determinable as one involving jurisdiction.

Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 56 L. ed. 208, 32 Sup. Ct. Rep. 96.

Nor as involving passing of title of the bankrupt.

Everett v. Judson, 228 U. S. 474, 478, 479, 57 L. ed. 927, 929, 46 L.R.A.(N.S.) 154, 33 Sup. Ct. Rep. 568.

But as involving property which creditors are entitled to have treated as property of the bankrupt.

Recording statutes are liberally construed in favor of creditors.

Bradley v. Kingman Implement Co. 79 Neb. 144, 112 N. W. 346; Rowand v. Anderson, 33 Kan. 268, 52 Am. Rep. 529, 6 Pac. 255; Tooker v. Siegel-Cooper Co. 194 N. Y. 447, 87 N. E. 773.

The contract in issue is in effect a chattel mortgage; not a conditional sale.

24 Am. & Eng. Enc. Law, 2d ed. pp. 1045, 1046; Andrews v. Colorado Sav. Bank, 46 Am. St. Rep. 295, note; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; Bailey v. Hervey, 135 Mass. 172; Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146; Beardsley v. Beardsley, 138 U. S. 262, 266, 34 L. ed. 928, 929, 11 Sup. Ct. Rep. 318; Black, Judicial Precedents, p. 168; Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 290, 53 L. ed. 997, 1002, 29 Sup. Ct. Rep. 614; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 280, 34 L. ed. 349, 352, 10 Sup. Ct. Rep. 999; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Corbett v. Riddle, 126 C. C. A. 535, 209 Fed. 811; Cowden v. Finney, 9 Idaho, 619, 75 Pac. 765; Coweta Fertilizer Co. v. Brown, 89 C. C. A. 612, 163 Fed. 165; 6 Cyc. 994; 3 Enc. U. S. Sup. Ct. Rep. 745, 746; Graham

v. Sadlier, 165 Ill. 97, 46 N. E. 221; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Hart v. Barney & S. Mfg. Co. 7 Fed. 543; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. ed. 1003; Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160; Howard v. Simpkins, 70 Ga. 322; Kelly v. Sibley, 69 C. C. A. 674, 137 Fed. 586; Herr v. Denver Mill & Mercantile Co. 6 L.R.A. 643, note; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079; 13 Sup. Ct. Rep. 170; Mott v. Havana Nat. Bank, 22 Hun, 357; Munroe v. Williams, 35 S. C. 572, 15 S. E. 279; Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. 858; Parke & L. Co. v. White River Lumber Co. 101 Cal. 39, 35 Pac. 442; Smith v. Gilmore, 7 App. D. C. 192; Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; Straub v. Screven, 19 S. C. 448; D. A. Tompkins Co. v. Monticello Cotton Oil Co. 137 Fed. 629; Townsend v. Ashepoo Fertilizer Co. 128 C. C. A. 613, 212 Fed. 100; Union Stock-Yards & Transit Co. v. Western Land & Cattle Co. 7 C. C. A. 660, 18 U. S. App. 438, 59 Fed. 53; Williams v. Drummond Tobacco Co. 17 Tex. Civ. App. 635, 44 S. W. 185; William W. Bierce v. Hutchins, 205 U. S. 340, 348, 51 L. ed. 828, 834, 27 Sup. Ct. Rep. 524; Abernathy v. Madden, 91 Kan. 809, 139 Pac. 431; Anglo-American Land, Mortg. & Agency Co. v. Lombard, 68 C. C. A. 89, 132 Fed. 741; Baker Ice Mach. Co. v. Bailey, 126 C. C. A. 425, 209 Fed. 603; Big Four Implement Co. v. Wright, 47 L.R.A.(N.S.) 1223, 125 C. C. A. 577, 207 Fed. 535; Christie v. Scott, 77 Kan. 257, 94 Pac. 214; Hall v. Draper, 20 Kan. 139; Hallowell v. Miene, 16 Kan. 65; Moline Plow Co. v. Witham, 52 Kan. 189, 34 Pac. 751; First Nat. Bank v. Tufts, 53 Kan. 710, 37 Pac. 127; Osborne v. Connor, 4 Kan. App. 609, 46 Pac. 327; Paul v. Lingenfelter, 89 Kan. 871, 132 Pac. 1179; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 566, 33 Pac. 363; Sumner v. McFarlan, 15 Kan. 600; 35 Cyc. 658–660; Contracting & Bldg. Co. v. Continental Trust Co. 47 C. C. A. 143, 108 Fed. 3; Edwards v. Symons, 65 Mich. 348, 32 N. W. 796; Mishawaka Woolen Mfg. Co. v. Westveer, 112 C. C. A. 109, 191 Fed. 465.

The question of the construction of a contract is determinable by the local law.

Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614; Dale v. Pattison, 234 U. S. 399, 404, 58 L. ed. 1370, 1374, 52 L.R.A.(N.S.) 754, 34 Sup. Ct. Rep. 785; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Mishawaka Woolen Mfg. Co. v. Westveer, 112 C. C. A. 109, 191 Fed. 466; Taney v. Penn. Nat. Bank, 232 U. S. 174, 180, 58 L. ed. 558, 34 Sup. Ct. Rep. 288.

The true question in Dunlop v. Mercer, 86 C. C. A. 435, 156 Fed. 545; Monitor Drill Co. v. Mercer, 20 L.R.A.(N.S.) 1065, 90 C. C. A. 303, 163 Fed. 943, 16 Ann. Cas. 214; Re Pierce, 87 C. C. A. 537, 157 Fed. 755; and York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481, is not the differentiation between conditional-sale contracts and chattel mortgages as such, but whether the delivery of merchandise intended for resale was fraudulent as to creditors, whatever the character of the instrument.

Re Carpenter, 125 Fed. 831; Coweta Fertilizer Co. v. Brown, 89 C. C. A. 612, 163 Fed. 166; 35 Cyc. 635; Fitzgerald v. Fuller, 19 Hun, 180; Re Galt, 120 Fed. 443; Re Garcewich, 53 C. C. A. 510, 115 Fed. 87; Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Ludden v. Hazen, 31 Barb. 650; Pratt v. Burhans, 84 Mich. 487, 22 Am. St. Rep. 703, 47 N. W. 1064; Re Rasmussen, 136 Fed. 704; Re Rodgers, 60 C. C. A. 567, 125 Fed. 177; Star Clothing Co. v. Nordeman, 118 Tenn. 384, 100 S. W. 93; Winchester Wagon Works Mfg. Co. v. Carman, 109 Ind. 31, 58 Am. Rep. 382, 9 N. E. 707.

A contract requiring a purchaser to install parts of machinery becoming an integral portion of a completed plant is not construable as a contract of conditional sale; and a contract placing the risk of accidental destruction on the purchaser is not construable as a contract of conditional sale.

American Soda Fountain Co. v. Blue, 146 Ala. 682, 40 So. 218; Harley v. Stanley, 138 Am. St. Rep. 903, note; J. M. Arthur & Co. v. Blackman, 63 Fed. 536; Foley v. Felrath, 98 Ala. 176, 39 Am. St. Rep. 39, 13 So. 485; Glisson v. Heggie Bros. 105 Ga. 30, 31 S. E. 118; Grant v. United States, 7 Wall. 331, 19 L. ed. 194; Jacob Strauss Saddlery Co. v. Kingman, 42 Mo. App. 208; La Valley v. Ravenna, 78 Vt. 152, 2 L.R.A.(N.S.) 97, 112 Am. St. Rep. 898, 62 Atl. 47, 6 Ann. Cas. 684; McConihe v. New York & E. R. Co. 20 N. Y. 495; Marion Mfg. Co. v. Buchanan, 118 Tenn. 238, 8 L.R.A.(N.S.) 590, 99 S. W. 984, 12 Ann. Cas. 707; 1 Mechem, Sales, § 634; Mountain City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 565; Planters' Bank v. Vandyck, 4 Heisk. 617; Randle v. Stone, 77 Ga. 501; Roach v. Whitfield, 94 Ark. 448, 140 Am. St. Rep. 131, 127 S. W. 722; Swallow v. Emery, 111 Mass. 355.

The contract operating as an affirmative stipulation giving the seller a definite right to file a mechanic's lien, and notice of intention to do so being declared in the contract—

(a) The contract operates as firm elec-

tion to enforce the purchase price; hence the sale is absolute, not conditional.

6 Am. & Eng. Enc. Law 2d ed. 480 note, and cases cited; American Soda Fountain Co. v. Blue, 146 Ala. 682, 40 So. 218, affirmed on second appeal in 150 Ala. 165, 43 So. 709; Arctic Ice Mach. Co. v. Armstrong County Trust Co. 112 C. C. A. 458, 192 Fed. 114; Aultman v. Silha, 85 Wis. 359, 55 N. W. 711; Bailey v. Hervey, 135 Mass. 172; Benjamin, Sales, 7th ed. Bennett's Notes, p. 301; Bensinger Self-Adding Cash Register v. Cain, 4 Tex. App. Civ. Cas. (Willson) 499, 18 S. W. 136; Chicago & A. R. Co. v. Union Rolling Mill Co. 109 U. S. 719, 27 L. ed. 1087, 3 Sup. Ct. Rep. 594; Re Cohn, 18 Am. Bankr. Rep. 797; Crompton v. Beach, 62 Conn. 28, 36 Am. St. Rep. 323, 25 Atl. 446; 35 Cyc. 673, 705; Dowdell v. Empire Furniture & Lumber Co. 84 Ala. 316, 4 So. 31; Edmead v. Anderson, 118 App. Div. 16, 103 N. Y. Supp. 369; Elwood State Bank v. Mock, 40 Ind. App. 685, 82 N. E. 1003; Fuller v. Eames, 108 Ala. 464, 19 So. 366; Gaar, S. & Co. v. Fleshman, 38 Ind. App. 493, 77 N. E. 744, 78 N. E. 348; Hine v. Roberts, 48 Conn. 267, 40 Am. Rep. 170; Holt Mfg. Co. v. Ewing, 109 Cal. 356, 42 Pac. 435; Hooven, O. & R. Co. v. Featherstone, 99 Fed. 181; Keystone Mfg. Co. v. Cassellius, 74 Minn. 115, 76 N. W. 1028; Laclede Power Co. v. Ennis Stationery Co. 79 Mo. App. 307; Lang v. Adams, 71 Kan. 310, 80 Pac. 593; Cole v. Hines, 32 L.R.A. 471, note; Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870; Re Levin, K. & Co. 136 C. C. A. 279, 220 Fed. 451; Loomis v. Bragg, 50 Conn. 228, 47 Am. Rep. 638; McCormick Harvesting Mach. Co. v. Lewis, 52 Kan. 358, 35 Pac. 12; Case Mfg. Co. v. Smith, 5 L.R.A. 231, 40 Fed. 339; Matteson v. Equitable Min. & Mill. Co. 143 Cal. 436, 77 Pac. 144; 1 Mechem, Sales, § 619; Merchants' & P. Bank v. Thomas, 69 Tex. 238, 6 S. W. 565; Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597; Moline Plow Co. v. Rodgers, 53 Kan. 743, 42 Am. St. Rep. 317, 37 Pac. 111; Montgomery Iron Works v. Smith, 98 Ala. 644, 13 So. 525; Nauman Co. v. Bradshaw, 113 C. C. A. 274, 193 Fed. 350; Parke & L. Co. v. White River Lumber Co. 101 Cal. 37, 35 Pac. 442; Richards v. Schreiber, C. & W. Co. 98 Iowa, 422, 67 N. W. 569; Segrist v. Crabtree, 131 U. S. 287, 292, 33 L. ed. 125, 127, 9 Sup. Ct. Rep. 687; Smith v. Barber, 153 Ind. 328, 53 N. E. 1014; Smith v. Gilmore, 7 App. D. C. 192; Tanner & D. Engine Co. v. Hall, 89 Ala. 628, 7 So. 187; Turk v. Carnahan, 25 Ind. App. 125, 81 Am. St. Rep. 85, 57 N. E. 729; Van Winkle v. Crowell, 146 U. S. 42, 51, 36 L. ed. 880, 883, 13 Sup. Ct. Rep. 18; Warner Elevator Mfg. Co. v. Capitol Invest. Bldg. & L. Asso. 127 Mich. 323, 89 Am. St. Rep. 473, 86 N. W. 828; Williston, Sales, § 571; William W. Bierce v. Hutchins, 205 U. S. 340, 346, 51 L. ed. 828, 833, 27 Sup. Ct. Rep. 524; Wurmser v. Sivey, 52 Mo. App. 424; Twentieth Century Machinery Co. v. Excelsior Springs Mineral Water & Bottling Co. — Mo. App. —, 171 S. W. 944; Orcutt v. Rickenbrodt, 42 App. Div. 238, 59 N. Y. Supp. 1008; Butler v. Dodson, 78 Ark. 569, 94 S. W. 703; Alden v. W. J. Dyer & Bro. 92 Minn. 136, 99 N. W. 784; D. M. Osborne & Co. v. Walther, 12 Okla. 27, 69 Pac. 953; Seanor v. McLaughlin, 165 Pa. 150, 32 L.R.A. 467, 30 Atl. 717; Button v. Trader, 75 Mich. 295, 42 N. W. 834; Frisch v. Wells, 23 L.R.A.(N.S.) 144, note; Hickman v. Richburg, 122 Ala. 638, 26 So. 136; Heller v. Elliott, 44 N. J. L. 467; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 63, 71 S. W. 1113.

(b) The contract operates as an admission that the machinery became a part of the realty, hence not the basis of a conditional sale.

Bratton v. Clawson, 2 Strobh. L. 478; Case Mfg. Co. v. Garven, 45 Ohio St. 301, 13 N. E. 493; Corliss v. McLagin, 29 Me. 115; 27 Cyc. 31, 37—39; Eaves v. Estes, 10 Kan. 314, 15 Am. Rep. 345; Fairbanks v. Richardson Drug Co. 42 Mo. App. 262; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Ford v. Cobb, 20 N. Y. 348; Fortman v. Goepper, 14 Ohio St. 564; Fosdick v. Schall, 99 U. S. 235, 251, 25 L. ed. 339, 342; Geppelt v. Middle West Stone Co. 90 Kan. 539, 135 Pac. 573; Harkey v. Cain, 69 Tex. 146, 6 S. W. 637; Haven v. Emery, 33 N. H. 66; Hawkins v. Hersey, 86 Me. 396, 30 Atl. 14; Hooven, O. & R. Co. v. John Featherstone's Sons, 49 C. C. A. 229, 111 Fed. 81; Jones, Chat. Mortg. 5th ed. § 132a; Jenks v. Colwell, 66 Mich. 420, 11 Am. St. Rep. 502, 33 N. W. 528; Lansing Iron & Engine Works v. Walker, 91 Mich. 409, 30 Am. St. Rep. 488, 51 N. W. 1061; Marshall v. Bacheldor, 47 Kan. 442, 28 Pac. 168; Morgan v. Arthurs, 3 Watts, 140; Murdock v. Harris, 20 Barb. 407; Oves v. Ogelsby, 7 Watts, 106; Phelps & B. Windmill Co. v. Baker, 49 Kan. 434, 30 Pac. 472; Phœnix Iron Works Co. v. New York Secur. & T. Co. 28 C. C. A. 76, 54 U. S. App. 408, 83 Fed. 757; Pike Electric Co. v. Richardson Drug Co. 42 Mo. App. 272; Porter v. Pittsburg Bessemer Steel Co. 122 U. S. 267, 282, 30 L. ed. 1210, 1211, 7 Sup. Ct. Rep. 1206; Progress Press Brick & Mach. Co. v. Gratiot Brick & Quarry Co. 151 Mo. 501, 74 Am. St. Rep. 557, 52 S. W. 401; Richardson v. Koch, 81 Mo. 264; San Antonio Brewing Asso. v. Arctic Ice Mach.

Mfg. Co. 81 Tex. 99, 16 S. W. 797; Sparks v. State Bank, 7 Blackf. 469; Springfield Foundry & Mach. Co. v. Cole, 130 Mo. 7, 31 S. W. 922; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180; Triumph Electric Co. v. Patterson, 127 C. C. A. 612, 211 Fed. 244; Tyson v. Post, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316; United States v. New Orleans & O. R. Co. (New Orleans & O. R. Co. v. Mellen) 12 Wall. 362, 365, 20 L. ed. 434, 436; Walmsley v. Milne, 7 C. B. N. S. 116, 29 L. J. C. P. N. S. 97, 6 Jur. N. S. 125, 1 L. T. N. S. 62, 8 Week. Rep. 138; White's Appeal, 10 Pa. 252; Re Williamsburg Knitting Mill, 190 Fed. 871; Winslow v. Merchants' Ins. Co. 4 Met. 306, 38 Am. Dec. 368.

The contract being dated October, 1911, and filed May 15, 1912, in circumstances making a transfer voidable as a preference, the date of the preference is reckoned as of the date of the filing.

American Lead Pencil Co. v. Champion, 57 Kan. 352, 46 Pac. 696; Babbitt v. Kelley, 96 Mo. App. 529, 70 S. W. 384; Re Ball, 123 Fed. 164; L. A. Becker Co. v. Gill, 124 C. C. A. 170, 206 Fed. 37; Big Four Implement Co. v. Wright, 47 L.R.A. (N.S.) 1223, 125 C. C. A. 577, 207 Fed. 537; Re Bolstad, 224 Fed. 283; Re Boyd, 130 C. C. A. 288, 213 Fed. 774; Bradley, C. & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Brigman v. Covington, 135 C. C. A. 250, 219 Fed. 500; Brown v. Platt, 8 Bosw. 324; Cameron v. Marvin, 26 Kan. 625; Carey v. Donohue, 126 C. C. A. 254, 209 Fed. 328; Chapman v. Weimer, 4 Ohio St. 481; Christ v. Zehner, 212 Pa. 188, 61 Atl. 822; Claridge v. Evans, 137 Wis. 218, 25 L.R.A.(N.S.) 144, 118 N. W. 198, 803, 2 Cobbey, Chat. Mortg. § 794; Covington v. Brigman, 210 Fed. 499; Deupree v. Watson, 132 C. C. A. 543, 216 Fed. 483; Re Dismal Swamp Contracting Co. 135 Fed. 415; Dixon v. Tyree, 92 Kan. 137, 139 Pac. 1026; Dobyns v. Meyer, 95 Mo. 132, 6 Am. St. Rep. 32, 8 S. W. 251; Re Doran, 83 C. C. A. 265, 154 Fed. 467; English v. Ross, 140 Fed. 630; Eppstein v. Wilson, 79 C. C. A. 155, 149 Fed. 197; First Nat. Bank v. Anderson, 24 Minn. 435; First Nat. Bank v. Johnson, 68 Neb. 641, 94 N. W. 837, 4 Ann. Cas. 485; First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 35; Forrester v. Kearney Nat. Bank, 49 Neb. 659, 68 N. W. 1059; Frank v. Miner, 50 Ill. 444; Gill v. Ely-Norris Safe Co. 170 Mo. App. 486, 156 S. W. 811; Godwin v. Murchison Nat. Bank, 145 N. C. 320, 17 L.R.A.(N.S.) 935, 59 S. E. 154; Re Great Western Mfg. Co. 81 C. C. A. 341, 152 Fed. 123; Re Hickerson, 162 Fed. 345; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Re Hunt, 139 Fed. 283; John Deere Plow Co. v. Edgar Farmer Store Co. 154 Wis. 490, 143 N. W. 194; Johnston v. Huff, A. & M. Co. 66 C. C. A. 534, 133 Fed. 704; Re Klein, 116 C. C. A. 603, 197 Fed. 241; Re Klingaman, 4 Am. Bankr. Rep. 254; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412, 89 C. C. A. 467, 162 Fed. 675; Re Standard Teleph. & Electric Co. 157 Fed. 106; Loeser v. Savings Deposit Bank & T. Co. 18 L.R.A.(N.S.) 1233, 78 C. C. A. 597, 148 Fed. 977; Long v. Farmers' State Bank, 9 L.R.A.(N.S.) 585, 77 C. C. A. 538, 147 Fed. 360; Re Sam Z. Lorch & Co. 199 Fed. 944; McElvain v. Hardesty, 94 C. C. A. 399, 169 Fed. 31; McVay v. English, 30 Kan. 368, 1 Pac. 795; Re Mandel, 10 Am. Bankr. Rep. 774; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; Mattley v. Giesler, 110 C. C. A. 90, 187 Fed. 970; Meyer Bros. Drug Co. v. Pipkin Drug Co. 69 C. C. A. 240, 136 Fed. 396; Re W. W. Mills Co. 162 Fed. 42; Moffat v. Beeler, 91 Kan. 215, 137 Pac. 963, Ann. Cas. 1915C, 602; Morgan v. First Nat. Bank, 76 C. C. A. 236, 145 Fed. 466; Page v. Rogers, 211 U. S. 575, 53 L. ed. 332, 29 Sup. Ct. Rep. 159; Pew v. Price, 251 Mo. 614, 158 S. W. 338; Pollock v. Jones, 61 C. C. A. 555, 124 Fed. 163; Ragan v. Donovan, 189 Fed. 138; Roberts v. Johnson, 18 Am. Bankr. Rep. 132; Rogers v. Page 72 C. C. A. 164, 140 Fed. 596; Roy v. Salisbury, 134 N. Y. Supp. 733; Sexton v. Kessler & Co. 225 U. S. 90, 98, 56 L. ed. 995, 1000, 32 Sup. Ct. Rep. 657; Re Shirley, 50 C. C. A. 252, 112 Fed. 301; Re Smith, 176 Fed. 426; Studebaker Bros. Mfg. Co. v. Elsey-Hemphill Carriage Co. 152 Mo. App. 401, 133 S. W. 412; Re Sturtevant, 110 C. C. A. 68, 188 Fed. 196; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Tilt v. Citizens' Trust Co. 191 Fed. 441; Torrance v. Winfield Nat. Bank, 66 Kan. 177, 71 Pac. 235; Utley v. Fee, 33 Kan. 683, 7 Pac. 555; Vitzthum v. Large, 162 Fed. 685; Wm. B. Grimes Dry Goods Co. v. McKee, 51 Kan. 706, 33 Pac. 594; Williams v. German-American Trust Co. 135 C. C. A. 257, 219 Fed. 507; Wilson v. Leslie, 20 Ohio, 166; Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; Youngberg v. Walsh, 72 Kan. 220, 83 Pac. 972; Zartman v. First Nat. Bank, 189 N. Y. 267, 12 L.R.A.(N.S.) 1083, 82 N. E. 127, 109 App. Div. 406, 96 N. Y. Supp. 633. See also Baker Ice Mach. Co. v. Bailey, 126 C. C. A. 425, 209 Fed. 603; Re Bazemore, 189 Fed. 236; Bowler v. First Nat. Bank, 21 S. D. 449, 130 Am. St. Rep. 725, 113 N. W. 618; Re Brown Wagon Co. 224 Fed. 266; Re Calhoun Supply Co. 189 Fed. 537; Re Farmer's Supply

Co. 196 Fed. 990; Re Jackson Brick & Tile Co. 189 Fed. 636; Re Jacobson, 200 Fed. 812; Keeble v. John Deere Plow Co. 111 C. C. A. 668, 190 Fed. 1019; Landis v. McDonald, 88 Mo. App. 335; Little v. Holley-Brooks Hardware Co. 67 C. C. A. 46, 133 Fed. 878; Rock Island Plow Co. v. Reardon, 222 U. S. 354, 56 L. ed. 231, 32 Sup. Ct. Rep. 164; Re Social Circle Cotton Mills, 213 Fed. 994; Sturdivant Bank v. Schade, 115 C. C. A. 140, 195 Fed. 188; Re Virgin, 224 Fed. 128; Re Wade, 185 Fed. 664; Re Whatley Bros. 199 Fed. 326.

The conditional vendees had an interest in the property, which, to a limited extent, passed to the vendor by recording the contract; hence the recording of the contract operated as a transfer.

Ætna F. Ins. Co. v. Tyler, 16 Wend. 385, 30 Am. Dec. 90; Albright v. Meredith, 58 Ohio St. 199, 50 N. E. 719; 6 Am. & Eng. Enc. Law, 2d ed. p. 455; Ames Iron Works v. Richardson, 55 Ark. 642, 18 S. W. 381; American Soda Fountain Co. v. Vaughn, 69 N. J. L. 582, 55 Atl. 54; Tufts v. Griffin, 22 Am. St. Rep. 866, note; Insurance Co. of N. A. v. Erickson, 111 Am. St. Rep. 128, note; Baker v. State Ins. Co. 31 Or. 41, 65 Am. St. Rep. 807, 48 Pac. 699; Beach's Appeal, 58 Conn. 478, 20 Atl. 475; Benjamin, Sales, 7th ed.; Bennett's Notes, p. 300; Burnley v. Tufts, 66 Miss. 48, 14 Am. St. Rep. 540, 5 So. 627; Carpenter v. Scott, 13 R. I. 477; Chase v. Ingalls, 122 Mass. 381; Connecticut Mut. L. Ins. Co. v. Stinson, 62 Ill. App. 330; Currier v. Knapp, 117 Mass. 324; Cutting v. Whittemore, 72 N. H. 107, 54 Atl. 1098; 32 Cyc. 648, 651; 35 Cyc. 305; Day v. Bassett, 102 Mass. 445; Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 245, 40 L.R.A. 358; Dupreau v. Hibernia Ins. Co. 76 Mich. 615, 5 L.R.A. 671, 43 N. W. 585; First Nat. Bank v. Staake, 202 U. S. 141, 146, 50 L. ed. 967, 969, 26 Sup. Ct. Rep. 580; Geiss v. Franklin Ins. Co. 123 Ind. 172, 18 Am. St. Rep. 324, 24 N. E. 99; Geppelt v. Middle West Stone Co. 90 Kan. 539, 545, 135 Pac. 573; Hamburg-Bremen F. Ins. Co. v. Ruddell, 37 Tex. Civ. App. 30, 82 S. W. 826; Hanover F. Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Harley v. Stanley, 25 Okla. 89, 138 Am. St. Rep. 900, 105 Pac. 188; Re Harrington, 29 Am. Bankr. Rep. 696; Hartford F. Ins. Co. v. Keating, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; Imperial F. Ins. Co. v. Dunham, 117 Pa. 460, 2 Am. St. Rep. 686, 12 Atl. 668; Jessup v. Fairbanks, M. & Co. 38 Ind. App. 673, 78 N. E. 1050; Johannes v. Standard Fire Office, 70 Wis. 196, 5 Am. St. Rep. 159, 35 N. W. 298; Jones, Chat. Mortg. 5th ed. § 117; Jones, Liens, §§ 1061, 1105; Knapp v. Alexander-Edgar Lumber Co. 237 U. S. 162, 167, 59 L. ed. 894, 898, 35 Sup. Ct. Rep. 515; Lancaster v. Southern Ins. Co. 153 N. C. 285, 138 Am. St. Rep. 665, 69 S. E. 214; Lasher v. St. Joseph F. & M. Ins. Co. 86 N. Y. 423; Light v. Greenwich Ins. Co. 105 Tenn. 480, 58 S. W. 851; Lippincott v. Rich, 22 Utah, 196, 61 Pac. 526; Liverpool & L. & G. Ins. Co. v. Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248; Loventhal v. Home Ins. Co. 112 Ala. 108, 33 L.R.A. 258, 57 Am. St. Rep. 17, 20 So. 419; McWilliams v. Cascade F. & M. Ins. Co. 7 Wash. 52, 34 Pac. 140; Matthews v. Capitol F. Ins. Co. 115 Wis. 272, 91 N. W. 675; Milwaukee Mechanics' Ins. Co. v. Rhea, 60 C. C. A. 103, 123 Fed. 10; National Cash Register Co. v. South Bay Club House Asso. 64 Misc. 125, 118 N. Y. Supp. 1044; Osborn v. South Shore Lumber Co. 91 Wis. 526, 65 N. W. 184; Re Peasley, 137 Fed. 190; Pelton v. Westchester F. Ins. Co. 77 N. Y. 605; Pennsylvania F. Ins. Co. v. Hughes, 47 C. C. A. 459, 108 Fed. 497; Phenix Ins. Co. v. Kerr, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723; Phillips v. Hollenberg Music Co. 82 Ark. 9, 99 S. W. 1105; Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 138 Am. St. Rep. 171, 52 So. 799; Phœnix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Pirie v. Chicago Title & T. Co. 182 U. S. 438, 444, 45 L. ed. 1171, 1176, 21 Sup. Ct. Rep. 906; Pom. Eq. Jur. §§ 105, 167, 368, 1046, 1161, 1263, 1406; Powers v. Burdick, 126 App. Div. 179, 110 N. Y. Supp. 883; Queen Ins. Co. v. May, — Tex. Civ. App. —, 35 S. W. 829; 1 Remington, Bankr. 2d ed. § 20; Rumsey v. Phœnix Ins. Co. 17 Blatchf. 527, 1 Fed. 396; Snyder v. Murdock, 51 Mo. 175; Stone v. Waite, 88 Ala. 599, 7 So. 117; Story, Eq. Jur. § 1217, and note; Sumner v. Wood, 67 Ala. 139, 42 Am. Rep. 104; Re Sunflower State Ref. Co. 115 C. C. A. 132, 195 Fed. 180; Tufts v. Brace, 103 Wis. 344, 79 N. W. 414; Tufts v. Griffin, 107 N. C. 47, 10 L.R.A. 526, 22 Am. St. Rep. 863, 12 S. E. 68; Tufts v. Wynne, 45 Mo. App. 42; United Shoe Machinery Co. v. Ramlose, 231 Mo. 528, 132 S. W. 1133; United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 970; 1 Washb. Real Prop. 4th ed. *509; Westchester F. Ins. Co. v. Weaver, 70 Md. 540, 5 L.R.A. 478, 17 Atl. 401, 18 Atl. 1034; 1 Whart. Contr. § 617; Whitlock v. Auburn Lumber Co. 145 N. C. 120, 12 L.R.A.(N.S.) 1214, 58 S. W. 909; Williston, Sales, §§ 22, 304, 326, 331, 332, 334; 6 Words & Phrases, pp. 5693, 5694.

A contract executed in October, 1911, and not recorded until May 15, 1912, is void as to all intermediate creditors, notwithstanding that no creditor held a lien prior to the recording.

Abernathy v. Madden, 91 Kan. 809, 139 Pac. 431; American Lead Pencil Co. v. Champion, 57 Kan. 352, 46 Pac. 696; Re Atlanta News Pub. Co. 160 Fed. 522; Baker v. Parkhurst, 119 Mich. 545, 78 N. W. 643; Baldwin v. Crow, 86 Ky. 670, 7 S. W. 146; L. A. Becker Co. v. Gill, 124 C. C. A. 170, 206 Fed. 36; Re Beckhaus, 100 C. C. A. 561, 177 Fed. 141; Blake v. Meadows, 225 Mo. 1, 30 L.R.A.(N.S.) 1, 123 S. W. 868; Bowles v. Jones, 123 Ky. 395, 96 S. W. 1121; Re Bothe, 97 C. C. A. 547, 173 Fed. 597; Re Braselton, 169 Fed. 960; Brown v. Brabb, 67 Mich. 17, 11 Am. St. Rep. 549, 34 N. W. 403; Cameron v. Marvin, 26 Kan. 612; Re Cannon, 121 Fed. 582; Clift v. Williams, 105 Ky. 559, 49 S. W. 328, 51 S. W. 821; Crucible Steel Co. v. Holt, 98 C. C. A. 101, 174 Fed. 127; 6 Cyc. 1071; 16 Cyc. 681; Dayton v. People's Sav. Bank, 23 Kan. 421; Dempsey v. Pforzheimer, 86 Mich. 652, 13 L.R.A. 388, 49 N. W. 465; Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509; Dixon v. Tyree, 92 Kan. 137, 139 Pac. 1026; Re Doran, 83 C. C. A. 265, 154 Fed. 467; Re Ducker, 67 C. C. A. 117, 134 Fed. 43; Fearey v. Cummings, 41 Mich. 376, 1 N. W. 946; First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 37; Gagnon v. Brown, 47 Kan. 83, 27 Pac. 104; Geiser Mfg. Co. v. Murray, 84 Kan. 450, L.R.A.—, —, 114 Pac. 1046; Re Harnden, 200 Fed. 175; Harrison v. South Carthage Min. Co. 95 Mo. App. 83, 68 S. W. 963; Hilliard v. Cagle, 46 Miss. 309; Holt v. Crucible Steel Co. 224 U. S. 262, 56 L. ed. 756, 32 Sup. Ct. Rep. 414; Hurley v. Atchison, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; Re Huxoll, 113 C. C. A. 637, 193 Fed. 851; Re Jacobson, 200 Fed. 812; James v. Gray, 1 L.R.A.(N.S.) 321, 65 C. C. A. 385, 131 Fed. 401; Re Johnson, 212 Fed. 311; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Kennedy v. Dawson, 96 Mich. 79, 55 N. W. 616; Landis v. McDonald, 88 Mo. App. 335; McAtee v. Shade, 107 C. C. A. 512, 185 Fed. 442; McElvain v. Hardesty, 94 C. C. A. 399, 169 Fed. 34; McVay v. English, 30 Kan. 368, 1 Pac. 795; Re Mission Fixture & Mantel Co. 180 Fed. 263; Moffat v. Beeler, 91 Kan. 209, 137 Pac. 963, Ann. Cas. 1915C, 602; Noyes v. Brace, 8 S. D. 190, 65 N. W. 1071; Re O'Callaghan, 30 Am. Bankr. Rep. 97; Re Palmer, 218 Fed. 74; Parshall v. Eggert, 54 N. Y. 18; Paul v. Lingenfelter, 89 Kan. 872, 132 Pac. 1179; Re Peasley, 137 Fed. 190; People use of Esper v. Burns, 161 Mich. 174, 137 Am. St. Rep. 466, 125 N. W. 740; Post v. Berry, 99 C. C. A. 186, 175 Fed. 564; Putnam v. Reynolds, 44 Mich. 113, 6 N. W. 198; Re Riehl, 200 Fed. 455; Roe v. Meding, 53 N. J. Eq. 350, 33 Atl. 394; Ruggles v. Cannedy, 127 Cal. 290, 46 L.R.A. 371, 53 Pac. 911, 59 Pac. 827; Sanger v. Guenther, 73 Wis. 354, 41 N. W. 436; Sedgwick City Bank v. Wichita Mercantile Co. 45 Kan. 346, 25 Pac. 888; Simmons v. Greer, 98 C. C. A. 408, 174 Fed. 654; Skilton v. Codington, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790; Standard Paper Co. v. Guenther, 67 Wis. 101, 30 N. W. 298; Swafford v. Asher, 31 Ky. L. Rep. 1338, 105 S. W. 164; Thompson v. Van Vechten, 27 N. Y. 568; Union Nat. Bank v. Oium, 3 N. D. 201, 44 Am. St. Rep. 533, 54 N. W. 1034; Re Wade, 185 Fed. 664; Wicks Bros. v. McConnell, 102 Ky. 434, 43 S. W. 205; Wm. B. Grimes Dry Goods Co. v. McKee, 51 Kan. 704, 33 Pac. 594; Williams v. Kirk, 68 Mo. App. 461; Youngberg v. Walsh, 72 Kan. 221, 83 Pac. 972; Williamson v. New Jersey Southern R. Co. 29 N. J. Eq. 335.

The seller having taken negotiable promissory notes from the purchaser, thereby electing to make the liability of the purchaser absolute, the sale was not conditional.

Babbitt v. Moore, 51 N. J. L. 229, 17 Atl. 99; First Nat. Bank v. Alton, 60 Conn. 402, 22 Atl. 1010; Bannister v. Rouse, 44 Mich. 428, 6 N. W. 870; Bick v. Clark, 134 Mo. App. 544, 114 S. W. 1144; Bigelow, Bills, Notes & Cheques, 2d ed. § 5, pp. 32, 33, 35, 36, 40; Choate v. Stevens, 116 Mich. 28, 43 L.R.A. 277, 74 N. W. 289; Chicago R. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 349, 10 Sup. Ct. Rep. 999; 7 Cyc. 532, 597; 1 Dan. Neg. Inst. §§ 1, 28, 30, 41, 52, 59, 80; Eaton & G. Comp. Paper, pp. 175, 656, §§ 20, 24; First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; Harkness v. Russell, 118 U. S. 664, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313; Overton v. Tyler, 3 Pa. St. 346, 45 Am. Dec. 645; Schneider v. Schiffman, 20 Mo. 571; Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524; Sloan v. McCarty, 134 Mass. 245; South Bend Iron Works v. Paddock, 37 Kan. 510, 15 Pac. 574; Third Nat. Bank v. Armstrong, 25 Minn. 530; Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212, 20 Ann. Cas. 1322; Wright v. Traver, 73 Mich. 493, 3 L.R.A. 50, 41 N. W. 517.

The circuit court of appeals erred in making an order of unconditional return of the machinery. The rights of seller and purchaser are determinable according to contract and principles of equity.

C. Aultman & Co. v. Olson, 43 Minn. 409, 45 N. W. 852; Barton v. Mulvane, 59 Kan. 313, 52 Pac. 883; Cole v. Hines, 81 Md. 476, 32 L.R.A. 455, 32 Atl. 196; Dederick v. Wolfe, 68 Miss. 500, 24 Am. St. Rep. 283,

10 So. 64; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Duncan v. Stone, 45 Vt. 118; Earle v. Robinson, 30 N. Y. Supp. 178; Fleck v. Warner, 25 Kan. 492; Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929, 12 Ann. Cas. 876; Hamilton v. Singer Mfg. Co. 54 Ill. 371; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; Hays v. Jordan, 85 Ga. 741, 9 L.R.A. 373, 11 S. E. 833; Hill v. Townsend, 69 Ala. 286; Hine v. Roberts, 48 Conn. 267, 40 Am. Rep. 170; Latham v. Davis, 44 Fed. 862; Loomis v. Bragg, 50 Conn. 228, 47 Am. Rep. 638; Meagher v. Hollenberg, 9 Lea. 392; Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597; Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Perkins v. Grobben, 116 Mich. 172, 39 L.R.A. 815, 72 Am. St. Rep. 512, 74 N. W. 469; Preston v. Whitney, 23 Mich. 260; A. D. Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377, 19 L.R.A. 682, 17 S. E. 174; Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co. 72 Miss. 608, 18 So. 364; Shafer v. Russell, 28 Utah, 444, 79 Pac. 559; Segrist v. Crabtree, 131 U. S. 287, 292, 33 L. ed. 125, 127, 9 Sup. Ct. Rep. 687; Snook v. Raglan, 89 Ga. 251, 15 S. E. 364; Tufts v. D'Arcambal, 85 Mich. 185, 24 Am. St. Rep. 79, 12 L.R.A. 446, 48 N. W. 497; White v. A. W. Gray's Sons, 96 App. Div. 154, 89 N. Y. Supp. 481; Scott v. Glover, 7 Ga. App. 182.

If machinery is to be returned, the holder of an outstanding chattel mortgage should be cited before final decree is entered.

Riverside & D. River Cotton Mills v. Menefee, 237 U. S. 189, 193, 59 L. ed. 910, 912, 35 Sup. Ct. Rep. 579; Ray v. Norseworthy, 23 Wall. 128, 135, 23 L. ed. 116, 118; Re Platteville Foundry & Mach. Co. 147 Fed. 828; Re Crowell, 199 Fed. 659; McKay v. Hamill, 107 C. C. A. 115, 185 Fed. 11; 2 Remington, Bankr. 2d ed. § 1889; Black, Bankr. § 471.

Possession is prima facie evidence of ownership, and one who permits another to remain in possession of property belonging to him is estopped to reclaim his own property as against one who changes his position upon the faith and strength of such ownership.

Elkus & G. Secret Liens & Reputed Ownership; Martin v. Mathiot, 14 Serg. & R. 214, 16 Am. Dec. 491; Robinson v. Elliott, 22 Wall. 513, 525, 22 L. ed. 758, 763; Sexton v. Wheaton, 8 Wheat. 229, 244, 5 L. ed. 603, 608; Toff v. Nelson, 109 N. Y. 316, 16 N. E. 360; Casey v. Cavaroc, 96 U. S. 467, 484, 24 L. ed. 779, 786.

Mr. H. C. Brome argued the cause, and, with Mr. Clinton Brome, filed a brief for appellee:

When the trustee in bankruptcy takes possession of property that is not, and never has been, a part of the bankrupt estate, possession having been obtained by the bankrupt by means of a contract expressly reserving the title in the seller until the purchase price is paid, and this contract is of record agreeably to the laws of the state prior to the adjudication in bankruptcy, the trustee takes the interest of the bankrupt, and no more; that is, he may retain the property for the benefit of the estate, but he must, in that event, pay the unpaid portion of the purchase price; failing to do this, he must surrender the property to its true owner.

Re Farmers' Co-Op. Co. 202 Fed. 1005.

A transfer amounting to a preference contemplated the parting with the bankrupt's property for the benefit of the creditor, and the subsequent diminution of the bankrupt's estate.

New York County Nat. Bank v. Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. Rep. 199.

The effort to place conditional sales, that do not diminish the bankrupt's estate, in the same category with chattel mortgages, that do diminish his estate, must fail. The contention that the statute of Kansas, as construed by the supreme court of that state, has that effect, is sufficiently answered by the circuit court of appeals for the eighth circuit in Big Four Implement Co. v. Wright, 47 L.R.A.(N.S.) 1223, 125 C. C. A. 577, 207 Fed. 534. The facts in that case are on all fours with the facts of the case at bar.

[271] Mr. Justice Van Devanter, after making the foregoing statement, delivered the opinion of the court:

The referee and the courts below held the contract to be one of conditional sale; that is, one making full payment of the purchase price a condition precedent to the passing of title; and this is criticized by the trustee, who insists that the contract was one of absolute sale with a chattel mortgage back, securing the deferred instalments.

In harmony with the prevailing view, the statutes of Kansas and the decisions of the supreme court of the state recognize that there is a real distinction between a conditional sale and an absolute sale with a mortgage back, in that, under the former, the vendor remains the owner, subject to the vendee's right to acquire the title by complying with the stipulated condition, while under the latter the vendee immediately becomes the owner, subject to the lien created by the mortgage. Gen Stat. 1909, §§ 5224–5226, 5232–5234, 5237; Sumner v. McFarlan, 15 Kan. 600; Hallowell v.

Milne, 16 Kan. 65; Hall v. Draper, 20 Kan. 137; Standard Implement Co. v. Parlin & O. Co. 51 Kan. 544, 33 Pac. 360; Moline Plow Co. v. Witham, 52 Kan. 185, 34 Pac. 751; Big Four Implement Co. v. Wright, 47 L.R.A.(N.S.) 1223, 125 C. C. A. 577, 207 Fed. 535. In Hall v. Draper, the true effect of a contract of conditional sale was drawn in question, and the court said, speaking through Justice Brewer, afterwards a member of this court: "The title, and all the rights of control and possession flowing from title, were theirs [the vendors'], except as in terms restricted by the contract. The only limitations upon their full control of the organ were those created by this instrument; and the only rights Leveridge [the vendee] had were those obtained by it. In this respect such a conditional sale differs from an absolute sale with a mortgage back. In such case the vendee has everything except as limited by the terms of the mortgage. Here he has nothing except as expressed [272] in his contract." True, in Christie v. Scott, 77 Kan. 257, 94 Pac. 214, there is general language which, if taken broadly, makes against this distinction. But, according to a familiar rule (Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290; Pacific Exp. Co. v. Foley, 46 Kan. 457, 464, 12 L.R.A. 799, 26 Am. St. Rep. 107, 26 Pac. 665), this language should be regarded as restrained by the circumstances in which it was used. The case did not present a controversy over property conditionally sold, but only the question whether the contract there shown entitled the vendor, after reclaiming the property and crediting the proceeds upon the purchase price, to enforce payment of the balance by the vendee. Without criticizing or referring to cases like Hall v. Draper, the court concluded its discussion of the question by saying: "Under the contract attached to these notes, we hold that the plaintiff was authorized to take the property and sell it and apply the proceeds toward the payment of the notes, and that by so doing the law does not imply a revocation of the contract of sale, nor does the law imply that there remains no consideration for the payment of the balance due on the notes." It therefore is plain that we ought not to treat the decision as overruling or qualifying those before mentioned.

In jurisdictions where regard is had for the distinction here indicated between a conditional sale and an absolute sale with a mortgage back, the question whether a particular contract shows one or the other turns upon the ruling intention of the parties as disclosed by the entire contract, and not upon any single provision separately considered. Invoking this test, the trustee contends that this contract was one of absolute sale with a mortgage back, notwithstanding the stipulation that the title should be and remain in the vendor until full payment. The contention does not appear to have support in any decision of the supreme court of Kansas, and in our opinion is not tenable. Requiring the vendee to give notes for the deferred instalments of the purchase price was not inconsistent [273] with the retention of title in the vendor pending payment of the notes. William W. Bierce v. Hutchins, 205 U. S. 340, 348, 51 L. ed. 828, 834, 27 Sup. Ct. Rep. 524. Nor did any inconsistency result from the provisions relating to rent, damage, and insurance. Instead of making against the retention of ownership by the vendor, they were in harmony with it, and doubtless were adopted upon the theory that the vendee, who was to have the possession and use of the property, should bear the burden of preserving and insuring it, and, if the purchase price was not paid, should not only return the property, but compensate the vendor for its use and any damage to it. In Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51, a contract was held to be one of conditional sale, although entitling the vendor to rental and damages if the price was not paid; and in Bryant v. Swofford Bros. Dry Goods Co. 214 U. S. 279, 53 L. ed. 997, 29 Sup. Ct. Rep. 614, there was a like holding, notwithstanding the vendee was required to keep the property insured for the benefit of the vendor, and, if it was destroyed by fire, was to remain liable for the purchase price. In neither case was the retention of ownership by the vendor deemed inconsistent with the other features of the contract. Coming to the provision relating to a mechanics' lien, we think it did no more than reserve to the vendor a privilege or option to file and enforce such a lien. It well may be that the exercise of this privilege would have been inconsistent with a continued assertion of title by the vendor. William W. Bierce v. Hutchins, 205 U. S. 346, 51 L. ed. 833, 27 Sup. Ct. Rep. 524. But the privilege was not exercised, and it hardly can be said that its mere reservation nullified the express words of the stipulation concerning the title. That it was not intended to do so seems manifest when the entire contract is considered.

We therefore are of opinion that the contract was rightly held to be one of conditional sale.

The question next to be considered is whether the contract operated as a preferential transfer by Grant Brothers within the meaning of § 60b of the bankruptcy

act, as [274] amended June 25, 1910, chap. 412, 36 Stat. at L. 838, 842, Comp. Stat. 1913, §§ 9586, 9644, which declares that "a transfer" by a bankrupt "of any of his property" shall be voidable by the trustee, if it be made or recorded (when recording is required) within four months before the petition in bankruptcy is filed, and "the bankrupt be insolvent and the . . . transfer then operate as a preference," etc. The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the bankruptcy act (§ 1, clause 25) that the word "transfer" shall be taken to include every mode "of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." [30 Stat. at L. 545, chap. 541, Comp. Stat. 1913, § 9585.] It therefore is plain that § 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the bankruptcy act seeks to apply for the benefit of all the creditors. New York County Nat. Bank v. Massey, 192 U. S. 138, 147, 48 L. ed. 380, 384, 24 Sup. Ct. Rep. 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupts' estate.

[275] Under the recording law of Kansas a contract of conditional sale is valid between the parties, whether filed for record or not, but is void as against a creditor of the vendee who fastens a lien upon the property by execution, attachment, or like legal process before the contract is filed for record. Gen. Stat. 1909, § 5237; McVay v. English, 30 Kan. 368, 371, 1 Pac. 795; American Lead Pencil Co. v. Champion, 57 Kan. 352, 357, 46 Pac. 696; Youngberg v. Walsh, 72 Kan. 220, 227, 83 Pac. 972; Geiser Mfg. Co. v. Murray, 84 Kan. 450, L.R.A.—, —, 114 Pac. 1046; Paul v. Lingenfelter, 89 Kan. 871, 132 Pac. 1179; Geppelt v. Middle West Stone Co. 90 Kan. 539, 544, 135 Pac. 573; Dixon v. Tyree, 92 Kan. 137, 139, 139 Pac. 1026; Big Four Implement Co. v. Wright, 47 L.R.A.(N.S.) 1223, 125 C. C. A. 577, 207 Fed. 535. Here the contract was made October 14, 1911, and filed for record May 15, 1912. In the meantime no creditor fastened a lien upon the property by execution, attachment, or other legal process. But it is contended that § 47a, clause 2, of the bankruptcy act, as amended in 1910, chap. 412, 36 Stat. at L. 838, 840, Comp. Stat. 1913, §§ 9586, 9631, gave the trustee the status of a creditor having such a lien. That section provides that a trustee in bankruptcy, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings." Although otherwise explicit, this provision does not designate the time as of which the trustee is to be regarded as having acquired the status indicated, and yet some point of time must be intended. Is it the date of the trustee's appointment, the filing of the petition in bankruptcy, or some time anterior to both? When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: "The filing of the petition of an [276] assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition." Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96. And again: "We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed, and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition." Everett v. Judson, 228 U. S. 474, 479, 57 L. ed. 927, 929, 46 L.R.A.(N.S.) 154, 33 Sup. Ct. Rep. 568. And see Zavelo v. Reeves, 227 U. S. 625, 631, 57 L. ed. 676, 678, 33

Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664. Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceeding, it seems reasonable to believe that some expression of that intention would have been embodied in § 47a as amended. As this was not done, we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed. Here the petition was filed almost two months after the contract was filed for record, and therefore the trustee was not entitled to assail it under the recording law of the state.

The record shows that between the date of the contract and the time it was filed for record the bankrupts mortgaged the machine to the First National Bank of Horton, and that the bank, although apparently asserting some right under the mortgage, was not brought into the present proceeding. In this situation, our decision and that of the Circuit Court of Appeals must be understood to be without prejudice to further proceedings respecting the rights, if any, existing under that mortgage.

Decree affirmed.

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[277] PHŒNIX RAILWAY COMPANY OF ARIZONA, Appt.,

v.

W. PAUL GEARY, Frank A. Jones, and Amos W. Cole, Members of the Corporation Commission of the State of Arizona, et al.

(See S. C. Reporter's ed. 277–283.)

Injunction — against state officials — confiscation.

1. A clear case of unreasonable, arbitrary, or confiscatory action on the part of a State Corporation Commission in directing a street railway company to double-track one of its lines for a specified distance must be made before a Federal court may restrain the enforcement of the Commission's order by an interlocutory injunction.

[For other cases, see Injunction, I. j, in Digest Sup. Ct. 1908.]

Appeal — scope of review — partial invalidity of state legislation.

2. The Federal Supreme Court, on an appeal from a decree of a district court refusing to grant an interlocutory injunction to restrain, on constitutional grounds, the enforcement of an order of a State Corporation Commission directing a street railway company to double-track one of its lines, need not determine the validity of the penalty provisions of the Arizona Constitution and laws applicable to public service corporations, in advance of an attempt to enforce such provisions, where they are clearly separable from the order of the Commission and the constitutional and statutory provisions under which it was made, and are not relied upon by appellant except as a ground for invoking the jurisdiction of a Federal court in equity.

[For other cases, see Appeal and Error, VIII. e; Statutes, I. d, 3; I. d, 4, in Digest Sup. Ct. 1908.]

[No. 48.]

Submitted October 29, 1915. Decided November 29, 1915.

APPEAL from the District Court of the United States for the District of Arizona to review a decree refusing to grant an interlocutory injunction to restrain the enforcement of an order of the State Corporation Commission, directing a street railway company to double-track one of its lines. Affirmed.

See same case below, 209 Fed. 694.

The facts are stated in the opinion.

Messrs. **Alexander Britton, Evans Browne, and Francis W. Clements** submitted the cause for appellant. Messrs. Louis H. Chalmers, Edward Kent, and Floyd M. Stahl were on the brief:

The order of the Arizona Corporation Commission sought to be enjoined was without the power of the Arizona Corporation Commission.

Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989.

The order of the Arizona Corporation Commission was shown to be unreasonable and unnecessary, and therefore violative of the 14th Amendment to the Constitution of the United States.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Missouri P. R. Co. v. Nebraska, supra; Washington, P. & C. R. Co. v. Magruder, 198 Fed. 231.

In view of the relative degree of injury to the respective parties by the granting or refusal of the interlocutory injunction prayed for, the showing of the appellant, presented to the lower court, required the issuance of an injunction *pendente lite*.

Washington, P. & C. R. Co. v. Magruder, 198 Fed. 232; New Memphis Gas & Light

NOTE.—As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363; and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

Co. v. Memphis, 72 Fed. 953; Sanitary Reduction Works v. California Reduction Co. 94 Fed. 696; Carpenter v. Knollwood Cemetery, 188 Fed. 857; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 881; Irving v. Joint Dist. Council, U. B. C. & J. 180 Fed. 900; Harriman v. Northern Securities Co. 132 Fed. 475; Wilmington City R. Co. v. Taylor, 198 Fed. 197; San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 163 Fed. 574; Russell v. Farley, 105 U. S. 403, 438, 26 L. ed. 1060, 1062; Newton v. Lewis, 25 C. C. A. 161, 49 U. S. App. 266, 79 Fed. 715; San Francisco Gas & Electric Co. v. San Francisco, 164 Fed. 892; Seaboard Air Line R. Co. v. Railroad Commission, 155 Fed. 808; Pacific Teleph. & Teleg. Co. v. Los Angeles, 192 Fed. 1009; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Denver & R. G. R. Co. v. United States, 59 C. C. A. 579, 124 Fed. 156.

Mr. **Wiley E. Jones**, Attorney General of Arizona, and Messrs. **Leslie C. Hardy** and **Edward M. Cleary**, submitted the cause for appellees. Mr. George W. Harben was on the brief:

The granting or refusing of an injunction lies within the discretion of the court, and should not be exercised except in a clear case.

Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

It has been the policy of this court in causes which involve the regulation of public utilities by legislative and administrative bodies not to interfere with their actions unless there was an unreasonable and arbitrary regulation.

San Diego Land & Town Co. v. National City, 174 U. S. 739-754, 43 L. ed. 1154-1160, 19 Sup. Ct. Rep. 804; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

Mr. Justice **Pitney** delivered the opinion of the court:

In June, 1913, the Corporation Commission of the State of Arizona made an order directing appellant to double-track its line of street railway on West Washington street in the city of Phœnix, in that state, between Seventh and Seventeenth avenues, —a distance of ten blocks; the work to be commenced within thirty days from the date of the order and completed on or before September 1st. By a subsequent order the time for completion was extended until December 1st, 1913. Having unsuccessfully applied to the Commission for a rehearing, appellant filed its present bill of complaint in the United States district court, praying that the Commission's order be declared null and void as in contravention of the Constitution of the United States, and that the defendants (who include the members of the Corporation Commission, the attorney general of the state, and the county attorney), be enjoined from enforcing or attempting to enforce it by [280] suit, prosecution, or other proceeding, and from instituting any proceeding for the recovery of fines or penalties for any violation of or refusal to obey it; the ground of complaint being that the order was unjust and unreasonable because the service already rendered upon Washington street by appellant was adequate and efficient; that the construction of a double track was not required by the needs of the public; that appellant's operating expenses exceeded its revenues, and that it was unable to make the additional expenditure of about $14,000 required for the double-tracking; and that compliance with the order would prevent appellant from making an adequate return, or any return at all, upon the value of its property. The bill further set up that, under the Constitution and statutes of Arizona, complainant was required, under severe penalties, to put the order into effect, and to keep it in effect until modified or abrogated, and that while a right to review the reasonableness and lawfulness of the order in a state court was given by statute, the court was prohibited from issuing any injunction or restraining order until after the final determination of the matter, and in the meantime the order would be in full force and effect and must be obeyed, under heavy penalties for each day's continuance of the violation; and it was alleged that these statutory and constitutional provisions were adopted for the purpose of compelling acquiescence in any order made by the Corporation Commission, and preventing a resort to the courts to test the reasonableness, justness, and validity thereof, and thus had the effect of depriving complainant of its property without due process of law, and denying to it the equal protection of the laws, in violation of the 14th Amendment.

Upon the filing of the bill, with accompanying affidavits, a temporary restraining order was granted, and a hearing of the application for interlocutory injunction was thereafter had before three judges under the provisions of § 266, [281] Judicial Code (act of March 3, 1911, 36 Stat. at L. 1087, 1162, chap. 231, Comp. Stat. 1913, §§ 968, 1243). The court held (209 Fed. 694) that complainant's showing as to the alleged un-

reasonableness of the Commission's order was not sufficiently strong to warrant an injunction to restrain its enforcement pendente lite, but the temporary restraining order was continued in force pending the present appeal, taken direct to this court under the cited section of the Code.

The jurisdiction of a Federal court of equity over the subject-matter is, of course, well settled. Ex parte Young, 209 U. S. 123, 144, 52 L. ed. 714, 722, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 380, 57 L. ed. 1511, 1534, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Siler v. Louisville & N. R. Co. 213 U. S. 175, 190, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 303, 58 L. ed. 229, 238, 34 Sup. Ct. Rep. 48.

The sole question raised is whether the bill of complaint and supporting affidavits, in view of the rebutting affidavits filed by the appellees, made so clear a case of unreasonable, arbitrary, or confiscatory action on the part of the Corporation Commission as to call for an interlocutory injunction. The attempt was to show that there was no reasonable necessity for the Commission's order, in view of the character of the community to be served, the amount of traffic over the line, the financial condition of complainant, the nature and extent of the service already rendered and capable of being rendered with the existing facilities, and the advantage to accrue to the public as compared with the expenditures to be sustained by complainant in complying with the order. But the facts and the inferences were much in dispute. Complainant is not required to open up new territory, but only to give better service upon a street already occupied by it under a public franchise. Its line of railway on Washington street is already double-tracked for a distance of 14 blocks in the business section of the city. The 10 blocks now required to be double-tracked lie between the business section and the state Capitol, where are [282] located the offices of the governor, the assembly chambers of the state legislature, the court room of the supreme court of the state and the chambers of the judges, the law library of the state, and the offices of the secretary of state, the attorney general, the Corporation Commission, and other state officials. On the line is located a public library and a park, both much frequented, while in the vicinity of the state Capitol there is an estimated population of from 1,200 to 1,500, the city as a whole having an estimated population of 25,000. There is abundant evidence of substantial inconvenience to the public owing to the fact that there is but a single track with one turnout between Seventh and Seventeenth avenues, and some evidence tending to create an inference that the revenues of the company would be materially increased by the double-tracking. The Commission's order appears to have been made after full hearing and investigation respecting these matters. And, upon the whole, we agree with the court below that the presumption of reasonableness existing in favor of the action of the Commission was not overcome in the showing that was made upon the application for an injunction.

The penalty provisions, except as a ground for invoking the jurisdiction of a Federal court in equity, are not relied upon by appellant. They are contained in certain sections of the Constitution and statutes of Arizona applicable to public service corporations. Constitution, art. 15, §§ 16 and 17; public service corporation act, Laws 1912, chap. 90, §§ 65, 68, 74a and b, 76, 77, 79, 81; Rev. Stat. 1913, §§ 2341, 2344, 2350a and b, 2352, 2353, 2355, 2357. They are clearly separable from the order of the Commission and the constitutional and statutory provisions under which it was made. Const. art. 15, § 5; public service corporation act, Laws 1912, chap. 90, § 36; Rev. Stat. 1913, § 2312. Therefore, in advance of an attempt to enforce the penalty [283] provisions, we need not pass judgment upon them. Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 443, 54 L. ed. 826, 831, 30 Sup. Ct. Rep. 535; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 172, 56 L. ed. 710, 717, 32 Sup. Ct. Rep. 449; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 380, 57 L. ed. 1511, 1534, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 319, 58 L. ed. 229, 245, 34 Sup. Ct. Rep. 48; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 473, 58 L. ed. 310, 319, 34 Sup. Ct. Rep. 152; Ohio Tax Cases, 232 U. S. 576, 594, 58 L. ed. 738, 746, 34 Sup. Ct. Rep. 372. The court below expressed the view that the cause should be retained in order to restrain prosecutions for penalties during such time as would be reasonably required to enable the corporation to comply with the order of the Commission. The court's order, as entered upon complainant's application, contains no provision upon the subject. Our affirmance of that order will be without prejudice to the authority of the District Court to deal with the question of penalties.

Affirmed.

PEDRO DE ELZABURU, Appt.,
v.
GENARA CHAVES et al.

(See S. C. Reporter's ed. 283-292.)

Federal courts — following decisions of insular courts — rule of property.

The Federal courts should respect the rule of property established by the rulings of the Porto Rico supreme court that the provisions of Porto Rico mortgage law, art. 395, under which a decision in proceedings to establish the ownership of real property is not res judicata, even as between the parties, remained in force notwithstanding the enactment of Porto Rico Code Civ. Proc. § 188, and Law of Evidence, §§ 59, 101, making judgments in special proceedings conclusive, which that court thought, having been enacted with full knowledge of the provision of art. 413 of the mortgage law (continued in force by the Foraker act of April 12, 1900, 31 Stat. at L. 79, chap. 191, Comp. Stat. 1913, § 3755, § 8), that "none of the articles of which this law consists can be repealed except by virtue of another special law," could not have been intended to operate as an implied repeal,—especially in view of the contemporaneous enactment of the "act relating to special legal proceedings," which expressly reserved from the operation of its repealing section the special proceedings established in the mortgage law.

[For other cases, see Courts, VII., in Digest Sup. Ct. 1908.]

[No. 52.]

Submitted November 1, 1915. Decided November 29, 1915.

APPEAL from the Supreme Court of Porto Rico to review a decree which, reversing a decree of the District Court of San Juan, dismissed the complaint in a suit to annul certain possessory proceedings, and the resulting entry of possession. Affirmed.

See same case below, 19 P. R. R. 162.

The facts are stated in the opinion.

Mr. Jacinto Texidor submitted the cause for appellant.

No brief was filed for appellees.

Mr. Justice Pitney delivered the opinion of the court:

This suit was commenced by the present appellant in the district court of San Juan to set aside as null and void certain possessory proceedings instituted by Paula Chaves in the year 1895 with respect to an estate containing 50 cuerdas of land, situate at a place known as Honduras, in the ward of Sabana Llana, in the municipality of Rio Piedras, Porto Rico, and the resulting entry of possession in the registry of property of San Juan, and to require the defendants (the present appellees), who are children and heirs of Paula Chaves, to vacate the property and deliver up possession to the plaintiff as the lawful owner. The district court rendered judgment in his favor; but the supreme court of Porto Rico reversed this judgment and [285] dismissed the complaint. 19 P. R. R. 162. The present appeal was taken under § 244, Judicial Code (act of March 3, 1911, 36 Stat. at L. 1087, 1157, chap. 231, Comp. Stat. 1913, §§ 968, 1221), it appearing that the estate in question exceeds $5,000 in value.

The transcript contains, in addition to the evidence, a "statement of facts in the nature of a special verdict," made up for the purposes of the present appeal in the manner contemplated by § 35 of the Foraker act (of April 12, 1900, chap. 191, 31 Stat. at L. 77, 85, Comp. Stat. 1913, §§ 3747, 3791). See Rosaly v. Graham y Fraser, 227 U. S. 584, 589, 57 L. ed. 655, 657, 33 Sup. Ct. Rep. 333; Ochoa v. Hernandez y Morales, 230 U. S. 139, 143, 57 L. ed. 1427, 1430, 33 Sup. Ct. Rep. 1033. But that practice was superseded by § 244, Judicial Code, which subjected appeals taken from the supreme court of Porto Rico to the same regulations as appeals from the district courts of the United States, thus extending our review so as to include questions of fact.[1]

Plaintiff asserted that the 50 cuerdas were part of a tract of 112 cuerdas, and this in turn part of a tract containing between 140 and 150 cuerdas formerly owned by Alonso Hernandez, who acquired it in the year 1854; that Hernandez hypothecated this property to the Spanish government as security for the faithful performance of his duties as collector of internal revenue; that because of an embezzlement of public funds by him the property was seized by the government in the year 1875; that about twenty years later, on June 5, 1895, it took possession of the land, and on September 14, in that year, possession was recorded in the registry in favor of the government, without prejudice to third parties who might have a better title; and that on October 15, 1897, the tract of 112 cuerdas was sold at auction to one Cuadrado, who transferred his right to plaintiff, and thereafter, by deed of [286] October 17, 1898, the proper public official conveyed the land to plaintiff. As to the source of the title of Hernandez, plaintiff claims to have shown

[1] Section 244, Judicial Code, was repealed by act of January 28, 1915, 38 Stat. at L. 804, chap. 22, but with a reservation of cases then pending in this court, as the present case was.

by evidence that prior to the year 1819 the whole tract was inherited by Eugenia de la Cruz and her brother, José, from their grandparents, and the brother conveyed his share to the sister; that in that year Eugenia sold the land without deed to Juana María de Otero; and that after the death of Eugenia, and in the year 1836, her son and testamentary executor instituted proceedings to prove the inheritance of the estate by his mother and the sale of it to Mrs. Otero. In these proceedings, which were in evidence, several witnesses testified that Eugenia de la Cruz was the owner of the property then in question for many years prior to the sale of it to Mrs. Otero in 1819, but agreed in saying that at the time of testifying and for some years before one Juan Caneti was in possession of it under some title unknown to them. The testimony having been forwarded to the court of San Juan, it was ordered that the owners of the adjacent properties and the síndico procurador be heard. The property owners waived hearing. It does not appear that Caneti was either summoned or heard. The síndico made no objection to approving the investigation, "for although the witnesses say that said property is possessed by Juan Caneti, this does not annul the ownership had by Eugenia, and Juana may have leased or sold it to Caneti." The investigation was thereupon approved by the court. Hernandez's title was derived in the year 1854 under a public deed made by a brother and four sisters named Otero, in their own name and for two other brothers named, for "an estate in the barrio of Honduras, Rio Piedras, which is bounded by lands belonging to the Marchioness de Leon and to José de la Cruz, and is composed of 140 or 150 cuerdas, the exact number of which will be stated in the deed to be executed for the purpose, [287] as well as the demarcation thereof, when the same is surveyed."

Defendants (the present appellees) alleged that Juan Caneti was the true owner at least of the tract of 50 cuerdas now in dispute; that from him it passed to his son, Santos Caneti, who in the year 1867 sold it on instalments to Ramon Clemente, the husband of Paula Chaves, from whom it descended to Paula and the defendants, who are her lawful children by Clemente. There was substantial evidence tending to support these allegations. It was also shown quite clearly that Paula Chaves was in continuous possession from the year 1875 until her death in 1899, after which event defendants held continuous possession down to the time of the suit. In the year 1895 Paula instituted proceedings for the recording of her possession, in which the adjoining owners were summoned, testimony was taken, and the proceedings were approved November 7, 1895, and recorded in the registry of property in the month of March following.

The supreme court of Porto Rico treated the present suit as partaking of the character of an action of ejectment to such extent that it devolved upon plaintiff at the outset to prove that he was the lawful owner of the lands claimed by and in the possession of defendants. The court reviewed the evidence, found that plaintiff's chain of title did not clearly identify the location or boundaries of the land claimed by him, that the evidence of Hernandez's title was dubious, and, while the tract of 50 cuerdas was clearly comprised within the boundaries which the Spanish government fixed for the properties sold by it to plaintiff, there was so much doubt respecting the question of ownership as to render it impossible to reach the conclusion that plaintiff had proved his title. It was pointed out that in the proceedings instituted in 1836 no description of the property was given, that the witnesses then examined failed to establish the possession of Mrs. Otero, but did [288] refer to the fact of possession by Juan Caneti, who was neither summoned nor heard; that it was not established in what manner the Oteros who made the deed of sale in 1854 to Hernandez were connected with Mrs. Otero named in the proceedings of 1836; that it was not shown how the seizure of the property by the Spanish government in 1875 was carried into effect, or the quantity or location of the property seized; that there was no record of the details connected with the act of taking possession of the 112 cuerdas by the mayor of Rio Piedras in behalf of the government on June 5, 1895, as alleged by plaintiff, but that even if those 112 cuerdas included the 50 cuerdas in controversy, it appeared that Paula Chaves, who at that time was in possession of the 50 cuerdas, not only remained in possession, but, for the purposes of the possessory title proceedings, brought by her later in the same year, obtained a certificate from the mayor, the secretary, and the síndico of the municipality of Rio Piedras, stating that according to the records in the municipal archives she was in possession under title of ownership; and that from the whole of the evidence it appeared that the Canetis had held continuous possession in early times, and the Chaves family at least from 1875.

Our examination of the record discloses no sufficient ground for reversing the supreme court of Porto Rico upon the questions of fact.

The chief reliance of appellant is upon certain questions of law, the first insistence being that the court erred in denying the force and effect of res judicata to a decision rendered by the district court of San Juan May 31, 1907, in a former action between the present parties. It appears that defendants, as heirs of Paula Chaves, instituted a proceeding in the municipal court of San Juan for the purpose of converting the entry of possession of the 50 cuerdas, previously made in her favor, into a dominion title; that plaintiff opposed the conversion; upon the trial [289] decision was rendered in his favor; and on appeal the district court of San Juan declared that the 50 cuerdas were not in possession of defendants, but were part of the estate of 112 cuerdas belonging to plaintiff, that he was in lawful possession, and that the heirs of Chaves had no right to convert their recorded possession into a dominion title.

The supreme court held that this decision was not res judicata. Appellant cites to the contrary, § 188 of the local Code of Civil Procedure (Comp. Stat. [P. R.] § 5172), which declares that "a judgment is a final determination of the rights of the parties in an action or proceeding," and §§ 59 and 101 of the law of evidence (Comp. Stat. [P. R.] §§ 1427, 1469), which are to the effect that, as to parties notified, "a judgment or final order in an action or special proceeding" is conclusive.[1]

[290] The question is whether the decision of May 31, 1907, was "a judgment or final order in an action or special proceeding" within the meaning of the sections cited. The proceeding was instituted under article 395 of the mortgage law (Comp. Stat. [P. R.] p. 1108), which enables an owner of property having no written title to record his ownership upon proving it before the judge of the court of first instance, or municipal court, under prescribed formalities. Notice is given to the person from whom the property may have been acquired, or his predecessor in interest, and to the representative of the department of public prosecution. The judge is to "receive written pleadings upon the claims and evidence which may have been presented by the representative of the department of public prosecution, or by the other persons who may have attended the proceedings," and in view of their allegations he is to decide upon the evidence and declare whether the ownership of the property involved has been established; any person interested may appeal from this decision; and "if said decision is accepted or affirmed, it shall constitute a sufficient title for the record of the ownership."

There seems to be no question that such a decision, as the law stood at the time of the annexation of the island to the United States, was not conclusive upon the question of ownership, even as between the parties participating in the proceeding, but was subject to be set aside in an ordinary action.

By article 413 of the mortgage law it was declared: "None of the articles of which this law consists can be repealed except by virtue of another special law." And by § 8 of the Foraker act of April 12, 1900 (31 Stat. at L. 79, chap. 191, Comp. Stat. 1913, § 3755), [291] the law was continued in force until amended or repealed by the legislative assembly or by act of Congress. The Code of Civil Procedure was enacted by the legislative assembly March 10, 1904. The law of evidence was enacted March 9, 1905. As already shown, it refers to "actions and special proceedings." Upon the same day another act was approved, entitled, "An Act Relating to Special Legal Proceedings." (Comp. Stat. [P. R.] p.

[1](1427) Sec. 59. The effect of a judgment or final order in an action or special proceeding before a court or judge of Porto Rico . . . having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person;

2. In other cases the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

(1428) Sec. 60. Other judicial orders of a court or judge of Porto Rico . . . create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity. . . .

. . . . . .

(1469) Sec. 101. The following presumptions, and no others, are deemed conclusive:

. . . . . .

6. The judgment or order of a court, when declared by this Code to be conclusive; . . .

300.) It contains provisions for the recording of public instruments and wills, for declaration of heirship, administration of decedents' estates, appointment of guardians, the care of the persons and properties of minors, and other matters; and in its final section there is this declaration: "All previous laws in conflict herewith are hereby repealed; but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this act, remain in force."

The effect of these subsequent enactments upon the special proceedings established in the mortgage law and regulations was considered by the supreme court of Porto Rico in Giménez v. Brenes (1906) 10 P. R. R. 124, 131, 133, etc., and again in Gonzales v. People (1906) 10 P. R. R. 458, 462. In the former case it was held, with respect to summary proceedings for the collection of a mortgage debt under article 128, in the latter with respect to a special proceeding under article 395, that the provisions of the mortgage law remained in force notwithstanding the Code of Civil Procedure, and in the latter case it was distinctly held that the proceedings to establish ownership did not produce the effect of res judicata. This was reaffirmed by the same court in Calderon v. Garcia (1908) 14 P. R. R. 407, 416. And see Ochoa v. Hernandez y Morales, 230 U. S. 139, 151, 57 L. ed. 1427, 1433, 33 Sup. Ct. Rep. 1033. These decisions of the supreme court of Porto Rico are based upon reasoning that, while conceding the full authority [292] of the legislative assembly to repeal or modify the mortgage law, in effect invokes article 413 of that law (continued in force as a part of it by the Foraker act) as prescribing a rule of interpretation to be applied in testing the intention of the law-making body as expressed in subsequent enactments. No express repeal of article 395 of the mortgage law being found, and the question being one of implied repeal, the court deemed it manifest that the legislative assembly, in adopting the Code of Civil Procedure and the law of evidence, did so with full knowledge of article 413 of the mortgage law, and therefore intended no implied repeal. And the law of evidence having been enacted contemporaneously with the act relating to special proceedings, the latter act was looked to in construing § 59 of the former, and the express reservation of the special proceedings established in the mortgage law and its regulations was treated as showing that they were to be left in existence with their former force and effect, and no greater. This view, to say the least, is a reasonable one; and since it is plain that the decisions, having stood so long unchallenged, have established a rule of property, it seems to us that they ought not now to be overruled. It is worthy of remark that Gonzales v. People, supra, was decided more than a full year before the decision of the district court of San Juan which appellant insists ought to be treated as conclusive. Defendants may well have refrained from taking an appeal from the decision of the district court in reliance upon the previous decision of the higher tribunal that it had no conclusive effect.

The remaining questions of law raised by appellant resolve themselves, upon analysis, into a mere criticism of the process of reasoning by which the court reached its conclusions upon the facts. We find them without substantial merit, so far as their effect upon the result is concerned.

Judgment affirmed.

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[293] TEODORA ARANA DE VILLANUEVA, Appt.,
v.
MARIANO P. VILLANUEVA.

(See S. C. Reporter's ed. 293-299.)

Appeal — from Philippine supreme court — jurisdictional amount.

1. The requisite jurisdictional amount is involved so as to sustain an appeal to the Federal Supreme Court from the Philippine supreme court to review a decree which affirmed a decree below, rejecting a wife's demand for a divorce, and liquidation of the community, where, in addition to an allegation in the bill of the existence of such an amount of community property as to give jurisdiction, an affidavit filed for the purpose of the appeal asserts that the value of the property in controversy exceeds that amount, there being no countervailing affidavit, and nothing in the record to demonstrate to the contrary.

[For other cases, see Appeal and Error, I. f, in Digest Sup. Ct. 1908.]

Appeal — from Philippine supreme court — review of facts.

2. Concurrent findings of fact by the two lower courts will be accepted by the Federal Supreme Court on an appeal from the Philippine supreme court, unless clearly erroneous.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

NOTE.—On appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

As to amount necessary to give United States Supreme Court jurisdiction—see notes to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256; and Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

Appeal — from Philippine supreme court — following decision below.

3. The local law, as applied by the court below to the facts, will be accepted by the Federal Supreme Court on an appeal from the Philippine supreme court unless constrained to the contrary by the conviction that error was clearly committed by the court below.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 65.]

Argued November 9, 1915. Decided December 6, 1915.

APPEAL from the Supreme Court of the Philippine Islands to review a decree which affirmed a decree of the Court of First Instance of the Province of Albay, dismissing a wife's suit for a divorce from her husband, and for a liquidation and partition of the community property. Affirmed.

The facts are stated in the opinion.

Mr. C. W. O'Brien argued the cause and filed a brief for appellant:

The doctrine of condonation is not applied so strictly to the wife as to the husband.

D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. Rep. 786; Beeby v. Beeby, 1 Hagg. Eccl. Rep. 789; Bishop, Marr. Div. & Sep. § 284.

Condonation does not embrace all the acts of the offending party, but only the acts of which the condoning party had knowledge at the time thereof.

Ralston v. Ralston, 8 Sc. Sess. Cas. 4th series, 371; Alexandre v. Alexandre, L. R. 2 Prob. 164, 39 L. J. Prob. N. S. 84, 23 L. T. N. S. 268, 18 Week. Rep. 1087; Bishop, Marr. Div. & Sep. § 299, note, 5; D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. Rep. 773; Durant v. Durant, 1 Hagg. Eccl. Rep. 733; Turton v. Turton, 3 Hagg. Eccl. Rep. 338; Bramwell v. Bramwell, 3 Hagg. Eccl. Rep. 618; Odom v. Odom, 36 Ga. 286; Clouser v. Clapper, 59 Ind. 548; Verhoff v. Van Houwenlengen, 21 Iowa, 429; Benedicto v. De la Rama, 3 Philippine, 34, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

All condonation, especially the implied condonation, is upon the condition that continually thereafter the party forgiven shall treat the other with conjugal kindness; wherefore a breach of the condition revives the original right of divorce.

Bishop, Marr. Div. & Sep. §§ 308, 311–313; 2 Greenl. Ev. § 53; Fisher v. Fisher, 93 Md. 298, 48 Atl. 833; Davis v. Davis, 19 Ill. 334; Moorhouse v. Moorhouse, 90 Ill. App. 401; Timerson v. Timerson, 2 How. Pr. N. S. 526; Johnson v. Johnson, 14 Wend. 637, reversing 4 Paige, 460, reversing 4 Edw. Ch. 439; Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296; Durant v. Durant, 1 Hagg. Eccl. Rep. 733; Cooke v. Cooke, 9 Jur. N. S. 754, 32 L. J. Prob. N. S. 154, 8 L. T. N. S. 644, 3 Swabey & T. 126, 11 Week. Rep. 957; Dent v. Dent, 34 L. J. Prob. N. S. 118, 13 L. T. N. S. 252, 4 Swabey & T. 105; Winscom v. Winscom, 10 Jur. N. S. 321, 33 L. J. Prob. N. S. 45, 3 Swabey & T. 380, 10 L. T. N. S. 100, 12 Week. Rep. 535; Ridgway v. Ridgway, 29 Week. Rep. 612.

Contra, Collins v. Collins, L. R. 9 App. Cas. 205, 32 Week. Rep. 500; Cass v. Cass, 34 La. Ann. 611; Benedicto v. De la Rama, 3 Philippine, 34.

From the fact that plaintiff occasionally returned to her home to visit her children, who still resided therein, it shall not be presumed that the parties were living together as man and wife, or that they resumed marital relations.

Harnett v. Harnett, 59 Iowa, 401, 13 N. W. 408; Toulson v. Toulson, 93 Md. 754, 50 Atl. 401; Hann v. Hann, 58 N. J. Eq. 211, 42 Atl. 564. Contra Marsh v. Marsh, 13 N. J. Eq. 281.

Mr. Howard Thayer Kingsbury argued the cause, and, with Mr. Frederic R. Coudert, filed a brief for appellee:

The burden of showing jurisdiction is on the appellant, and she must establish the jurisdictional facts by a fair preponderance of testimony.

Wilson v. Blair, 119 U. S. 387, 30 L. ed. 441, 7 Sup. Ct. Rep. 230; Johnson v. Wilkins, 116 U. S. 392, 29 L. ed. 671, 6 Sup. Ct. Rep. 600.

While in some cases where judgment goes for the defendant the amount of the plaintiff's claim is the test of jurisdiction, nevertheless it must appear that the claim is made in good faith and upon substantial grounds.

Gorman v. Havird, 141 U. S. 206, 35 L. ed. 717, 11 Sup. Ct. Rep. 943.

The law governing divorce in the Philippines is the old Spanish law of the Partidas. How these ancient statutes are to be construed and applied is a question of local law, upon which this court customarily follows the ruling of the local courts, unless they are "clearly wrong."

Santa Fe C. R. Co. v. Friday, 232 U. S. 694, 700, 58 L. ed. 802, 803, 34 Sup. Ct. Rep. 468; Nadal v. May, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611; Ker & Co. v. Couden, 223 U. S. 268, 279, 56 L. ed. 432, 435, 32 Sup. Ct. Rep. 284.

This court will also accept the findings of fact in which both courts below have concurred, unless they are "clearly erroneous."

Dun v. Lumbermen's Credit Asso. 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 335, 14 Ann. Cas. 501; Shappirio v. Goldberg, 192 U. S. 232, 240, 48 L. ed. 419, 424, 24 Sup. Ct. Rep. 259.

[294] Mr. Chief Justice White delivered the opinion of the court:

The decree which the appellant seeks to reverse affirmed one rendered by the court of first instance, rejecting her demand for a divorce from her husband and for a liquidation and partition of the property belonging to the legal community which existed between them. At the outset we say that we think there is no foundation for the suggestion that we are without jurisdiction because of the inadequacy of the amount involved, since the complaint by which the suit was begun alleged the existence of such an amount of community property as to give jurisdiction, and because the affidavit filed for the purpose of the appeal also so establishes, there being no countervailing affidavit and nothing in the record to demonstrate to the contrary. De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485.

The complaint for divorce and liquidation of the community as it was finally amended, which was filed in 1910, alleged the marriage of the parties in 1867 and the birth of ten children, nine of whom were alive and of age and one of whom was dead, leaving surviving issue. As a basis for the divorce prayed various acts of adultery by the defendant were charged, extending over a period of forty-two years; that is, from 1868, shortly after the marriage, until the bringing of the suit in 1910. The facts thus charged embraced six periods: the first, from 1868 until the filing of the suit with a named person, from which relation it was alleged there had been begotten five children, four of whom were alive and bore their father's surname; the second, with another named person during 1889 and 1890, from which relation there was begotten a daughter who likewise bore her father's surname; the third, with a named person during the year 1891; the fourth, with a named person from 1892 until the time the [295] suit was commenced, from which relation it was alleged children also were begotten; the fifth, with a named person during the years 1901 and 1902; and the sixth, with a named person during the years 1903 and 1904. The answer set up a general denial, a special defense that if the acts of adultery alleged were found to have been committed, they were done with the knowledge of the complainant, who had condoned them, and, moreover, that the action was prescribed.

After full hearing the court of first instance found that the defendant had been guilty of adultery with the person named in the complaint in the first period during the years from 1868 until 1900, but that there was no proof of any such adultery having been committed by him with the person named for the ten years preceding the suit, that is, from 1900 to 1910. The court also found that it was established that the defendant had adulterous relations with the person named during the second period, that is, from 1889 to 1890, and that from such relations, as alleged, a daughter named Maria was begotten, but that the relations had ceased years before the bringing of the suit, since the woman named had died long before at a period fixed approximately as the time of the beginning of the American occupation of the islands. The court also found that it had been proved that acts of adultery had been committed with the person named during the fourth period, that is, in 1892 and some time thereafter, but it also affirmatively found that all relations between the defendant and the person named in this period had ceased prior to 1900. It was moreover expressly found that there was no proof whatever offered concerning any of the other acts of adultery charged in the complaint.

Concerning the first period, the court found that the proof left no doubt that the complainant at an early date became aware of the adulterous relations to which that [296] period related, and although she did so, continued her marital relations with her husband and had condoned his infidelity. Indeed, it was found that forgiveness by the wife was clearly established from the fact that during the ten years which had elapsed before the bringing of the suit and after the illicit relations had ceased, the children begotten of such relation were brought into the household with the consent of the wife, and lived as part of the common family. Applying the law to this condition it was held that the condonement or forgiveness was a complete bar to the suit based upon the acts which had been thus forgiven. So far as concerned the acts of infidelity committed during the second and fourth periods, as stated, although it was found that there was no direct proof that the complainant knew of such wrongs when committed, nevertheless it was held that there was no ground for awarding relief because of such acts irrespective of the question of forgiveness or condonement resulting from the long continuance of the marital relations after such acts had been committed, for the reason that the complainant had expressly declared in testifying that she solely asked relief because of the acts embraced in the first period, and none other,—a situation which, it was held, brought the case directly within the control of Laws 1

and 2, title 9, Partida 4, expressly confining the right to complain of adultery by one of the parties to a marriage to the injured party. And this conclusion was sustained by pointing out that although the complaint for divorce had been sworn to by the complainant, she had in her testimony admitted that she knew nothing of the particular acts embraced in the periods in question, and intended only to sue for those described in the first period; thus, as to such other acts, giving rise to the implication that their averment was the result of the instigation of some person not authorized to act, probably impelled by some interest direct or indirect in the liquidation of [297] the community property which would follow if the prayer of the complainant had been granted.

In a careful opinion the court below, reviewing the action of the court of first instance, adopted and reaffirmed in every substantial particular the facts found by that court, and also agreed with the legal conclusions which the court had applied to the facts by it found. In applying the law to the facts it was pointed out that the controlling law was to be found not in the Civil Code, but in the Partidas, and it was held that as by provisions of the Partidas which were cited it was expressly provided that condonement or forgiveness of acts of adultery excluded the subsequent right to relief based upon the fact that they had been committed, it followed from the conclusive proof of forgiveness resulting from the facts found that no error had been committed in rejecting the demand for a divorce. In stating the reasons which led it to this conclusion the mind of the court was principally directed to the acts of infidelity found to have been committed during the first period and the acts by which forgiveness as to them had been indubitably established. But the court, considering the facts found as to the other two periods, without deciding that such acts of infidelity had not been condoned, expressly held that the necessary result of the provisions of the Partidas which had been applied by the lower court, exclusively confining the right to relief for acts of infidelity to the injured spouse, plainly justified the court of first instance in its ruling that the disclaimer of all right to relief as to any acts but those which the complaint alleged were committed during the first period excluded all right to recover for any but those acts, to which the controversy thus became confined.

The first two of the nine assignments of error question the finding and ruling of the court concerning the acts committed during the first period and their condonement or forgiveness. The third and fourth assail the correctness [298] of the conclusion concerning the second and fourth periods and the ruling of the court relating to them, based on the disclaimer made by the complainant in her testimony of any right to relief on account of them; and as cognate to this subject, the fifth complains of the action of the court in analyzing the motives which prompted the inclusion in the suit of causes upon which the complainant asserted she did not rely for relief, for the purpose of bringing the case within the rule laid down in Laws 1 and 2, title 9, Partida 4, which both courts applied. The remainder in general terms but assert error committed in the findings and in the law which was applied to them in deciding the cause.

Although the arguments pressed at bar to sustain these assignments apparently enlarge them, in substance they add nothing to them, but simply reiterate in changed and more minute forms of statement the grounds of error asserted in the assignments. Under these conditions it is apparent that all the errors relied upon, whether embraced in the assignments or pressed in the argument, considered in their essence, only dispute the correctness of the facts found by both the courts below, and but challenge the accuracy of the principles of the local law which were applied to the facts for the purpose of deciding the cause. Under these circumstances, without noticing more in detail either the assignments or the arguments supporting them, we content ourselves with saying that we are of the opinion, after examining and weighing them all, that they are without merit for the following reasons: (a) Because in so far as they dispute the concurrent findings of fact of both the courts below, they entirely fail to give rise to that conviction of clear error which must be entertained in order to authorize a reversal of the findings (Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 58 L. ed. 630, 34 Sup. Ct. Rep. 438; Gilson v. United States, 234 U. S. 380, 383, 384, 58 L. ed. 1361, 1362, 1363, 34 Sup. Ct. Rep. 778); and (b) because in so far as they challenge the correctness of the [299] application which the courts made of the local law to the facts in deciding the cause, they are totally deficient in that persuasive strength which it is essential they should possess in order to produce the conviction that clear error was committed by the court below, and thus lead us to depart from the principle by which we follow and sustain the local law as applied by the court below unless we are constrained to the contrary by a sense of clear error committed (Ker & Co. v. Couden, 223 U. S. 268, 279, 56 L. ed. 432, 435, 32 Sup. Ct. Rep. 284; Santa

Fe C. R. Co. v. Friday, 232 U. S. 694, 700, 58 L. ed. 802, 803, 34 Sup. Ct. Rep. 468; Nadal v. May, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611).

Affirmed.

ETHEL C. MACKENZIE, Plff. in Err.,
v.
JOHN P. HARE, Thomas V. Cater, Charles L. Queen, William McDevitt, and John Herman, as and Composing the Board of Election Commissioners of the City and County of San Francisco.

(See S. C. Reporter's ed. 299-312.)

Citizens — expatriation — marriage with foreigner.

1. No exception in favor of an American-born woman who marries a resident foreigner and remains within the jurisdiction of the United States may be read into the provisions of the act of March 2, 1907 (34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960), that "any American woman who marries a foreigner shall take the nationality of her husband," but may resume her American citizenship at the termination of the marital relation, if within the United States, by her continuing to reside therein, and, if abroad, by returning to the United States, or by registering as an American citizen.

[For other cases, see Citizens, IV., in Digest Sup. Ct. 1908.]

Citizens — expatriation — marriage with foreigner.

2. Congress could validly enact the provisions of the act of March 2, 1907 (34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960), under which an American-born woman who marries a foreigner forfeits her citizenship, even though she remains within the jurisdiction of the United States.

[For other cases, see Citizens, IV., in Digest Sup. Ct. 1908.]

[No. 79.]

Argued November 11 and 12, 1915. Decided December 6, 1915.

IN ERROR to the Supreme Court of the State of California to review a decree which denied a writ of mandamus to compel election officers to register as an elector an American-born woman who had married a subject of Great Britain. Affirmed.

See same case below, 165 Cal. 776, L.R.A.1916D, 127, 134 Pac. 713, Ann. Cas. 1915B, 261.

The facts are stated in the opinion.

Mr. Milton T. U'Ren argued the cause and filed a brief for plaintiff in error:

It was never the intention of Congress to deprive an American-born woman remaining within the jurisdiction of the United States of her citizenship by reason of her marriage to a resident foreigner.

Re Wildberger, 214 Fed. 508; Re Levy, 1 Bart. Elec. Cas. 41.

Plaintiff, having been born within the United States, and subject to the jurisdiction thereof, became a citizen by the fact of her birth.

7 Cyc. 137; Inglis v. Sailor's Snug Harbor, 3 Pet. 99, 7 L. ed. 617; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

Sex is not involved in the question of citizenship.

Abbott's Law Dict; Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; State ex rel. Campbell v. Howard County Ct. 90 Mo. 593, 2 S. W. 788; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666.

For definitions of expatriation, see:

Webster's Universal Dict.; Bouvier's Law Dict.; Standard Dict.; 14 Ops. Atty. Gen. 295; Morse, Citizenship, p. 114, § 82; Black's Law Dict.

The prevalent doctrine of this country always has been that a citizen has the right to expatriate himself.

Brannon, 14th Amend. p. 21; Re Look Tin Sing, 21 Fed. 907; 9 Ops. Atty. Gen. 62; 9 Fed. Stat. Anno. pp. 390, 391.

Expatriation is a natural and inherent right.

7 Cyc. 144; Browne v. Dexter, 66 Cal. 39, 4 Pac. 913.

Actual removal is a necessary element of expatriation.

6 Am. & Eng. Enc. Law, 31; 14 Ops. Atty. Gen. 295; 9 Ops. Atty. Gen. 62; Stoughton v. Taylor (Juando v. Taylor) 2 Paine, 652, Fed. Cas. No. 7,558; 7 Cyc. 145, 156; Hardy v. De Leon, 5 Tex. 211.

As to the nature of allegiance, see—

Standard Dict.; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. ed. 617; Burkett v. McCarty, 10 Bush, 758; Ainslie v. Martin, 9 Mass. 454.

Granting, for the purpose of the argument, that certain authority over expatriation resides in Congress by implication, nevertheless such implied power is not unlimited. It is not an arbitrary and despotic power under which Congress may take from a citizen his rights of citizenship without that citizen's consent.

Scott v. Sandford, 19 How. 393, 448, 15 L. ed. 691, 719; Burkett v. McCarty, 10

NOTE.—On the effect of marriage on wife's status as an alien—see note to Comitis v. Parkerson, 22 L.R.A. 148.

Bush, 758; Ainslie v. Martin, 9 Mass. 454; Re Look Tin Sing, 21 Fed. 905; Osborn v. Bank of United States, 9 Wheat. 738, 825, 6 L. ed. 204, 225; United States v. Wong Kim Ark, 169 U. S. 703, 42 L. ed. 910, 18 Sup. Ct. Rep. 456.

Marriage in itself is not an act of expatriation.

Comitis v. Parkerson, 22 L.R.A. 148, 56 Fed. 556; Wallenburg v. Missouri P. R. Co. 159 Fed. 217; Brannon, 14th Amend. p. 28; 15 Ops. Atty. Gen. 599; 10 Ops. Atty. Gen. 321; Ruckgaber v. Moore, 104 Fed. 947; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Beck v. McGillis, 9 Barb. 35.

It is true that the English and Continental courts have held for a long time to the doctrine of the merging of the identity of the wife with that of her husband. Under such a doctrine the wife was held not to have a citizenship separate and apart from that of her husband. In contemplation of law, she and her husband were one, and that one was the husband. This doctrine, however, in so far as it involves the political rights of a woman, has never been the law in the United States.

Shanks v. Dupont, supra; Comitis v. Parkerson, 22 L.R.A. 150, note.

The doctrine of the merging of identity is obsolete, and the cases decided upon such reasoning are no longer authority.

Williamson v. Osenson, 232 U. S. 619, 58 L. ed. 758, 34 Sup. Ct. Rep. 442.

No constitutional rights or privileges of an American citizen can be abridged or taken away by international law.

Scott v. Sandford, 19 How. 393, 451, 15 L. ed. 691, 720.

It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

Boyd v. United States, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524.

Mr. Thomas V. Cator argued the cause, and, with Messrs. Percy V. Long and William McDevitt, filed a brief for defendants in error:

The residence of the wife is immaterial. It is the act of marriage which, *ipso facto,* causes her to take the nationality of the alien husband.

Pequignot v. Detroit, 16 Fed. 211; Kane v. McCarthy, 63 N. C. 299; Headman v. Rose, 63 Ga. 458; Ware v. Wisner, 50 Fed. 310; Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; Dorsey v. Brigham, 177 Ill. 256, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Hopkins v. Fachant, 65 C. C. A. 1, 130 Fed. 842; United States v. Kellar, 13 Fed. 82, note; Leonard v. Grant, 5 Fed. 13; Halsey v. Beer, 52 Hun, 366, 5 N. Y. Supp. 334; People v. Newell, 38 Hun, 79; Gumm v. Hubbard, 97 Mo. 321, 10 Am. St. Rep. 312, 11 S. W. 61; Kircher v. Murray, 54 Fed. 621; Re Nicola, 106 C. C. A. 464, 184 Fed. 322; 14 Ops. Atty. Gen. 402; United States ex rel. Gendering v. Williams, 173 Fed. 626; Re Rionda, 164 Fed. 368; United States v. Cohen, 29 L.R.A.(N.S.) 829, 103 C. C. A. 28, 179 Fed. 834.

The citizenship of a native-born citizen may be lost or taken away by his own acts.

United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

The 14th Amendment did not alter the status of free white persons, as previously existing.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; United States v. Wong Kim Ark, 169 U. S. 674, 42 L. ed. 899, 18 Sup. Ct. Rep. 456.

All writers on international law or on the subject of citizenship treat the power of the sovereignty over the subject of expatriation as fundamental.

3 Moore, International Law, p. 712; Van Dyne, Citizenship, p. 272; 2 Wharton, International Law Dig. § 176, p. 360; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Murray v. The Charming Betsy, 2 Cranch, 120, 2 L. ed. 226; Talbot v. Janson, 3 Dall. 154, 1 L. ed. 549; Murray v. M'Carty, 2 Munf. 396; Comitis v. Parkerson, 22 L.R.A. 148, 56 Fed. 556; Pequignot v. Detroit, 16 Fed. 211.

All writers on the law of citizenship treat marriage as a mode of expatriation.

Cockburn, Nationality, p. 24; Leonard v. Grant, 5 Fed. 11; Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; Van Dyne, Naturalization, 1907 ed. pp. 227, 333-357; Van Dyne, Citizenship (see head "Expatriation"); 2 Wharton, International Law Dig. § 186, p. 420; 3 Moore's Digest of International Law, p. 448; Webster, Citizenship, pp. 297, 298; Brannon, 14th Amend. p. 28; Bouvé, Exclusion of Aliens, pp. 389, 390.

Transfer of allegiance by marriage rests upon international principles, apart from the idea of emigration.

United States ex rel. Gendering v. Williams, 173 Fed. 626; Pequignot v. Detroit, 16 Fed. 211.

The act of 1907, as to § 3, was adopted by Congress for the express purpose of announcing its express confirmation of the doctrine that marriage of a native woman to a foreigner should operate in the manner decided in the case of Pequignot v. Detroit, regardless of the residence of the wife.

The transfer of allegiance of a woman

marrying a foreigner rests upon international law or comity; and the case of Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666, does not hold that the removal of the wife is necessary.

A woman by marriage to a foreigner takes the same nationality as the husband in all the countries of the world, and the effect is the same in the country of her nativity as elsewhere, if her former sovereign consents.

Moore's Digest of International Law, supra, § 412; Pequignot v. Detroit, supra; United States ex rel. Gendering v. Williams, 173 Fed. 627, 106 C. C. A. 464, 184 Fed. 322; Halsey v. Beer, 52 Hun, 366, 5 N. Y. Supp. 334; People v. Newell, 38 Hun, 79; Kane v. McCarthy, 63 N. C. 299; Headman v. Rose, 63 Ga. 458; Ware v. Wisner, 50 Fed. 310.

The act of 1907 is in clear and specific terms, and mandatory in its expression, and intended the transfer of allegiance to be immediate upon marriage; and did not contemplate leaving open any question as to the nature of residence abroad. The act has been so interpreted by the State Department at Washington, and also by the Federal courts.

See letter of Huntington Wilson, Acting Secretary of State, to Mr. Kent, March 13, 1912; Re Rionda, 164 Fed. 368; United States v. Cohen, 29 L.R.A.(N.S.) 829, 103 C. C. A. 28, 179 Fed. 835.

Mr. Justice McKenna delivered the opinion of the court:

Mandamus prosecuted by plaintiff in error as petitioner against defendants in error, respondents, as and composing [306] the board of election commissioners of the city and county of San Francisco, to compel her registration as a qualified voter of the city and county, in the appropriate precinct therein.

An alternative writ was issued, but a permanent writ was denied upon demurrer to the petition.

The facts are not in dispute and are stated by Mr. Justice Shaw, who delivered the opinion of the court, as follows:

"The plaintiff was born and ever since has resided in the state of California. On August 14, 1909, being then a resident and citizen of this state and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here, and it is his intention to make this state his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that, by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States." [165 Cal. 778, L.R.A.1916D, 127, 134 Pac. 713, Ann. Cas. 1915B, 261.]

Plaintiff in error claims a right as a voter of the state under its Constitution and the Constitution of the United States.

The Constitution of the state gives the privilege of suffrage to "every native citizen of the United States," and it is contended that under the Constitution of the United States every person born in the United States is a citizen thereof. The latter must be conceded, and if [307] plaintiff has not lost her citizenship by her marriage, she has the qualification of a voter prescribed by the Constitution of the state of California. The question then is, Did she cease to be a citizen by her marriage?

On March 2, 1907, that is, prior to the marriage of plaintiff in error, Congress enacted a statute the 3d section of which provides: "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." [34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960.]

Plaintiff contends that "such legislation, if intended to apply to her, is beyond the authority of Congress."

Questions of construction and power are, therefore, presented. Upon the construction of the act it is urged that it was not the intention to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the act and upon the report of the committee, upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, "that the intention of Congress was solely to legislate concerning the status of citizens *abroad* and the questions arising by reason thereof."

Does the act invite or permit such assistance? Its declaration is general, "that any American woman who marries a foreigner shall take the nationality of her husband." There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume [308] her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or, within one year, registering as an American citizen. The act is therefore explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate.

Whatever was said in the debates on the bill or in the reports concerning it, preceding its enactment or during its enactment, must give way to its language; or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others.

The application of the law thus being determined, we pass to a consideration of its validity.

An earnest argument is presented to demonstrate its invalidity. Its basis is that the citizenship of plaintiff was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right, privilege, and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation.

The argument to support the contention and the argument to oppose it take a wide range through the principles of the common law and international law and their development and change. Both plaintiff and defendants agree that under the common law originally allegiance was immutable. They do not agree as to when the rigidity of the principle was relaxed. Plaintiff in error contests the proposition which she attributes to defendants in error, [309] "that the doctrine of perpetual allegiance maintained by England was accepted by the United States," but contends "that the prevalent doctrine of this country always has been that a citizen had a right to expatriate himself," and cites cases to show that expatriation is a natural and inherent right.

Whether this was originally the law of this country or became such by inevitable evolution it is not important to inquire. The first view has certainly high authority for its support. In Shanks v. Dupont, 3 Pet. 242, 246, 7 L. ed. 666, 668, Mr. Justice Story, delivering the judgment of the court, said: "The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens." And Kent, in his Commentaries, after a historical review of the principle and discussion in the Federal courts, declares that "the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." 2 Kent, 14th ed. 49. The deduction would seem to have been repelled by the naturalization laws, and it was certainly opposed to executive opinion; and, we may say, popular sentiment, so determined that it sought its vindication by war. Further discussion would lead us far afield, and, besides, would only have historical interest.[1] The condition which Kent suggested has occurred; there is a legislative declaration. In 1868 Congress explicitly declared the right of expatriation to have been and to be the law. And the declaration was in effect said to be the dictate of necessity. [310] The act recites that emigrants have been received and invested with citizenship in recognition of the principle of the right of expatriation and that there should be a prompt and final disavowal of the claim "that such American citizens, with their descendants, are subjects of foreign states." Rev. Stat. § 1999, Comp. Stat. 1913, § 3955.

But plaintiff says, "Expatriation is evidenced only by emigration, coupled with other acts indicating an intention to transfer one's allegiance." And all the acts must be voluntary, "the result of a fixed determination to change the domicil and permanently reside elsewhere, as well as to throw off the former allegiance, and become a citizen or subject of a foreign power."

The right and the condition of its exercise being thus defined, it is said that the authority of Congress is limited to giving its consent. This is variously declared and emphasized. "No act of the legislature," plaintiff says, "'can denationalize a citizen

[1] The course of opinion and decision is set forth in Van Dyne's "Citizenship of the United States," and in his "Naturalization in the United States." Moore's Digest of International Law. See also Cockburn on Nationality.

without his concurrence,'" citing Burkett v. McCarty, 10 Bush, 758. "And the sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime," citing Ainslie v. Martin, 9 Mass. 454. "The Constitution does not authorize Congress to enlarge or abridge the rights of citizens," citing Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204. "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. . . . The 14th Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right to citizenship;" citing United States v. Wong Kim Ark, 169 U. S. at p. 703, 42 L. ed. 910, 18 Sup. Ct. Rep. 456.

It will thus be seen that plaintiff's contention is in exact antagonism to the statute. Only voluntary expatriation, [311] as she defines it, can devest a woman of her citizenship, she declares; the statute provides that, by marriage with a foreigner, she takes his nationality.

It would make this opinion very voluminous to consider in detail the argument and the cases urged in support of or in attack upon the opposing conditions. Their foundation principles, we may assume, are known. The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary, and worked in many instances for her protection. There has been, it is true, much relaxation of it, but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose, and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?

Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. (As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.) But monition is not necessary in the present case. There need be no dissent from the cases cited by plaintiff; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it. It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with [312] a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts, it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid, but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

Judgment affirmed.

Mr. Justice McReynolds is of opinion that this court is without jurisdiction, and that therefore this writ of error should be dismissed.

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[313] TOWN OF ESSEX, Appt.,
v.
NEW ENGLAND TELEGRAPH COMPANY OF MASSACHUSETTS.

(See S. C. Reporter's ed. 313-323.)

Commerce — power of Congress — telegraph company.

1. Congress did not exceed its powers under the commerce clause of the Federal Constitution by enacting the act of July

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U.

24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. § 5263, Comp. Stat. 1913, § 10,072), giving telegraph companies accepting its provisions the right, secured against arbitrary interference by the state, to construct, maintain, and operate their lines over and along any of the military or post roads of the United States.

[For other cases, see Commerce, III. o, in Digest Sup. Ct. 1908.]

Telegraphs — state interference — estoppel.

2. A telegraph company which has accepted the provisions of the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. § 5263, Comp. Stat. 1913, § 10,072), giving the right to construct, maintain, and operate telegraph lines over and along any of the military or post roads of the United States, is protected by that act against exclusion or other arbitrary interference by a town whose authorities, with full knowledge of all the circumstances, permitted the location and construction of such lines along the highways, and for more than twenty years acquiesced in their maintenance and operation, although the telegraph company was never granted the formal antecedent permit contemplated by Mass. Pub. Stat. chap. 109, § 3, "specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run."

[For other cases, see Telegraphs, in Digest Sup. Ct. 1908.]

Injunction — against interference with telegraph company — extent of relief.

3. An injunction against interference by municipal authorities with the lines of a telegraph company which has accepted the provisions of the act of July 24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. § 5263, Comp. Stat. 1913, § 10,072), giving the right to construct, maintain, and operate telegraph lines over and along any of the military or post roads of the United States, should provide that nothing therein contained be construed to prevent such authorities from subjecting the location and operation of the company's lines to reasonable regulations.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 56.]

Argued and submitted November 5, 1915.
Decided December 6, 1915.

APPEAL from the District Court of the United States for the District of Massachusetts to review a decree enjoining municipal interference with the lines of a telegraph company. Modified by subjecting the location and operation of such lines to reasonable regulations, and as so modified affirmed.

See same case below, 206 Fed. 926.

The facts are stated in the opinion.

Mr. Romney Spring submitted the cause for appellant. Messrs. William G. Thompson and George E. Mears were on the brief:

The telegraph company had acquired no right to occupy the streets by lapse of time or by the acquiescence of any officials.

Reg. v. United Kingdom Electric Teleg. Co. 9 Cox, C. C. 174, 3 Fost. & F. 73, 2 Best. & S. 647, 31 L. J. Mag. Cas. N. S. 166, 8 Jur. N. S. 1153, 6 L. T. N. S. 378, 10 Week. Rep. 538, 12 Eng. Rul. Cas. 562; 3 Dill. Mun. Corp. 5th ed. § 1220, and cases cited; Com. v. King, 13 Met. 115; Com. v. Upton, 6 Gray, 473; Young v. Yarmouth, 9 Gray, 386; Morton v. Moore, 15 Gray, 576; Com. v. Boston, 97 Mass. 555; Banks v. Highland Street R. Co. 136 Mass. 485; New Salem v. Eagle Mill. Co. 138 Mass. 8; Hynes v. Brewer, 194 Mass. 435, 9 L.R.A. (N.S.) 598, 80 N. E. 503.

The act of Congress of July 24, 1866, confers no positive right upon any telegraph company which has complied with its provisions to occupy public highways in a state without first obtaining the permission of the state as the owner of the soil, or of the public easement therein, whether the consent of the state or of the subordinate tribunal to which the state has delegated its power is unreasonably withheld or not.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 100, 101, 37 L. ed. 380, 383, 384, 13 Sup. Ct. Rep. 485; St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 471, 37 L. ed. 810, 814, 13 Sup. Ct. Rep. 990; Postal Teleg. Cable Co. v. Baltimore, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; Western U.

S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On right of telegraph and telephone companies to use streets—see note to St. Louis v. Western U. Teleg. Co. 37 L. ed. U. S. 810.

As to injunction to restrain acts of public officers—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

On exclusion of foreign express company as an interference with interstate commerce—see note to Kindel v. Beck & P. Lithographing Co. 24 L.R.A. 312.

On state law affecting telegraphs as regulation of interstate commerce—see note to Western U. Teleg. Co. v. Commercial Mill. Co. 36 L.R.A.(N.S.) 220.

As to right to place overhead wires in highway without grant or permission from public authority—see note to State ex rel. Bartlett v. Weber, 43 L.R.A.(N.S.) 1033.

Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 167–169, 56 L. ed. 710, 715, 716, 32 Sup. Ct. Rep. 449; Banks v. Highland Street R. Co. 136 Mass. 485; Postal Teleg. Cable Co. v. Chicopee, 207 Mass. 343, 32 L.R.A.(N.S.) 997, 93 N. E. 927; Postal Teleg. Cable Co. v. Newport, 25 Ky. L. Rep. 635, 76 S. W. 159; American Rapid Teleg. Co. v. Hess, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; Toledo v. Western U. Teleg. Co. 52 L.R.A. 730, 46 C. C. A. 111, 107 Fed. 12; Pomona v. Sunset Teleph. & Teleg. Co. 224 U. S. 330, 56 L. ed. 788, 32 Sup. Ct. Rep. 477.

The cases in which the effect of this statute, or of the interstate commerce clause of the Constitution, upon the right of the state to impose upon telegraph companies a license fee or tax as a condition of granting to them the privilege of doing business within the state, has been considered, are not in point. The case at bar does not involve in any way the question whether a state can require a party, whether a telegraph company or anybody else, to take out a license for the privilege of carrying on interstate commerce, or whether a state can tax the property of a corporation not situated within the state. Cases turning upon this sort of question are:

Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Western U. Teleg. Co. v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116.

Mr. G. Philip Wardner argued the cause and filed a brief for appellee:

The streets upon which the appellee's line of telegraph is maintained are post roads.

Richmond v. Southern Bell Teleph. & Teleg. Co. 174 U. S. 761, 763, 43 L. ed. 1162, 1163, 19 Sup. Ct. Rep. 778; St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 100, 37 L. ed. 380, 383, 13 Sup. Ct. Rep. 485; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 559, 49 L. ed. 312, 318, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 165, 56 L. ed. 710, 714, 32 Sup. Ct. Rep. 449, 178 Fed. 312; Ex parte Conway, 48 Fed. 77; Re Matthews, 122 Fed. 258; Newcastle v. Postal Teleg. Cable Co. 152 Fed. 572; Mackay Teleg. & Cable Co. v. Texarkana, 199 Fed. 348.

From public streets and highways which are post roads, and which are not owned by a state, or municipality therein, but in which the fee is owned by abutters, subject to a public easement, including the occupation of said streets and highways by a telegraph line, a telegraph company which has accepted the provisions and obligations of the act of July 24, 1866, and whose line does not interfere with ordinary travel on such streets and highways, cannot be absolutely excluded by any state or municipality, and in said streets and highways such a company has, under said act of Congress, a right to construct and maintain its line of telegraph, subject, of course, to proper state and municipal regulation and supervision.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay) 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; St. Louis v. Western U. Teleg. Co. 39 Fed. 59, 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; St. Louis v. Western U. Teleg. Co. 63 Fed. 68; Postal Teleg. Cable

Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; United States v. Union P. R. Co. 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. Rep. 190; Southern Bell Teleph. & Teleg. Co. v. Richmond, 78 Fed. 858, 28 C. C. A. 659, 42 U. S. App. 686, 85 Fed. 19, 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Western U. Teleg. Co. v. Richmond, 178 Fed. 310, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449; Western U. Teleg. Co. v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; Postal Teleg. Cable Co. v. New Hope, 192 U. S. 55, 48 L. ed. 338, 24 Sup. Ct. Rep. 204; Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Philadelphia v. Western U. Teleg. Co. 40 Fed. 615, 81 Fed. 948, 82 Fed. 797, 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454; Philadelphia v. Atlantic & P. Teleg. Co. 42 C. C. A. 325, 102 Fed. 254, 109 Fed. 55; Nashville v. Cumberland Teleph. & Teleg. Co. 76 C. C. A. 297, 145 Fed. 607; Memphis v. Postal Teleg. Cable Co. 139 Fed. 707, 76 C. C. A. 292, 145 Fed. 602; Western U. Teleg. Co. v. American U. Teleg. Co. 9 Biss. 72, Fed. Cas. No. 17,444; Western U. Teleg. Co. v. New York, 3 L.R.A. 449, 2 Inters. Com. Rep. 533, 38 Fed. 552; Ex parte Conway, 48 Fed. 77; Postal Teleg. Cable Co. v. Southern R. Co. 89 Fed. 190; Michigan Teleph. Co. v. Charlotte, 93 Fed. 11; Wichita v. Old Colony Trust Co. 66 C. C. A. 19, 132 Fed. 641; Ganz v. Ohio Postal Teleg. Cable Co. 72 C. C. A. 186, 140 Fed. 692; Mackay Teleg. & Cable Co. v. Texarkana, 199 Fed. 347; Postal Teleg. Cable Co. v. Chicopee, 207 Mass. 341, 32 L.R.A.(N.S.) 997, 93 N. E. 927; Western U. Teleg. Co. v. Superior Ct. 15 Cal. App. 688, 115 Pac. 1091, 1100; Carver v. State, 11 Ga. App. 22, 74 S. E. 556; Western U. Teleg. Co. v. Lakin, 53 Wash. 326, 101 Pac. 1094, 17 Ann. Cas. 718.

The telegraph line, being a quasi public property, operated to give service to the public and to the United States, under the post-road act of Congress, will not be treated the same as a private trespasser, public interests being involved, and the continuity of telegraph service for the public being necessary.

Union P. R. Co. v. Greeley, 110 C. C. A. 571, 189 Fed. 1; Cook, Corp. 7th ed. pp. 3885, 3886.

Mr. Justice McReynolds delivered the opinion of the court:

Appellant was enjoined by the decree below from interfering with the operation of lines owned by the appellee company. The controversy arose under the act of Congress approved July 24, 1866 (14 Stat. at L. 221, chap. 230, Rev. Stat. §§ 5263 et seq. Comp. Stat. 1913, § 10,072), which declares that companies accepting its provisions "shall have the right to construct, maintain, and operate lines of telegraph . . . . over and along any of the military or post roads of the United States," provided they do not interfere with ordinary travel. Appellant insists that, as construed and applied below, the statute transcends the powers granted to Congress by the Constitution; and there is sufficient substance in the claim to give us jurisdiction.

The appellee was incorporated under the laws of Massachusetts, April 7, 1884. Immediately thereafter it filed with the Postmaster General a written acceptance of the restrictions and obligations prescribed by the act of July 24, 1866, and constructed lines of wires strung upon poles across the commonwealth of Massachusetts and particularly along certain streets and roads in the town of Essex. These have been continuously operated in connection, on the east, with cables reaching foreign countries, and, on the west, with wires leading to all parts of the Union; for a long time they have constituted an important part of the Postal Telegraph & Cable system; and over them pass great numbers of interstate and foreign [317] messages, many being transmitted for the United States under official regulations.

The especially pertinent provisions of the Massachusetts laws relating to companies incorporated for transmitting intelligence by electricity, in force during 1884 and long thereafter, appear in Public Statutes, chapter 109, §§ 2, 3, 15, and chapter 27, § 49, and are as follows:

"Each company may under the provisions of the following section construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters."

"The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a

writing specifying where the posts may be located, the kind of posts, and the height at which, and the places where, the wires may run. After the erection of the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

"No enjoyment by a person or corporation for any length of time of the privilege of having or maintaining telegraph posts, wires, or apparatus in, upon, over or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof."

"The selectmen of a town may empower citizens of Massachusetts to establish and maintain, in such town, posts, wires and other apparatus for telegraphic and telephonic [318] communication, in conformity with the provisions of chapter 109."

In Pierce v. Drew, 136 Mass. 75, 76, 77, 49 Am. Rep. 7 (1883), the supreme court said of chapter 109:

"That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws, for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads upon the locations assigned to them by the officers of the municipality wherein such ways are situate, cannot be doubted. . . .

"No right is given these companies to use the highways at their own pleasure, or to compel in all cases, as the plaintiff suggests, locations therein to be given them by the municipal authorities. The second section of the statute is to be construed with the third section, and shows an intention that a legally constituted board shall determine not only where, but whether, there can be a location which shall not incommode the ordinary public ways, with full power to revise its own doings, and to correct any errors which the practical working of the arrangements may reveal."

The evidence warrants the conclusion that in 1884 appellee made written application to the Essex selectmen for a right of way, but their records disclose nothing concerning the matter. Directly thereafter, without opposition, the existing lines were constructed along 4 miles of the town's highways. During many succeeding years no objection appears to have been made to their operation, and, until a short time before this suit was begun, their presence was acquiesced in. Certainly no sort of affirmative action was taken to interfere with them; and there is evidence indicating that half the poles were relocated under direction of a selectman, about 1895, when the electric railway was laid down.

In 1902, repairs being needed, the selectmen were petitioned [319] to locate the poles and license their future maintenance. This request was not granted. In 1905, repairs having become imperative, another petition for a location was presented. This was refused; officers of the town then denied appellee's right to use the highways, and threatened to prevent repairs, by force if necessary, and to take action against future operation of the lines within its limits. Thereupon, July 31, 1905 (twenty-one years after original construction), the telegraph company, relying on the act of 1866, commenced this proceeding in the district court, seeking an injunction against threatened interference. By a temporary order granted September 5, 1905, the town, its officers, agents, and employees, were "enjoined and restrained, until the further order of this court, from interfering in any manner whatsoever with the complainant's line of telegraph in said defendant town, or with the location or relocation by the complainant on the roads and highways now occupied by its said line of telegraph in said defendant town, or with the resetting of the poles of said line in said town by the complainant, or with the complainant's making such repairs and changes as are necessary to put said line in a condition of safety and efficiency, or from in any manner causing or allowing any other person or corporation to interfere with or stop such location, relocation, resetting, repairs, or changes by the complainant."

Answering, September 26, 1905, appellant claimed the lines were constructed without any authority whatsoever, and denied the company's right, under the act of 1866 or otherwise, to maintain or operate them. A cross bill was also presented, alleging unlawful use of the ways, and praying that the company be restrained therefrom until a franchise shall be obtained as provided by state laws.

No motion was ever made to dissolve the temporary injunction. The cause coming on for final hearing upon pleadings and proofs in 1913 (twenty-nine years subsequent [320] to construction), the court held that the act of 1866 protected the lines from interference, and rendered a decree dismissing the cross bill, sustaining the original bill, and awarding a perpetual injunction substantially in the language of the preliminary order dated September 5, 1905.

Appellant now maintains that the court below erroneously construed and applied

the act of 1866, and undertook to bestow upon the telegraph company rights in its highways beyond the power of Congress to grant; that its ways are occupied without lawful authority, either state or Federal; that such occupation constitutes a continuing nuisance; and that the original bill should have been dismissed, leaving the town free to act as seemed advisable.

Many opinions of this court establish beyond question the validity and point out the general purposes of the act of 1866. "It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed." Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 11, 24 L. ed. 708, 711. A state has no authority to say that a telegraph company may not operate lines constructed over postal routes within its borders Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 554, 31 L. ed. 790, 795, 8 Sup. Ct. Rep. 961. A city may not arbitrarily exclude the wires and poles of a telegraph company from its streets, but may impose reasonable restrictions and regulations. St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 105, 37 L. ed. 380, 385, 13 Sup. Ct. Rep. 485; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 170, 56 L. ed. 710, 716, 32 Sup. Ct. Rep. 449. See also Western U. Teleg. Co. v. Pennsylvania R. Co. 195 U. S. 540, 49 L. ed. 312, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; United States v. Union P. R. Co. 160 U. S. 1, 44, 40 L. ed. 319, 334, 16 Sup. Ct. Rep. 190; Postal Teleg. Cable Co. v. Chicopee, 207 Mass. 341, 343, 32 L.R.A.(N.S.) 997, 93 N. E. 927.

If the official records of the selectmen disclosed that, [321] responding to the petition of 1884, they gave a writing "specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run," and if thereafter the telegraph company had placed poles and strung wires accordingly, plainly, we think, under the opinions cited above, such lines would be protected by the act of 1866 against exclusion or other arbitrary action by the town.

With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (Roberts v. Northern P. R. Co. 158 U. S. 1, 11, 39 L. ed. 873, 877, 15 Sup. Ct. Rep. 756; Northern P. R. Co. v. Smith, 171 U. S. 260, 271, 275, 43 L. ed. 157, 161, 163, 18 Sup. Ct. Rep. 794); and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. Randolph County v. Post, 93 U. S. 502, 513, 23 L. ed. 957, 959; Boone County v. Burlington & M. River R. Co. 139 U. S. 684, 693, 35 L. ed. 319, 322, 11 Sup. Ct. Rep. 687; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 566, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 662, 56 L. ed. 934, 940, 32 Sup. Ct. Rep. 572; Dill. Mun. Corp. 5th ed. §§ 1194, 1227.

The streets and highways of Essex are undoubtedly post roads within the meaning of the act of 1866. Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 170, 56 L. ed. 710, 716, 32 Sup. Ct. Rep. 449, act of March 1, 1884, chap. 9, 23 Stat. at L. 3, Comp. Stat. 1913, § 7457. What rights—if any—in respect of them [322] were immediately secured by the telegraph company through acceptance of that act, we need not consider. It entered upon those now occupied notoriously, peacefully, and without objection, and has developed there a necessary means of communication. The statute must be construed and applied in recognition of existing conditions and with a view to effectuate the purposes for which it was enacted. Among the latter, as stated in Pensacola Teleg. Co. v. Western U. Teleg. Co. and Western U. Teleg. Co. v. Atty. Gen. supra, are the extension and protection of instrumentalities essential to commercial intercourse and the efficient conduct of governmental affairs. In the circumstances, appellee has acquired the same Federal right to maintain and operate its poles and wires along the ways in question that would have attached had the selectmen granted a formal antecedent permit. Commercial transactions and the orderly conduct of governmental business have come to depend on the daily use of these lines, and certainly would be as seriously hindered by their severance as if they had been constructed after an of-

ficial location. There is no suggestion that ordinary travel is being interfered with; and, having long acquiesced in appellee's peaceful possession, the town may not now rely upon the claim that this was obtained without compliance with prescribed regulations, and treat the company as a naked trespasser. Its rights under the Federal law would be violated by the threatened arbitrary interference.

The further claim is here made for the first time that, in any event, the injunction is too broad. In Western U. Teleg. Co. v. Richmond, supra, it was pointed out that the act of 1866 does not deprive a municipality of the right to subject telegraph companies occupying its streets to reasonable regulations. The injunction as granted might interfere with action altogether proper, and the decree below will be modified by the addition of the words, [323] "Provided, that nothing herein shall be so construed as to prevent the board of selectmen or the town of Essex from subjecting the location and operation of the company's lines to reasonable regulations." With this modification, it is affirmed. The costs will be charged to appellant.

Modified and affirmed.

PROVO BENCH CANAL & IRRIGATION COMPANY and the North Union Irrigation Company, Plffs. in Err.,
v.
CALEB TANNER.

(See S. C. Reporter's ed. 323-325.)

Error to state court — scope of review — findings of fact.

The contention that property was taken without due process of law by an award of nominal damages only in the proceedings by which a landowner, under Utah Comp. Laws 1907, § 1288x22, secured the right to enlarge irrigation canals already constructed by others, presents no question which the Federal Supreme Court may consider on writ of error to a state court, where the latter court, although expressly recognizing the right of recovery for any substantial damage, found as a matter of fact that none had been shown by the proof, and that consequently only a nominal sum could be recovered.

[For other cases, see Appeal and Error, 2175-2208, in Digest Sup. Ct. 1908.]

[No. 72.]

Argued and submitted November 11, 1915. Decided December 6, 1915.

NOTE.—As to review of questions of fact on writ of error to a state court—see Smiley v. Kansas, 49 L. ed. U. S. 546.

60 L. ed.

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of the District Court for the Fourth Judicial District of that state, awarding nominal damages only in a proceeding by a landowner to obtain permission to enlarge irrigation canals already constructed by others. Affirmed.

See same case below, 40 Utah, 105, 121 Pac. 584.

Mr. J. W. N. Whitecotton argued the cause and filed a brief for plaintiffs in error.

Mr. Charles S. Varian submitted the cause for defendant in error. Mr. D. D. Houtz was on the brief.

Memorandum opinion by Mr. Justice McReynolds, by direction of the court:

Plaintiffs in error, having acquired easements and rights of way over certain lands in the state of Utah, constructed [324] thereon connecting canals to convey water intended for irrigation purposes. Relying upon the provisions of a statute of that state (Comp. Laws 1907, § 1288x22), copied in the margin,[1] the validity of which is not contested (Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171), defendant in error Tanner instituted the original proceeding, praying for permission to increase the carrying capacity of the canals, that the character of the enlargement and resulting damages be determined, and that, upon payment of the sum assessed and completion of the enlargement, he be decreed the right to flow water therein. Answers were filed, proof taken, and, the cause having been duly heard by the court without a jury, a decree was entered granting the relief prayed under carefully specified conditions, among them being a perpetual bond to protect against future injuries. Each of the owners was awarded $1 as damages. Upon appeal the action of

[1] When any person, corporation, or association desires to convey water for irrigation or for any other beneficial purpose, and there is a canal or ditch already constructed that can be enlarged to convey the required quantity of water, then such person, corporation, or association, or the owner or owners of the land through which a new canal or ditch would have to be constructed to convey the quantity of water necessary, shall have the right to enlarge said canal or ditch already constructed, by compensating the owner of the canal or ditch to be enlarged, for the damage, if any, caused by said enlargement; provided, that said enlargement shall be done at any time from the 1st day of October to the 1st day of March, or at any other time that may be agreed upon with the owner of said canal or ditch.

the trial court was approved by the supreme court. 40 Utah, 105, 121 Pac. 584.

Counsel for plaintiffs in error asserts here that, "after all, the whole question is, was there a taking of the property of the canal owners;" and, answering this in the affirmative, he maintains that the judgment below deprives them thereof without due process of law. But the state court, expressly recognizing the right of recovery for [325] any substantial damage, found, as matter of fact, that none had been shown by the proof, and consequently only a nominal sum could be recovered. It declared that "nothing is made to appear upon which a finding or judgment for substantial damages can rest"—"there is no direct evidence upon this point whatever," and cited Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581, in support of the award.

The record discloses no error which we can consider (Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220), and the judgment is affirmed.

L. LAWRENCE WEBER, Appt.,
v.
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, N. J.

(See S. C. Reporter's ed. 325–330.)

Injunction — to enforce entry of prize fight films — sufficiency of bill.

The contention that Congress exceeded its power under the commerce clause of the Federal Constitution by enacting the provisions of the act of July 31, 1912 (37 Stat. at L. 240, chap. 263, Comp. Stat. 1913, § 10,416), § 1, making it unlawful to bring into or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight which is designed to be used, or may be used, for purposes of public exhibition, is so obviously devoid of merit that a bill which, on the ground of the unconstitutionality of such statute, sought to compel the collector of customs to permit the entry of photographic films of a foreign prize fight, states no cause of action, and is properly dismissed by a Federal district court.

[For other cases, see Injunction, 209–217; Commerce, III. b, in Digest Sup. Ct. 1908.]

[No. 644.]

Argued December 1, 1915. Decided December 13, 1915.

APPEAL from the District Court of the United States for the District of New Jersey to review a decree dismissing a bill in a suit to compel the collector of customs to permit the entry into the United States of photographic films of a foreign prize fight. Affirmed.

The facts are stated in the opinion.

Mr. **Benjamin F. Spellman** argued the cause, and, with Mr. Charles A. Towne, filed a brief for appellant:

The police power was never delegated to the general government.

Passenger Cases, 7 How. 470, 12 L. ed. 780; Cooley, Const. Lim. 574; Keller v. United States, 213 U. S. 144, 53 L. ed. 738, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

Photographic-film positives, imported by the owner, designed to be used for purposes of public exhibition by him, and not for purposes of traffic, sale, or commerce, are not articles of commerce.

Definitions of Commerce: Century Dict.; Standard Dict.; Webster's Dict.; Gibbons v. Ogden, 9 Wheat. 1, 189, 190, 6 L. ed. 23, 68, 69; Adair v. United States, 208 U. S. 161, 177, 52 L. ed. 436, 443, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 470, 24 L. ed. 527, 529; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 353, 47 L. ed. 492, 499, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241; Kidd v. Pearson, 128 U. S. 1, 20, 32 L. ed. 346, 349, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 46, 56 L. ed. 327, 344, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The public exhibition of motion pictures is not commerce; and hence the photographic-film positives referred to in this case, being designed to be used for purposes of such exhibitions, are not instrumentalities of commerce.

NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

People v. Klaw, 55 Misc. 72, 106 N. Y. Supp. 341; Metropolitan Opera Co. v. Hammerstein, 162 App. Div. 691, 147 N. Y. Supp. 532.

The court declined to hear Assistant Attorney General Warren, who filed a brief for appellee:

The power of Congress to regulate commerce with foreign nations includes the power to prohibit. The contention of appellant that this power is limited to the exclusion from the United States of property intended for sale is clearly foreclosed by the decisions of this court, and this court will decline jurisdiction of the case, as in substance so wholly wanting in merit as to be frivolous and wholly unsubstantial.

Brolan v. United States, 236 U. S. 216, 218, 221, 59 L. ed. 544, 547, 549, 35 Sup. Ct. Rep. 285; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; The Abby Dodge, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310.

Commerce, as used in the Constitution, comprehends traffic, navigation, and every species of commercial intercourse or trade.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 470, 38 L. ed. 1047, 1054, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Lottery Case (Champion v. Ames) 188 U. S. 321, 352, 47 L. ed. 492, 499, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The commerce clause operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.

Re Debs, 158 U. S. 564, 591, 39 L. ed. 1092, 1105, 15 Sup. Ct. Rep. 900.

Films are articles susceptible of purchase and sale, and are commonly bought and sold. They are, therefore, articles of trade, and the subject of large interstate transactions.

United States v. Motion Picture Patents Co. 225 Fed. 803; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387; Mutual Film Co. v. Industrial Commission, 236 U. S. 248, 59 L. ed. 561, 35 Sup. Ct. Rep. 393.

The white slave law, so far as it is directed against transportation of women for use as a source of profit, is analogous to the statute at bar; for in both cases the object of the transportation is the use of the thing or person transported, as capital from which income is to be derived, rather than as an object of sale.

Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905,

The appellant contends that there can be no commerce unless there are two or more parties involved,—that commerce cannot exist where there is but one party. This broad statement is, of course, not true either in fact or in law.

Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

The power of Congress to exclude articles from foreign trade is plenary, as stated in the Brolan Case; but even if not so plenary, its power is at least sufficient to forbid the introduction of prize-fight films, to keep them out of the channels of commerce on the ground that, in the opinion of Congress, they should be thus declared to be "illicit articles—articles which the law seeks to keep out of commerce . . . articles which are outlaws of commerce," in the words of this court in Hipolite Egg Co. v. United States, 220 U. S. 45, 54, 57, 58, 55 L. ed. 364, 366, 368, 31 Sup. Ct. Rep. 364.

Even if Congress be not expressly vested with a national police power, and even if Congress expressly intended to legislate to supply deficiencies in the exercise of police power by certain states, yet it is vested with express and plenary power to regulate commerce with foreign nations, and may so regulate, without supervision of its impelling reasons by this court. Congress alone is judge of the necessity of exclusion from foreign trade.

United States v. Marigold, 9 How. 560, 566, 567, 13 L. ed. 257, 260, 261.

While the commerce clause empowered Congress to regulate commerce, not public morals, the second may, nevertheless, be incidental to the first. It is no objection to the validity of Congressional legislation that an article prohibited by Congress in the legitimate exercise of its commerce power might also be prohibited by the states in the exercise of their police power.

Hoke v. United States, 227 U. S. 308, 320, 323, 57 L. ed. 523, 526, 527, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Edward B. Whitney, Latest Development of the Interstate Commerce Power, in 1 Mich. L. Rev. p. 615 (1903).

The appellant's contention that this court can inquire into the reasons impelling Congress to exclude prize-fight films is unsupportable.

Doyle v. Continental Ins. Co. 94 U. S. 535, 541, 24 L. ed. 148, 151; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Northern Securities Co. v. United

States, 193 U. S. 197, 337, 48 L. ed. 679, 700, 24 Sup. Ct. Rep. 436.

Mr. Chief Justice White delivered the opinion of the court:

The act of July 31, 1912 (§ 1, chap. 263, 37 Stat. at L. 240, Comp. Stat. 1913, § 10,416), makes it unlawful "to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." With this provision in force, in April, 1915, the appellant brought to the port of entry of the city of Newark in the state of New Jersey photographic films of a pugilistic encounter or prize fight which had taken place at Havana, and demanded of the deputy collector of customs in charge the right to enter the films. On refusal of the official to permit the entry, appellant filed his bill of complaint to enforce the right to enter by a mandatory injunction and by other appropriate relief to accomplish the purpose in view. The ground relied on for the relief was the averment that the prohibition of the act of Congress [329] in question was repugnant to the Constitution because, in enacting the same, "Congress exceeded its designated powers under the Constitution of the United States, and attempted, under the guise of its powers under the commerce clause, to exercise police power expressly reserved in the states." The collector moved to dismiss on the ground that the bill stated no cause of action because the assailed provision of the act of Congress was constitutional, and therefore on the face of the bill there was no jurisdiction to award the relief sought.

The motion was sustained and a decree of dismissal was rendered, and it is this decree which it is sought to reverse by the appeal which is before us, the propositions relied upon to accomplish that result but reiterating in various forms of statement the contention as to the repugnancy to the Constitution of the provision of the act of Congress. But in view of the complete power of Congress over foreign commerce, and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous. Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; The Abby Dodge, 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310; Brolan v. United States, 236 U. S. 216, 59 L. ed. 544, 35 Sup. Ct. Rep. 285.

It is true that it is sought to take this case out of the long-recognized rule by the proposition that it has no application because the assailed provision was enacted to regulate the exhibition of photographic films of prize fights in the United States, and hence it must be treated not as prohibiting the introduction of the films, but as forbidding the public exhibition of the films after they are brought in,—a subject to which, it is insisted, the power of Congress does not extend. But, aside from the fictitious assumption on which the proposition is based, it is obviously only another form of denying the power of Congress to prohibit, since if the imaginary premise and proposition based on it were acceded to, the contention [330] would inevitably result in denying the power in Congress to prohibit importation as to every article which, after importation, would be subject to any use whatever. Moreover, the proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised. Doyle v. Continental Ins. Co. 94 U. S. 535, 541, 24 L. ed. 148, 151; McCray v. United States, 195 U. S. 27, 53-59, 49 L. ed. 78, 94-97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Calder v. Michigan, 218 U. S. 591, 598, 54 L. ed. 1163, 1167, 31 Sup. Ct. Rep. 122.

Affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
J. T. BIGGER et al.

(See S. C. Reporter's ed. 330-339.)

Error to circuit court of appeals — dismissal on motion.

1. A writ of error to the circuit court of appeals in a suit against a Federal corporation which had removed the case from

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Note.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605, and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

As to degree of care required toward passenger at station—see note to St. Louis, I. M. & S. R. Co. v. Woods, 33 L.R.A.(N.S.) 855.

On duty of carrier as to condition of place used as flag station—see note to Fulghum v. Atlantic Coast Line R. Co. 39 L.R.A. (N.S.) 558.

As to what injuries may be deemed the proximate result of discharging passenger at improper place, or one not his destination—see note to Georgia R. & Electric Co. v. McAllister, 7 L.R.A.(N.S.) 1177.

a state court to a Federal district court will not be dismissed where the questions raised by such writ of error are not frivolous.

[For other cases, see Appeal and Error, VII. i, in Digest Sup. Ct. 1908.]

Pleading — to jurisdiction — waiver.

2. The defendant, in a suit removed by it from a state court to a Federal district court, may not raise the question of the state court's jurisdiction by an amended answer filed in the Federal court, where the petition for removal contained no reservation of a question of such jurisdiction, and where, after the case reached the Federal court, there were pleadings to the merits and other action submitting to the jurisdiction.

[For other cases, see Pleading, I. g, in Digest Sup. Ct. 1908.]

Trial — question for jury — knowledge of passenger.

3. Whether or not a passenger for a station beyond the carrier's line should have known that there was a through coach attached to the train is a question for the jury, in an action against such carrier for the passenger's death, alleged to have been caused by exposure to a storm when transferring at the junction point.

[For other cases, see Trial, 402a-417, in Digest Sup. Ct. 1908.]

Connecting carriers — duty to passenger at junction point.

4. A carrier which has accepted a passenger for a destination beyond its own line does not discharge its duty by delivering him at the junction point during a heavy rain, with no other other shelter than that afforded by a "switch shanty," where he could have reached a through coach attached to the train by merely passing through other cars had he been informed that there was such a coach.

[For other cases, see Carriers, II. a, 3, in Digest Sup. Ct. 1908.]

Connecting carriers — measure of care toward passenger at junction point.

5. A connecting carrier owes the same degree of care towards a through passenger who has alighted from a train at a junction point to change cars that it is bound to observe in his transportation.

[For other cases, see Carriers, II. a, 4, a, in Digest Sup. Ct. 1908.]

Appeal — error in instructions — prejudice.

6. The jury in an action against a carrier for the death of a passenger could not have been embarrassed by the court's instructions as to the degree of care which the carrier owed to the passenger under the circumstances, where, if the testimony for the plaintiff was true, the carrier did not observe even ordinary care, and if that for defendant was true, the company was not liable, and the jury was so instructed.

[For other cases, see Appeal and Error, VIII. m, 4, a, in Digest Sup. Ct. 1908.]

[No. 342.]

Submitted November 30, 1915. Decided December 13, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Texas in favor of plaintiff in an action against a carrier for the death of a passenger. Affirmed.

See same case below, 133 C. C. A. 673, 218 Fed. 990.

The facts are stated in the opinion.

Messrs. George Thompson and T. D. Cobb submitted the cause for plaintiff in error:

The question of jurisdiction was properly raised and preserved.

O'Connell v. Reed, 5 C. C. A. 593, 12 U. S. App. 369, 56 Fed. 531.

Under the evidence introduced the court erred in not instructing a verdict for defendants. The death of the deceased was caused by his own exposure and negligence and want of care, and was not the direct and proximate result of any injuries received by him while he was on defendant's train as a passenger.

Bowen v. New York C. R. Co. 18 N. Y. 408, 72 Am. Dec. 529; Brunswick & W. R. Co. v. Wiggins, 61 L.R.A. 113, and notes, 113 Ga. 842, 39 S. E. 551; Davis v. Houston & T. C. R. Co. 25 Tex. Civ. App. 8, 59 S. W. 844; Gulf, C. & S. F. R. Co. v. Guess, — Tex. Civ. App. —, 154 S. W. 1061; Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902, 32 Tex. Civ. App. 14, 73 S. W. 981; International & G. N. R. Co. v. Welch, 86 Tex. 204, 40 Am. St. Rep. 829, 24 S. W. 390; Louisville & N. R. Co. v. Keller, 104 Ky. 768, 47 S. W. 1072; 5 Am. Neg. Rep. 348; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1017; Nunn v. Georgia R. Co. 71 Ga. 710, 51 Am. Rep. 284; Gulf, C. & S. F. R. Co. v. Butcher, 83 Tex. 316, 18 S. W. 583; International & G. N. R. Co. v. Halloren, 53 Tex. 54, 37 Am. Rep. 744; West Chicago Street R. Co. v. Walsh, 78 Ill. App. 595; St. Louis Southwestern R. Co. v. Missildine,— Tex. Civ. App. —, 157 S. W. 245; St. Louis, A. & T. R. Co. v. Finley, 79 Tex. 88, 15 S. W. 266, 6 Am. Neg. Cas. 599; Street, Personal Injuries, §§ 358, 394, 396; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264, 6 Am. Neg. Cas. 592; Texas & P. R. Co. v. Bingham, 90 Tex. 227, 38 S. W. 162; Texas & P. R. Co. v. Cole, 66 Tex. 563, 1 S. W. 629; Wood v. New York C. & H. R. R. Co. 17 Am. Neg. Rep. 276, note; 2 White, Personal Injuries, p. 1075.

The law requires the highest degree of care only while the passenger is on the train. After the passenger has left the

train and is no longer under the control of the trainmen (though he may still be a passenger until he leaves the depot), the railway only owes him the degree of ordinary care.

Texas & P. R. Co. v. Dick, 26 Tex. Civ. App. 256, 63 S. W. 895, 10 Am. Neg. Rep. 196; Townes, Torts (Tex.) 90; Davis v. Houston & T. C. R. Co. 25 Tex. Civ. App. 8, 59 S. W. 844; St. Louis, A. & T. R. Co. v. Finley, 79 Tex. 88, 15 S. W. 266, 6 Am. Neg. Cas. 599; Texas & P. R. Co. v. Cole, 66 Tex. 563, 1 S. W. 629; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; St. Louis Southwestern R. Co. v. Missildine, — Tex. Civ. App. —, 157 S. W. 245; Gulf, C. & S. F. R. Co. v. Guess, — Tex. Civ. App. —, 154 S. W. 1061; 2 White, Personal Injuries, §§ 19, 20, pp. 994, 995; Texas & P. R. Co. v. Bigham, 90 Tex. 227, 38 S. W. 162; Street, Personal Injuries, §§ 358, 394, 396.

Railroads are not required to provide adequate accommodations for passengers where they alight to change cars, so that they may be protected from the inclemency of the weather.

St. Louis & S. F. R. Co. v. Grider, 110 Ark. 437, 161 S. W. 1032; Stamp v. Eastern R. Co. — Tex. Civ. App. —, 161 S. W. 450.

The carrier discharged the duty imposed by the court's charge, *viz.*, to provide adequate, safe, and comfortable accommodations, and such as to protect the passengers from the inclemency of the weather. It provided for such accommodation by a through car of the I. & G. N. R. Co. which it transported over all its connecting lines for passengers of the I. & G. N. bound for points over said line, and a through passenger owed some duty and care to ascertain such fact for himself.

2 White, Personal Injuries, pp. 586, 1075; Gulf, C. & S. F. R. Co. v. Guess, — Tex. Civ. App. —, 154 S. W. 1061; 5 Am. & Eng. Enc. Law, pp. 557–561; International & G. N. R. Co. v. Welch, 86 Tex. 204, 40 Am. St. Rep. 829, 24 S. W. 390.

Bigger being sick and a consumptive when he began his journey, he was guilty of negligence in continuing his journey in wet clothing.

International & G. N. R. Co. v. Halloren, 53 Tex. 54, 37 Am. Rep. 744; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264; 6 Am. Neg. Cas. 592; Texas & P. R. Co. v. Cole, 66 Tex. 563, 1 S. W. 629; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; Gulf, C. & S. F. R. Co. v. Guess, — Tex. Civ. App. —, 154 S. W. 1061; 5 Am. & Eng. Enc. Law, 571; Ft. Worth & R. G. R. Co. v. Stewart, — Tex. Civ. App. —, 146 S. W. 355; St. Louis Southwestern R. Co. v. Freles, — Tex. Civ. App. —, 166 S. W. 91.

The said Bigger, having been an invalid and affected with consumption at and before he got wet, had no business or employment. The verdict in this case was, therefore, excessive, and based upon no sufficient evidence of expectancy.

Street, Personal Injuries, § 394.

The court having erroneously submitted the issue to the jury as to whether or not defendant notified the deceased to transfer to the I. & G. N. car, before reaching Longview, the defendant claiming to have made the announcement in the coach in which deceased was riding, which he as an ordinarily prudent person should have heard, and having instructed the jury that there was a sharp conflict, on the question of announcement for the jury to reconcile, when there was none, it was error not to give the requested special charge to the effect that the testimony of defendant's witnesses could not, in the absence of anything to discredit or contradict them, be arbitrarily disregarded because they were employed by the railway company.

Brunswick & W. R. Co. v. Wiggins, 61 L.R.A. 113, and note, 113 Ga. 842, 39 S. E. 551.

The court should have instructed the jury as requested on the question of ordinary care required of Bigger, as a sick passenger, and his failure to transfer, and his failure to stop at Longview and otherwise take care of himself. Bigger's want of care in not informing himself of the attached car, and failure to have it attached to transfer him, was both negligence and a waiver.

5 Am. & Eng. Enc. Law, 576.

The undisputed evidence showing that Bigger was safely transported on the train of and over the line of the T. & P. R. Co., and that the injury, if any, was received after he left the train at the depot to enter the I. & G. N. car, and the suit being based upon the existence of a partnership between the defendants, and no proof having been offered to show the ownership of the ground and whose was the duty, if any existed, to build and maintain the depot and sheds, it was error to dismiss any of the parties and hold the T. & P. alone.

International & G. N. R. Co. v. Halloren, 53 Tex. 54, 37 Am. Rep. 744; Gulf, C. & S. F. R. Co. v. Butcher, 83 Tex. 316, 18 S. W. 583; Houston & T. C. R. Co. v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902, 32 Tex. Civ. App. 14, 73 S. W. 981; Texas & P. R. Co. v. Miller, 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264, 6 Am. Neg. Cas. 592; Louisville & N. R. Co. v. Keller, 104 Ky. 768, 47 S. W. 1072, 5 Am.

Neg. Rep. 348; West Chicago Street R. Co. v. Walsh, 78 Ill. App. 595; Davis v. Houston & T. C. R. Co. 25 Tex. Civ. App. 8, 59 S. W. 844; Nunn v. Georgia R. Co. 71 Ga. 710, 51 Am. Rep. 284; St. Louis, A. & T. R. Co. v. Finley, 79 Tex. 88, 15 S. W. 266, 6 Am. Neg. Cas. 599; Texas & P. R. Co. v. Cole, 66 Tex. 563, 1 S. W. 629; Missouri, K. & T. R. Co. v. Hagan, 42 Tex. Civ. App. 133, 93 S. W. 1014; St. Louis Southwestern R. Co. v. Missildine, — Tex. Civ. App. —, 157 S. W. 245; Gulf, C. & S. F. R. Co. v. Guess, — Tex. Civ. App. —, 154 S. W. 1061; 2 White, Personal Injuries, §§ 19, 20, pp. 944, 945, 1075; Wood v. New York C. & H. R. R. Co. 17 Am. Neg. Rep. 276, note; 5 Am. & Eng. Enc. Law, 2d ed. pp. 558–561, 571, 576, 645; International & G. N. R. Co. v. Welch, 86 Tex. 204, 40 Am. St. Rep. 829, 24 S. W. 390; Texas & P. R. Co. v. Bigham, 90 Tex. 227, 38 S. W. 162; Street, Personal Injuries, §§ 358, 396, 394; Brunswick & W. R. Co. v. Wiggins, 61 L.R.A. 113, and note, 113 Ga. 842, 39 S. E. 551.

The circuit court of appeals erred in holding that it has no authority to pass upon the question of the excessiveness of the verdict.

Felton v. Spiro, 24 C. C. A. 327, 47 U. S. App. 402, 78 Fed. 576, 2 Am. Neg. Cas. 682; Mt. Adams & E. P. Inclined R. Co. v. Lowrey, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Farrar v. Wheeler, 75 C. C. A. 386, 145 Fed. 483; Felt v. Puget Sound Electric R. Co. 175 Fed. 477; Duke v. St. Louis & S. F. R. Co. 172 Fed. 686.

The undisputed evidence showing that Bigger came to San Antonio a sick man, to regain his health, because he could never live in Tennessee, and was returning from a visit to Tennessee, *via* the I & G. N. and T. & P. roads, in a train upon which there was an I. & G. N. coach provided for I. & G. N. passengers, which he could have entered and in which he doubtless traveled going to Tennessee, this being the safer way for him to travel, as he had traveled over the same route and was familiar with it, and the undisputed evidence showing that he was guilty of want of ordinary care in not making inquiries concerning his route, train, or cars, or in not going in said car, irrespective of whether the railway was guilty or not of failure of any duty in not giving notice to transfer to the I. & G. N. car, or in not providing sheds to protect him from the rain after leaving the train, —his own want of care was the proximate cause of his injury.

International & G. N. R. Co. v. Edwards, 100 Tex. 24, 93 S. W. 106; Louisville & N. R. Co. v. Peck, 152 Ky. 6, 49 L.R.A.(N.S.) 198, 153 S. W. 40; Russell v. St. Louis & S. F. R. Co. 175 Mo. App. 457, 161 S. W. 638; Stamp v. Eastern R. Co. — Tex. Civ. App. —, 161 S. W. 450; Dallas v. Moore, 32 Tex. Civ. App. 230, 74 S. W. 95; Thomp. Neg. 1947, § 6218.

The passenger is under some obligation to use ordinary care for himself and to exercise his faculties in looking out for and taking care of himself on the trip.

Louisville & N. R. Co. v. Messer, 164 Ky. 218, 175 S. W. 360.

Messrs. H. C. Carter and Perry J. Lewis submitted the cause for defendants in error:

After a party has asserted and submitted itself to the jurisdiction of a court, it is too late then to plead its privilege to be sued in some other court.

Re Moore, 209 U. S. 491–513, 52 L. ed. 904–914, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; Western Loan & Sav. Bank v. Butte & B. Consol. Min. Co. 210 U. S. 368–372, 52 L. ed. 1101–1103, 28 Sup. Ct. Rep. 720; Texas & P. R. Co. v. Cox, 145 U. S. 593–603, 36 L. ed. 829–832, 12 Sup. Ct. Rep. 905.

The case of Gulf, C. & S. F. R. Co. v. Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653, 70 S. W. 359, 96 Tex. 301, 72 S. W. 163, holds that a railroad was negligent where the conductor in charge of the train failed to inform a passenger that there were coaches attached to the train in which he might continue his journey, and that it was negligence on the part of the railway company to order and command the passenger to leave the train at a place upon its platform that was not a safe place for the passengers to alight. This case also holds that the passenger, in obeying the request of an employee, was not guilty of contributory negligence.

White, Personal Injuries, § 663; Louisville & N. R. Co. v. Keller, 104 Ky. 768, 47 S. W. 1072, 5 Am. Neg. Rep. 348.

The degree of care which the court charged is the settled law of this country.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898, 7 Am. Neg. Cas. 331; Missouri, K. & T. R. Co. v. White, 22 Tex. Civ. App. 424, 55 S. W. 593; St. Louis Southwestern R. Co. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343; Missouri, K. & T. R. Co. v. Cook, — Tex. Civ. App. —, 166 S. W. 453; Houston & T. C. R. Co. v. Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981; International & G. N. R. Co. v. Holloren, 53 Tex. 54, 37 Am. Rep. 744; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593.

Mr. Justice McKenna delivered the opinion of the court:

Action for personal injuries, brought by

J. T. Bigger against plaintiff in error and the International & Great Northern Railway Company and the St. Louis, Iron Mountain, & Southern Railway Company in the state district court of Bexar county, Texas.

The case made by Bigger's pleading was this:

Bigger was a passenger upon the Texas & Pacific Railway Company's train on a ticket from San Antonio, Texas, to Owensboro, Kentucky, and return, having purchased the ticket from the International & Great Northern Railway Company, at San Antonio, Texas. A partnership was alleged between the companies.

Bigger was returning from Owensboro to San Antonio, and was compelled and required to leave the train at [332] Longview during a very severe downpour of rain at a place where there was no protection. His clothes became thoroughly drenched with rain, and he was required to ride in them so drenched until he reached San Antonio at about 10 o'clock at night. As a result of such exposure and wetting he became seriously ill.

At the time the Texas & Pacific reached the station at Longview there was in the train a car destined to San Antonio, on the line of the International & Great Northern Railway, of which the employees of the Texas & Pacific knew, but they neglected to inform Bigger of the fact and give him an opportunity to transfer to such car.

It was charged in his complaint that such facts constituted negligence on the part of the company and its employees.

In accordance with a petition by the Texas & Pacific Company the case was removed to the United States district court for the western district of Texas. There an amended petition or complaint was filed, suggesting Bigger's death, and his wife and six children were made parties plaintiff.

The St. Louis, Iron Mountain, & Southern Railway Company filed a separate demurrer and answer.

The International & Great Northern Railway Company and the Texas & Pacific Railway Company joined in a general demurrer and in an answer to the merits. Subsequently both of the latter companies were given leave to amend and availed themselves of it. The answer of the Texas & Pacific Railway Company contained a general demurrer, a general denial of the allegations, and set up special matters in defense. It contained no plea or exception to the jurisdiction in the court, state or Federal.

The case was continued and set for trial upon motion of defendants, and the Texas & Pacific Railway Company then filed a second amended answer, in which it set up that it was incorporated under an act of Congress, had [333] its domicil in Dallas, Texas, that no part of its road was in Bexar county, and therefore the action was improperly brought in the latter county, and the court was without jurisdiction to try it, it being "one arising under and involving damages for personal injury." Insufficiency of the petition in law was also alleged and that the petition showed on its face that the company was a common carrier without any elements of partnership existing between it and the other defendants. The answer also contained general denials of the allegations of the petition, and averred besides that Bigger had ample opportunity to transfer from one coach to another, and that had he used ordinary care he would have got into the proper coach either when he first boarded the train or at some time during passage. That the railway company complied with its duty when it safely transported Bigger to Longview, and at that station its relation to him, so far as he was a passenger, terminated, as he was entitled to ride to such point and no farther.

That it stopped its train at the usual place, and the station building and shelter from rain was in close proximity to such point. That other passengers alighted and proceeded to such station building, that there was no reason why Bigger should not have done so, and that his exposure was due to his own negligence.

That his ill health and subsequent death were not caused by nor were they the result of any negligence of the company, but that he was in an extremely poor state of health, having been the victim for a long time of a tubercular infection which had so far progressed that he had been compelled to give up his work and return to San Antonio, with hope practically abandoned, and that his death was the proximate and direct result of such infection.

Upon the issues thus joined the case was tried to a jury. The court directed a verdict for all of the companies [334] except the Texas & Pacific, against which company a verdict was returned in the aggregate amount of $15,250, the amounts awarded to the wife and children being respectively specified. Judgment was entered accordingly and affirmed by the circuit court of appeals.

A motion is made to dismiss or, alternatively, to affirm.

The motion to dismiss is overruled. The railway company is a Federal corporation and the questions raised are not frivolous.[1] We pass, therefore, to the merits.

[1] This case was pending in this court before and at the time of the passage of the act of January 28, 1915, 38 Stat. at L. 804, chap. 22, §§ 5 and 6, which takes away from

The questions of fact must be considered as determined against the company by the verdict of the jury; that is, that Bigger was required to get off the train at Longview in a drenching rain, that the accommodations there were insufficient for the protection of passengers, that he could have been transferred to a coach attached to the train, but was not, nor was he told of it, and that the exposure resulted in his death. And, further, the verdict is conclusive as to the condition of his health and as to the expectancy from his life.

Our consideration, therefore, must be confined to the questions of law arising on giving or refusing instructions, or on some other ruling of the court. There is such other ruling. The company in its second amended answer in the district court excepted to plaintiff's petition on the ground that it showed on its face that the suit was improperly brought in Bexar county. The exception was overruled and this is assigned as error. It was not error. The petition for removal contained no reservation of a question of the jurisdiction of the state court, and after the case reached the district court there were pleadings to the [335] merits and other action submitting to the jurisdiction. Texas & P. R. Co. v. Hill, 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575.

There is the general contention that a verdict should have been directed for the company. The contention involves the whole case, and facts and law are so intermingled as to make the latter inseparably dependent upon the former. For instance, it is urged that Bigger did not exercise care when he boarded the train at Little Rock. He could have known, it is said, that there was an International & Great Northern coach attached to the train, and that he should have heard the announcement to passengers to transfer to that coach; and "should at some time during the route have looked and listened." The announcement is disputed, and whether he should have known of the International & Great Northern coach was for the jury to decide.

There is testimony to the effect that Bigger was required to get out at Longview during a rain of such severity as to amount to a cloud-burst, and which had covered the ground with water. Against this, it is said that where he descended from the train was a suitable place to walk, and that there were sheds and depots and other buildings near at hand to protect him from the rain. And it is urged that he should not have continued his journey in wet clothes; that he could have changed clothes at a hotel in Longview or sought the accommodations of a Pullman sleeper. Finally it is said that the Texas & Pacific owed him no further duty when he left its train. The latter contention can be immediately rejected. The company accepted him as a passenger for a destination beyond Longview, and its duty was not discharged by delivering him to a storm, protected from its inclemency only by the shelter afforded by a "switch shanty," so-called by an employee of the road. We may remark that to that shanty a lady passenger was also conducted by the porter of the train, he apparently not having knowledge of the existence [336] of other buildings which the company alleged were available to Bigger. The lady testified that the water was "3 inches deep on the ground" and came to her ankles, and that "it was raining just like a cloud-burst." Nor was it a condition suddenly occurring. It rained before the train reached Longview. "and the tracks looked," the witness said, "like they were covered with water." And, we may say, as indicating the severity of the storm, the train was compelled to return to Longview on account of washouts. Such conditions of discomfort and peril to health she, Bigger, and, it appears, two other passengers, were required to pass to and endure in order to take a car which was attached to the train and which could have been reached by merely passing through other cars. And these were the conditions a jury had the right to believe existed, although there was contradiction of them. The other contentions involved considerations for the judgment of the jury.

There is an objection to the charge of the court that it gave too much emphasis to the duty of the company, and not enough to the duty of Bigger as a passenger. The objection involves the charge as a whole, and, as it would be inconvenient to quote it, we simply say that the objection is not justified. The court expressed the elements of liability of the company, and it expressed as well the conditions of recovery on the part of plaintiffs, and it is hypercritical to say that the emphasis was more on one than on the other, as presently will be shown.

The most important contention of the company is based on the charge of the court as to the degree of care required of the company. The court said that if Bigger's "illness and subsequent death did not result directly from the negligence of the defendant, they [plaintiffs] would not be entitled to recover." And, it was added, "What, then, is negligence? It is the failure to

courts of the United States jurisdiction in suits by or against any railroad company on the ground that such company was incorporated under an act of Congress. The act excepts actions or suits pending at the time of the passage of the act.

do what a reasonable person would ordinarily have done under the circumstances of [337] the situation, or the doing what such person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or in commission. The duty is dictated and measured by the exigencies of the occasion."

The court recited the evidence and the contentions of the parties, and said that it was the duty of the company "to provide adequate and safe accommodations for passengers where they could alight to change cars and where they could be protected." And, further, that if this was done the company had fulfilled its duty and no recovery could be had against it. If it had not done so, and, "if the employees of the defendant required the deceased to get off the train in a severe rain, and his illness resulted therefrom without any fault or negligence on his part, the plaintiffs would be entitled to recover." And it was said: "In this connection you are further instructed that the deceased was required to look out for his own comfort and safety; and if he was in any respect guilty of negligence contributing to his illness and death, then no recovery can be had by the plaintiffs in this proceeding."

The court, at the request of the company, further instructed the jury that if Bigger, at the time he entered the car, was sick with lung trouble, and knew there were chances of injury by exposure, and he neglected to use ordinary care and prudence to protect himself against any contingency which might arise during the journey, and if he changed cars when, by the use of ordinary care, he could have avoided doing so, or if there was a safer way for him to have gone, which he might have ascertained by ordinary care, the company would not be responsible for the injury which resulted, if any resulted. And, further, that "all these facts and circumstances in connection with his [Bigger's] condition" should be considered in determining "whether or not he used that ordinary care and prudence which an ordinarily prudent person would have exercised [338] under similar circumstances." To these instructions there was no objection except to that part which extended the duty of the company to the protection of passengers after they had alighted from the train.

But the court instructed the jury, at the request of plaintiffs, that the railway company "owed its passengers the duty to exercise that high degree of care that would be exercised by every prudent person under the same or similar circumstances, and a failure to exercise such degree of care would be negligence." This instruction is attacked as error only because it imposed a high degree of care on the company after Bigger had left the train "and was therefore in a position to use care in taking care of himself." The ground of the objection seems to be that the duty of the company ceased upon the arrival of its train at Longview. To this, as we have already said, we cannot assent. The same care was necessary to be observed for Bigger's protection at that place, under the circumstances presented by the record, as was necessary to be observed in his transportation, and the charge of the court correctly expressed it. Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898, 7 Am. Neg. Cas. 331.

But even if the railway company could plead a lesser degree of care than that declared to be its duty in the charge of the court, it is very disputable if error was committed to the prejudice of the company. Between the plaintiffs' ground of action and the company's ground of defense there was a clear line of distinction. The testimony of plaintiffs was to the effect that Bigger was compelled to descend from the train in the midst of a severe storm to the inadequate protection of a mere shanty to await the car for San Antonio, such car being attached to the train he was on and to which he could have gone by simply passing through other cars had he been told that it was part of the train. The company asserts that he was told and that he disregarded the information. If the latter [339] was true the company was not liable, and the court so instructed the jury. If the testimony of plaintiffs was true, the company did not observe even ordinary care; and which was the fact it was for the jury to decide, and their judgment in deciding could not have been embarrassed by a consideration of degrees of negligence or care.

The other contentions of the company we think do not require special comment. They are directed to the proposition, many times repeated, that the company owed no duty to Bigger, or else had observed it, and that Bigger had not used care either in avoiding exposure or in preventing an injurious effect from it. They attack the sufficiency of the evidence, and assert, in effect, that its conflicts should be resolved against plaintiffs. The propositions of law involved are those which we have considered.

Judgment affirmed.

The Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissent, because they are of opinion that some

of the instructions complained of laid upon the carrier a heavier duty than the law recognizes.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
CLAUDE SWEARINGEN.

(See S. C. Reporter's ed. 339–344.)

Master and servant — employers' liability — violation of hours of service act — assumed risk — contributory negligence.

The unjustified retention of an interstate railway employee on duty for more than sixteen hours, contrary to the hours of service act of March 4, 1907 (34 Stat. at L. 1415, chap. 2939, Comp. Stat. 1913, § 8677), § 2, does not make the railway company unqualifiedly liable for negligently injuring him, irrespective of his contributory negligence or assumed risk, unless the retention contributed to the injury, since the statute that excludes contributory negligence and assumption of risk in such cases is not the hours of service act itself, but the subsequent employers' liability act of April 22, 1908 (35 Stat. at L. 66, chap. 149, Comp. Stat. 1913, §§ 8659, 8660), §§ 3, 4, which has that operation only when the breach of the law contributes to the injury.

[No. 74.]

Argued and submitted November 11, 1915. Decided December 13, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Texas in favor of plaintiff in an action for personal injuries. Reversed.

The facts are stated in the opinion.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

As to the validity of legislation regulating hours of labor—see note to Atkin v. Kansas, 48 L. ed. U. S. 148; Ex parte Wong Wing, 51 L.R.A.(N.S.) 361; and Miller v. Wilson, L.R.A.1915F, 829.

Generally, as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374; and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

60 L. ed.

Mr. Robert Dunlap argued the cause, and, with Messrs. Gardiner Lathrop, J. W. Terry, and A. H. Culwell, filed a brief for plaintiff in error:

The court erred in charging in effect that a violation of the hours of service act was negligence *per se*, and destroyed the defenses of assumed risk and contributory negligence, regardless of whether or not it was the proximate cause of the accident.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 280, 281, 57 L. ed. 1179, 1187, 1188, 33 Sup. Ct. Rep. 858; Nitro-Glycerine Case (Parrott v. Wells) 15 Wall. 537, 21 L. ed. 211; Puget Sound Traction Light & P. Co. v. Hunt, 139 C. C. A. 432, 223 Fed. 955; 29 Cyc. 600; Missouri, K. & T. R. Co. v. Foreman, 98 C. C. A. 281, 174 Fed. 381; Midland Valley R. Co. v. Fulgham L.R.A.—, —, 104 C. C. A. 151, 181 Fed. 95; Felt v. Boston & M. R. Co. 161 Mass. 311, 37 N. E. 375; Hannigan v. Lehigh & H. River R. Co. 157 N. Y. 244, 51 N. E. 992.

The court's submission of the proviso of the hours of service act was not sufficiently comprehensive.

United States v. New World, O. & W. R. Co. 216 Fed. 704; Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co. 139 U. S. 79, 86, 35 L. ed. 97, 100, 11 Sup. Ct. Rep. 490.

There are four provisos to the act, and it must be assumed that a definite meaning was intended for each of them, and that they did not mean the same thing.

United States v. Great Northern R. Co. 136 C. C. A. 238, 220 Fed. 633.

Whether the accident and consequent delay was an unavoidable accident, or the result of a cause not known to the carrier, or its officer or agent in charge of such employee at the time such employee left the terminal, and which could not have been reasonably foreseen, were appropriate questions of fact which should have been submitted to the jury, unless, of course, defendant's evidence of exoneration was clear and undisputed.

Missouri, K. & T. R. Co. v. United States, 231 U. S. 112, 58 L. ed. 144, 34 Sup. Ct. Rep. 26; United States v. Lehigh Valley R. Co. 135 C. C. A. 282, 219 Fed. 532.

It was not the intent of Congress to make the railway companies insurers, nor to exact from them practical impossibilities.

Northern P. R. Co. v. United States, 129 C. C. A. 514, 213 Fed. 163; United States v. Missouri P. R. Co. 130 C. C. A. 5, 213 Fed. 170.

The court erred in directing the jury that plaintiff might recover in any one of five contingencies mentioned, ignoring the question whether in any such case the al-

leged negligence was the proximate cause of the accident or injury; and, moreover, the evidence was insufficient to justify the submission of certain alleged grounds of recovery to the jury.

Chambers v. Everding & Farrell, 71 Or. 521, 136 Pac. 885, 143 Pac. 620; Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 163; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Wolosek v. Chicago & M. Electric R. Co. 158 Wis. 475, 149 N. W. 201; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Stefanowski v. Chain Belt Co. 129 Wis. 484, 7 L.R.A.(N.S.) 955, 109 N. W. 532; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; 1 Sutherland, Damages, 3d ed. § 16; 1 Shearm. & Redf. Neg. 4th ed. § 28; Fleming v. Beck, 48 Pa. 313; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Morrison v. Davis, 20 Pa. 175, 57 Am. Dec. 695; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 952, 7 Am. Neg. Cas. 478; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199, 16 Am. Neg. Rep. 86; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A. (N.S.) 684, 81 C. C. A. 338, 152 Fed. 120.

The evidence was conclusive that plaintiff assumed the risk of the position of the engine in the train, and of the position and size of the sill step.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 504, 505, 58 L. ed. 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Kohn v. McNulta, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530.

The evidence was wholly insufficient to submit certain grounds of alleged negligence to the jury.

Griffin v. Springfield Street R. Co. 219 Mass. 55, 106 N. E. 552.

The court erred in instructing the jury in this case that, in respect to allegations as to assumed risk and contributory negligence and the existence of a casualty and an unforeseeable cause, the burden of proof rested upon the defendant.

Beach, Contrib. Neg. 3d ed. §§ 427, 428.

Mr. Perry J. Lewis submitted the cause for defendant in error. Messrs. C. P. Johnson and S. Engelking were on the brief:

The language of the court, "If you find that the breaking of the valve yoke could have been guarded against, or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of his injury in requiring him to be on duty more than sixteen hours," is complained of as charging negligence *per se*. However, this identical language, under similar circumstances, was approved by this court in Grand Trunk R. Co. v. Ives, 144 U. S. 408, 418, 36 L. ed. 485, 489, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659, and seems to have been literally embodied in the charge.

The inference of proximate cause was inevitable.

Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 472, 35 L. ed. 213, 215, 11 Sup. Ct. Rep. 569.

The general charge fully covered the identical matter set out in special charge number two. Its refusal was therefore proper.

Hartford Life Annuity Ins. Co. v. Unsell, 144 U. S. 439, 447, 36 L. ed. 496, 499, 12 Sup. Ct. Rep. 671; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 70, 75, 36 L. ed. 71, 79, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690.

The charge which places on defendant the burden of proof as to the defenses of contributory negligence, assumed risk, and the relief of the proviso, was proper.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 298, 23 L. ed. 898, 900, 7 Am. Neg. Cas. 331; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 571, 580, 37 L. ed. 284, 288, 13 Sup. Ct. Rep. 557.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit for personal injuries suffered by the plaintiff (defendant in error) while acting as fireman upon and in charge of a defective engine that had been picked up by a train. He had been kept on duty for more than [343] sixteen hours, and, as we take it for present purposes, contrary to the act of March 4, 1907, chap. 2939, § 2, 34 Stat. at L. 1415, 1416, Comp. Stat. 1913, §§ 8677, 8678, without the justifications or excuses allowed in § 3. While about to do some oiling according to directions, he fell from the running board of the pilot and his leg was cut off. There was evidence of negligence on the part of the railroad, but the defendant set up that the plaintiff was

guilty of contributory negligence and assumed the risk. The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defense.

The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: "If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's pleas of contributory negligence and assumed risk, as then the plaintiff can in no way be held to have been guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in any way be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt."

The last half of this instruction was excepted to in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the matter [344] of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the hours of labor act itself, but the subsequent employers' liability act of April 22, 1908, chap. 149, §§ 3, 4, 35 Stat. at L. 65, 66, Comp. Stat. 1913, §§ 8657, 8659, 8660. The latter has that operation only when the breach of the law contributes to the injury. St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 279, 280, 57 L. ed. 1179, 1187, 33 Sup. Ct. Rep. 858. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case.

Judgment reversed.

Mr. Justice Day and Mr. Justice Pitney dissent.

UNITED STATES, Appt.,
v.
SIMON NORMILE, John A. Fastabend, and William F. McGregor, Late Partners as Normile, Fastabend, & McGregor. (No. 83.)

SIMON NORMILE, John A. Fastabend, and William F. McGregor, Late Partners as Normile, Fastabend, & McGregor, Appts.,
v.
UNITED STATES. (No. 84.)

(See S. C. Reporter's ed. 344–349.)

United States — contracts — increased cost — temporary structures.

1. The cost of the last two of three unsuccessful temporary dams erected by the contractor for a public work at a place designated by the government engineer in charge, and the charges for superintendence during the time consumed in constructing them, are not chargeable to the United States, where the contract was silent as to temporary structures, and the site designated by the engineer seems to have been as good as any other, the final success on a new site having been achieved by new methods, not by change of place, there being nothing to show that the new methods could not earlier have been adopted.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

United States — contracts — extra expense — delay.

2. The increased cost of the necessary labor and materials for a public work, due to the breaking out of the war of 1898 with Spain, is not chargeable to the United States because of an unexplained delay on its part in notifying the contractors that they could begin work, where the notice was given in time to begin work as early as contemplated by the specifications, and the prices had advanced before the supposed neglect on the part of the government began, and the contractors had not the facilities to accumulate materials, even if they had been notified at an earlier date.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

[Nos. 83 and 84.]

Argued December 3, 1915. Decided December 13, 1915.

CROSS APPEALS from the Court of Claims to review a judgment allowing in part a claim for extra expense incurred in carrying out a contract for a public work. Judgment reversed and petition dismissed.

See same case below, 49 Ct. Cl. 73.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause, and, with Mr. Philip M. Ashford, filed a brief for the United States.

Messrs. Frank Carter Pope and Benjamin Carter argued the cause and filed a brief for Simon Normile et al.:

In determining the rights of parties under a contract, a court will give great deference to the practical interpretation which has been put on it, in the course of its performance, by the parties themselves.

District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; Simpson v. United States, 172 U. S. 372, 382, 43 L. ed. 482, 485, 19 Sup. Ct. Rep. 212; Topliff v. Topliff, 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057; Fitzgerald v. First Nat. Bank, 52 C. C. A. 276, 114 Fed. 474.

The United States, in letting a construction contract, warrants the adequacy of the plan and the competence and diligence of its agents in the performance of all duties imposed upon them by the contract.

Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212; Christie v. United States, 237 U. S. 234, 59 L. ed. 933, 35 Sup. Ct. Rep. 565; United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117; Moore v. United States, 46 Ct. Cl. 139; Spearin v. United States, Ct. Cl. not reported; Wyandotte & D. R. Co. v. King Bridge Co. 40 C. C. A. 325, 100 Fed. 197.

One party to a contract, having prevented performance by the other within the stipulated time, is not relieved from liability by anything done in the enforcement or discharge of provisions in the contract, or of other agreements supplemental thereto, by which liquidated damages were to be paid by such other party in the event of delay chargeable to him or purely accidental.

Maryland Steel Co. v. United States, 235 U. S. 451, 59 L. ed. 312, 35 Sup. Ct. Rep. 190; United States v. United Engineering & Contracting Co. 234 U. S. 236, 58 L. ed. 1294, 34 Sup. Ct. Rep. 843.

One party, who has prevented the performance of a contract, cannot be heard to say, in defense of a claim against him for damages, that the other party should have gone on and done those things, unless in the situation which actually arose, that would have been required for performance of the contract on his part.

Hinckley v. Pittsburgh Bessemer Steel Co. 121 U. S. 264, 30 L. ed. 967, 7 Sup. Ct. Rep. 875.

When one party to a contract has prevented performance thereof in accordance with its terms, and plans made by the other party for obtaining his materials have been upset thereby, the innocent party is not bound, upon the termination of the delay, to buy forthwith the entire supply of materials which will be required,—and least of all where, by reason of the delay, conditions have so changed that the materials cannot be used as rapidly as was intended by the contract.

Kelly & Kelly v. United States, 31 Ct. Cl. 361.

[346] Mr. Justice Holmes delivered the opinion of the court.

This is a claim for extra expenses incurred in performing a contract to build a dam and certain accessories on the Yamhill river, Oregon. The contract was made on March 11, 1898, and required the claimants to begin work as prescribed by ¶ 41 of the specifications, to complete the keeper's dwelling, etc., within sixty days from notification, and the whole work before December 31, 1898. Paragraph 41 of the specifications stated that the sites for the construction had not yet been purchased and that no work would be begun until they were secured. It then provided that within ten days after notification that the sites had been secured and the contract had been approved, the contractor "must proceed with the work in a vigorous manner; he must complete the keeper's dwelling, woodshed, walks, fences, etc., within sixty days from date of notification, and the whole contract on or before December 31, 1898." It added that because of the spring rise of the Willamette, etc., it was probable that work on the lock and dam could not be begun before June at the earliest; and that the date of completion had been set because it was desired that all work should be finished during one low-water season,—the meaning of which was known by the claimants. Authority to purchase was asked by telegraph on March 10 and granted on March 15. The abstract of title and deeds were sent to the Chief of Engineers on April 9 and 14, and the contractors, who had given notice of their readiness to begin, were told on April 9 that the deeds had been sent on. On April 29 a telegram was received showing encumbrances to be removed before the deeds were accepted. On May 13 the attorney for the United States approved the title. On May 12 the contractors began work on the keeper's dwelling, etc., and on June 14 were given the notification to proceed.

[347] Before June 14, 1898, considerable work had been done, material had been as-

sembled, and labor employed. The war with Spain began on April 21, 1898, raising the price of labor and materials. The increased cost is found, but it is found also that this increase was not shown to be due to any breach of contract by the United States, and that the claimants did not have room and facilities for storing large consignments of materials. The claimants, however, insist upon this item being allowed, and make it the ground of their cross appeal.

In 1899, after a lock wall had been built at right angles with the line of the wing dam and parallel to the line of the stream, it became necessary to divert the water from the line of the wing dam in order that the latter might be built. This had to be done by sending the water through the lock chamber, and to that end it was necessary to build a temporary dam. The claimants had no civil engineer, although they commanded some experience. They asked the local engineer in charge for the United States where the temporary dam should be placed. He indicated a site near the head of the lock, where the river was narrow, as the only suitable place, and the claimants started upon the dam in June. The up-stream end of the lock chamber was closed with a lift-wall, and to turn the water through the chamber it had to be raised 16 feet. The bottom of the river was inclined to disintegrate, and when the water was raised to 12 feet the dam broke. Two more attempts were made with the same result. Early in 1900 the claimants applied to the local engineer for leave to change the place and to cut a hole through the lift-wall, which was granted, and the dam was built. The bottom of the river at the new site was similar to that at the old, and it would not have been possible to construct the dam there without the relief afforded by the hole. The court of claims allowed the cost of the last two temporary dams and the United States appeals.

[348] The specifications provided that if the time for performance should be extended, all expenses for inspection and superintendence should be deducted. The claimants requested an extension of time, not suggesting violence of the elements, contemplated in the contract as a ground, or fault of the United States. The extension was granted with a warning that it would not absolve them from the above expenses. The court of claims allowed the claimants the expenses accrued during the time of building the second and third temporary dams, from which allowance also the United States appeals.

Taking up first the allowance for the unsuccessful temporary dams and charges for superintendence during the time consumed in constructing them, we are of opinion that the United States is entitled to prevail in its appeal. The contract was silent as to them, and did not embrace them. A contract to produce a result does not bring the means employed to provide it into the contract. Bacon v. Parker, 137 Mass. 309, 311; United States v. O'Brien, 220 U. S. 321, 327, 55 L. ed. 481, 484, 31 Sup. Ct. Rep. 406. They remain under the control of the contractors alone. The claimants rely upon specification 40: "The lines and levels for this work will be established on the ground by the engineers, and the contractor must conform and keep thereto." But this refers to the work, the permanent structure, not to the transitory instrumentality used in building it. While the engineer in answer to the claimants pointed out a place for the temporary dam, it does not appear to have been ordered to be placed there. Moreover, the site seems to have been as good as any other, the final success having been achieved by cutting a hole in the lift-wall of the lock chamber, not by the change of place. There is nothing to show that the claimants could not have left this opening, or have obtained leave to make it earlier. Leave was granted as soon as asked. The mode of constructing the temporary dam was wholly the claimants' affair.

[349] Upon the cross appeal also we are of opinion that the government is in the right. If it had attempted to hold the claimants to the time originally mentioned in the contract, the question might be different, but we see no ground for a claim on their part to hold the United States liable for delay. Specification 41, the substance of which has been stated, is inconsistent with the implication of an undertaking that the claimants shall be notified to begin within any particular time. The findings hardly warrant the statement in the opinion that the delay from May 13 to June 14 was chargeable to the defendant's neglect. It simply is left unexplained. The notice was given in time to begin work on the lock and dam as early as was contemplated by specification 41. But further, as is pointed out by the court below, the prices had advanced before the supposed neglect began,—not to speak of the finding that the claimants had not the facilities to accumulate material even if they had been notified at an earlier date.

Judgment reversed.

Petition dismissed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
H. W. OTOS.

(See S. C. Reporter's ed. 349-352.)

Master and servant — safety appliances — employers' liability — switching to repair track.

1. A car in an interstate train which was marked for repairs and was to be switched to the repair track before going farther was not withdrawn from interstate commerce so as to relieve the carrier from liability, under the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8606), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), to a switch foreman engaged in breaking up the train, who was injured in the switching operations because of a defective automatic coupler on such car.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — moving car for repairs.

2. Whether or not the absolute liability imposed upon the carrier, under the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8606), extends to the moving of a car defectively equipped to a place where it may be repaired, the supplementary act of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), unmistakably imports that the liability exists.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — safety appliances — contributory negligence.

3. Contributory negligence of an injured employee is not a defense to an action by him under the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8606), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), if a defective automatic coupler was the proximate cause of the injury.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 429.]

Argued November 30, 1915. Decided December 13, 1915.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of the County of Yellow Medicine, in that state, in favor of plaintiff in an action under the safety appliance and employers' liability acts. Affirmed.

See same case below on first appeal, 128 Minn. 283, 150 N. W. 922; on second appeal, 129 Minn. 523, 151 N. W. 1102.

The facts are stated in the opinion.

Mr. E. C. Lindley argued the cause, and, with Messrs. M. L. Countryman and A. L. Janes, filed a brief for plaintiff in error:

A wrong or tort cannot be founded upon a non-negligent necessary act, performed pursuant to a paramount duty.

Cooley, Torts, 2d ed. 791; Bigelow, Torts, 64; Pollock, Torts, 19; Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334.

A car, even though loaded with interstate commerce, while being taken to a repair track for necessary repairs of defects discovered by inspection in transit, is not engaged in interstate commerce, and such movement is not a violation of the Federal safety appliance law. It is a necessary act, done in compliance with the statutory duty.

Texas & P. R. Co. v. Rigsby, 138 C. C. A. 51, 222 Fed. 221; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617.

Mr. Tom Davis argued the cause, and, with Messrs. Samuel A. Anderson and Ernest A. Michel, filed a brief for defendant in error:

Defendant in error was engaged in interstate commerce.

St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 589, 55 L. ed. 590, 596, 31 Sup. Ct. Rep. 617; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Pederson v. Delaware, L. & W. R. Co. 220 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

The safety appliance act applies to all

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On the liability of a railroad company for injuries to an employee while coupling cars —see notes to Kohn v. McNulta, 37 L. ed. U. S. 150; and Northern P. R. Co. v. Everett, 38 L. ed. U. S. 373.

On the duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473; Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A. (N.S.) 49.

cars and similar vehicles used on any railroad engaged in interstate commerce.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

There is a liability while the car is being removed to the repair track, under the amended statute.

Doherty, Liability of Railroads to Interstate Employees, pp. 299, 308-310; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785.

Mr. Justice Holmes delivered the opinion of the court:

This is an action under the safety appliance act and employers' liability act. The plaintiff (defendant in error) was a switch foreman and was breaking up a train that had come into his state from the west. At the moment when he was hurt he had three cars attached to a switching engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The automatic coupler on the Minneapolis car was out of order, the pin lifter was missing, other repairs were needed, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going further. In the switching operation the plaintiff, being unable to uncouple the Duluth car from the side where the pin lifter was missing without going between the cars, did so while the cars were moving, and was badly hurt. The jury was instructed that [351] if the injuries "were due directly to the absence and imperfect working condition of the coupler in question" the defendant would be liable. The plaintiff got a verdict and judgment was ordered for $30,000, which order was affirmed by the supreme court of the state. 128 Minn. 283, 150 N. W. 922.

The defendant argues that the car had been withdrawn from interstate commerce, and that therefore the act of March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, Comp. Stat. 1913, § 8606, does not apply; that if it does apply, the defendant was required by that act and the supplementary act of April 14, 1910, chap. 160, 36 Stat. at L. 298, Comp. Stat. 1913, § 8617, to remove the car for repairs, and that its effort to comply with the statutes could not constitute a tort; and that the plaintiff was a person intrusted by it with the details of the removal, and could not make it responsible for the mode in which its duty was carried out; that he might have detached the car while it was at rest. But we are of opinion that the argument cannot prevail.

The car was loaded and in fact was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the act of Congress. Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617. As the safety appliance act governed the case, it imposed an absolute liability upon the carrier. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612. The supplementary act of April 14, 1910, chap. 160, § 4, 36 Stat. at L. 299, Comp. Stat. 1913, § 8621, relieves the carrier from the statutory penalties while the car is being hauled to the nearest available point where it can be repaired, but expressly provides that it shall not be construed to relieve from liability for injury to an employee in connection with the hauling of the car. The [352] next section recites that under § 4 the movement of a car with defective equipment may be made within the limits there specified without incurring the penalties, "but shall in all other respects be unlawful." Whether or not the absolute liability created by the earlier act extended to the present case, and we are far from implying that it did not, the act of 1910 imports, with unmistakable iteration, that the liability exists. Under the instructions of the court the jury must have found that the defect was the proximate cause of the injury, as that was made a condition of the plaintiff's right to recover. If so, the fact that the plaintiff's conduct contributed to the result was not a defense. Act of April 22, 1908, chap. 149, §§ 3, 4, 35 Stat. at L. 65, 66, Comp. Stat. 1913, §§ 8657, 8659, 8660. Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168. In view of the statutes, it is unnecessary to consider the limits to the plaintiff's authority by his instructions from above. In any view of the evidence he was not withdrawn from the protection of the acts.

Judgment affirmed.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
BEAUREGARD MAGDALENE KOENNECKE, as Administratrix of the Estate of J. T. KOENNECKE, Deceased.

(See S. C. Reporter's ed. 352–355.)

Constitutional law — due process of law — procedure — refusing continuance.

1. Requiring the trial of an action for the death of an interstate railway employee to proceed after allowing an amendment to the complaint, which already contained an allegation of dependency, so as specifically to bring the case within the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), is not such an abuse of discretion as amounts to a denial of the due process of law guaranteed by U. S. Const., 14th Amend., where defendant's counsel was not willing to say that he was taken by surprise, although stating that he was not prepared on the question of dependency.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — when servant is engaged in interstate commerce.

2. A railway employee injured while acting as switchman was employed in interstate commerce within the meaning of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where he was engaged at the time in distributing the cars from an interstate train, and clearing the track for another interstate train.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Trial — taking case from jury — negligence — assumption of risk.

3. An action against a railway company for the death of a switchman in its yard could not have been taken from the jury on the ground either that there was no negligence, or that the deceased assumed the risk, where the jury might have found that he was killed by a train which had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train, and no warning of its approach.

[For other cases, see Trial, VI. d, in Digest Sup. Ct. 1908.]

[No. 491.]

Argued November 30, 1915. Decided December 13, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas for Richland County, in that state, in favor of plaintiff in an action for death. Affirmed.

See same case below, 101 S. C. 86, 85 S. E. 374.

The facts are stated in the opinion.

Mr. Jo Berry S. Lyles argued the cause and filed a brief for plaintiff in error:

Since the Federal act does not provide the specifications and regulations or rules of conduct in detail, we must look to the common law to fill the gap; but it must be the common law as it exists uniformly throughout the area to which the act applies, and, still seeking uniformity, this can be found only in the common law as construed uniformly in the Federal courts, and not in the varying and different rules and regulations found in the common law as construed by the several states.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

The uniform rule prevailing in the Federal courts is that an employee in a switching yard, primarily purposed and used for the constant switching movement of cars and engines, is charged with notice of such primary purpose, as a man of ordinary intelligence and prudence, and can reasonably expect no special warning of such a movement so long as it is an ordinary and customary one. The primary purpose of such a yard is the ordinary switching of cars and engines, and employees there take their employment for the purpose of assisting in such, not for the purpose of hindering or delaying it. Employees, therefore, must look out for the moving cars and engines, and so long as there is nothing unusual about the movement, those in charge of the cars and engines are not obliged to look out for employees.

Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Nor-

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On *volenti non fit injuria* as a defense to actions by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

folk & W. R. Co. v. Gesswine, 75 C. C. A. 214, 144 Fed. 56; Connelly v. Pennsylvania R. Co. 47 L.R.A.(N.S.) 867, and note, 119 C. C. A. 392, 201 Fed. 54.

Error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration.

Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

There was no evidence that plaintiff's intestate was employed in interstate commerce.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163.

The question is still open for review in this court whether there was any evidence of negligence on the part of the defendant, and whether there was any evidence proximately connecting any breach of duty shown to have existed with the injuries suffered by the intestate.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Even granting that the testimony shows a breach of duty on the part of defendant under some one or more of the allegations of the complaint, there is no evidence to justify the reasonable inference that such breach of duty was a proximate cause of intestate's death. The cause of intestate's death is a matter of pure surmise, and it it is no more reasonable to conjecture that it was caused by the negligence of the defendant in any of the particulars alleged than it is to conjecture that it was caused entirely by the negligence of intestate, by a mistake of judgment on his part, or in any other manner to which the limitless road of conjecture may lead us.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Green v. Southern R. Co. 72 S. C. 398, 52 S. E. 45, 5 Ann. Cas. 165.

The evidence admitted only of the inference that intestate assumed the risks.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 194, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; Southern R. Co. v. Logan, 71 C. C. A. 281, 138 Fed. 725.

When the plaintiff sought to change her complaint by alleging the facts that the defendant carrier was engaged, and the plaintiff's intestate employed, in interstate commerce, she sought absolutely to change her cause of action from one under one statute to one under another and different statute, as these are the two facts making the Federal act applicable.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 482, 56 L. ed. 1171, 1174, 32 Sup. Ct. Rep. 790; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

The theory of the supreme court of South Carolina that the change made by the amendment was merely technical, and not substantial, is contrary to the decisions of this court.

Troxell v. Delaware, L. & W. R. Co. 227 U. S. 435, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 150; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

The defendant was, therefore, forced on to trial on an entirely distinct and separate cause of action, on which it had never been summoned into court, and on which it had had no notice. It was forced to proceed with the trial of this new case over its objection, and its prayer for a reasonable time within which to prepare to meet the new case was denied.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625.

Mr. **Frank G. Tompkins** argued the cause, and, with Messrs. C. S. Monteith and W. H. Cobb, filed a brief for defendant in error:

The allowance of this amendment in no way contravened the Federal act. The court merely gave effect to a rule of local practice.

Birt v. Southern R. Co. 87 S. C. 239, 69 S. E. 233; Shelton v. Southern R. Co. 86 S. C. 98, 67 S. E. 899; Hewlett v. South Bound R. Co. 93 S. C. 76, 76 S. E. 32.

And such practice has the approval of this court.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep.

135, Ann. Cas. 1914B, 134; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

The amendment allowed in the case at bar was clearly within the power and discretion of the court. Such an amendment may be allowed even during the trial, when it does not so materially change the claim or defense as to result in prejudice to the adverse party.

Shelton v. Southern R. Co.; Birt v. Southern R. Co., and Hewlett v. South Bound R. Co., supra; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

Where such amendments are asked for during the trial, if the opposite party would be misled or surprised thereby to his prejudice, it is incumbent upon him to make the fact appear by affidavit or otherwise, to the satisfaction of the court; and, if that is done, the court would either refuse the amendment, or, granting it, would continue the hearing, or impose such other terms and conditions as it might deem necessary to prevent prejudice.

Shelton v. Southern R. Co. supra.

Intestate was engaged in interstate commerce.

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Pederson v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C, 153; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

The engine that killed deceased was not engaged in an ordinary or customary switch or intra-yard movement, but was engaged in a train movement over main line tracks, which movement had not been completed, and the movement was not and could not be made with the freedom which is usual in an intra-yard movement.

United States v. Chicago, B. & Q. R. Co. 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; United States v. Erie R. Co. 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621.

There was ample testimony offered in support of every allegation of negligence charged in the complaint, and the case was submitted to the jury under a full charge of the court. The charge was such as has been approved by this court in Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67.

Even if we were to concede, which we by no means do, that the testimony offered in support of the allegations of negligence in the complaint was meager, this court should not dismiss the case.

American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Myers v. Pittsburgh Coal Co. 233 U. S. 184, 58 L. ed. 906, 34 Sup. Ct. Rep. 559.

A direction of a verdict was not warranted and would have been improper.

McGovern v. Philadelphia & R. R. Co. supra.

The contention advanced by the plaintiff in error to the effect that the question of dependency was not an issue, under the state law, is erroneous. It is true that recovery under the state law can be had in the absence of evidence showing pecuniary loss, but where there is no evidence of pecuniary loss, it is the duty of the court to instruct the jury not to consider pecuniary loss as an element of damage.

Barksdale v. Seaboard Air Line R. Co. 76 S. C. 183, 56 S. E. 906.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action brought by the defendant in error for causing the death of her intestate, J. T. Koennecke. That latter was run over by a train of the plaintiff in error (the defendant) while acting as switchman in the defendant's yard at Cayce, South Carolina. The declaration alleged reckless negligence, and set out that the wife and four children named were the only heirs and distributees of the deceased, that they were dependent upon him for support, and that they had suffered damage to the amount of $75,000. There was a statute in South Carolina similar to Lord Campbell's act and allowing exemplary damages in the case alleged. In view of testimony brought out on cross-examination of the plaintiff's witnesses the plaintiff [354] asked leave to amend so as specifically to bring the case under the employers' liability act of Congress, of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, the declaration as it stood not disclosing in terms under which statute the action was brought. If it were read as manifestly demanding exemplary damages, that would point to the state law, but the allegation of dependence was relevant only under the act of Congress. The amendment was allowed over a denial of the power of the court to allow it, which, however, is not argued here. Central Vermont R. Co. v. White, 238 U. S. 507, 59 L.

ed. 1433, 35 Sup. Ct. Rep. 865; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134. The defendant then objected to the trial going on. The court left it to the counsel to say whether he was taken by surprise, and, the counsel not being willing to say so, although saying that he was not prepared on the question of dependency, ordered the trial to proceed. It was alleged as an error that the requirement was contrary to the 14th Amendment. The other errors alleged concerned the sufficiency of the evidence said to bring the case within the act of Congress and also the evidence touching the questions of negligence and assumption of risk. The plaintiff got a verdict for $22,500, and the supreme court of the state sustained the judgment. 101 S. C. 86, 85 S. E. 374.

There is nothing to show that the trial court exceeded its discretionary power in allowing the trial to go on,—still less that there was such an arbitrary requirement as to amount to a denial of due process of law within the 14th Amendment. The court well may have considered that the defendant was endeavoring to get a technical advantage, as it had a right to, but that it would suffer no wrong. The cause of action arose under a different law by the amendment, but the facts constituting the tort were the same, whichever law gave them that effect, and the court was warranted in thinking that on the matter of dependency there was no surprise.

[355] Next it is urged that there was no evidence that the deceased was employed in interstate commerce. Upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute, and involving no new principle, we confine ourselves to a summary statement of results. The deceased was engaged in distributing the cars from an interstate train and clearing the track for another interstate train. We see no ground for dispute upon this point. Illinois C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163. The suggestion that, the train that had come in being a local train, it might have dropped all the cars that came from outside the state and taken up others, appears to us to present too remote a possibility to warrant withdrawing the case from the jury. See New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780.

We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its argument and in its briefs, we are of opinion that the judgment should be affirmed.

Judgment affirmed.

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[356] THOMAS CHRISTIANSON, Plff. in Err.,
v.
COUNTY OF KING.

(See S. C. Reporter's ed. 356-373.)

Appeal — from circuit court of appeals — diverse citizenship — Federal question presented by amended bill.

1. The jurisdiction of a Federal circuit court of appeals is not final where it sufficiently appears from the amended bill that jurisdiction below did not depend solely upon the citizenship of the respective par-

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605; and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

On the power of Congress over territories—see note to First Nat. Bank v. Yankton County, 25 L. ed. U. S. 1046.

As to whether judicial proceeding is necessary to effect escheat—see note to Louisville School Board v. King, 15 L.R.A.(N.S.) 379.

As to escheat, generally—see notes to American Mortg. Co. v. Tennille, 12 L.R.A. 529; and Hamilton v. Brown, 40 L. ed. U. S. 691.

On conclusiveness of judgments, generally, see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

ties, but that the controversy involved, with other questions, the construction of an act of Congress prescribing the authority of a territorial legislature.

[For other cases, see Appeal and Error, III. d, 2, b, in Digest Sup. Ct. 1908.]

Territories — legislative power — escheat.

2. To provide for escheat to the county on the death of an owner in fee without heirs, as was done by Wash. Laws 1862–63, p. 262, was within the legislative power of the territorial legislature, which was defined by the Washington organic act of March 2, 1853 (10 Stat. at L. 172, chap. 90, Comp. Stat. 1913, § 3438), § 6, as extending to "all rightful subjects of legislation," not inconsistent with the Federal Constitution and laws, notwithstanding the further provision of that section that "no law shall be passed interfering with the primary disposal of the soil."

[For other cases, see Territories, II., in Digest Sup. Ct. 1908.]

Statutes — entitling — expression of subject — plurality of subjects.

3. The provisions of Wash. Laws 1862–63, p. 262, for escheat to the county on the death of an owner in fee without heirs, have "proper relation" to other matters embraced in the statute, and are adequately "expressed in the title," within the meaning of the Washington organic act of March 2, 1853 (10 Stat. at L. 172, chap. 90, Comp. Stat. 1913, § 3425), § 6, where the title of the act was "An Act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory," and it covered the whole subject of probate practice, of wills, of descent, and of distribution.

[For other cases, see Statutes, I. e, in Digest Sup. Ct. 1908.]

Territories — legislative powers — escheat.

4. The Washington territorial legislature having authority under the organic act of March 2, 1853 (10 Stat. at L. 172, chap. 90, Comp. Stat. 1913, § 3425), § 6, to provide for escheat on failure of heirs, could suitably provide as to the tribunal which should have jurisdiction and the procedure for determining whether the rule was applicable in a particular case.

[For other cases, see Territories, II., in Digest Sup. Ct. 1908.]

Probate courts — jurisdiction — escheat.

5. A probate court having power under Wash. Laws 1862–63, p. 193, to determine the interests of the heirs of a decedent in the real estate to be distributed, had also the power to determine whether there were heirs, and if it found that there were none, to decree an escheat to the county, under a provision of that act which made such escheat on failure of heirs a part of the scheme of distribution as therein defined.

[For other cases, see Courts, II. b, 2, in Digest Sup. Ct. 1908.]

Executors and administrators — appointment — collateral attack.

6. The appointment of an administrator by a probate court having jurisdiction over the subject-matter is not subject to collateral attack because of any informality in the petition for his appointment.

[For other cases, see Executors and Administrators, II. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — escheat.

7. Property is not taken without due process of law, contrary to U. S. Const., 14th Amend., by a decree of a probate court, made under statutory authority, escheating to the county, after appropriate notice, the real property of an intestate who was found to have left no heirs.

[For other cases, see Constitutional Law, 441–522, in Digest Sup. Ct. 1908.]

Judgment — conclusiveness — collateral attack — probate court.

8. The decree of a probate court of competent jurisdiction, made under statutory authority, escheating to the county, after appropriate notice, the real property of an intestate who was found to have left no heirs, is not open to collateral attack by a person claiming title as heir and grantee of other heirs.

[For other cases, see Judgment, 382–391, in Digest Sup. Ct. 1908.]

[No. 67.]

Argued November 9 and 10, 1915. Decided December 13, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of Washington, Northern Division, sustaining a demurrer to, and dismissing, the complaint in an action to recover land and to quiet title. Affirmed.

See same case below, 122 C. C. A. 188, 203 Fed. 894.

Statement by Mr. Justice Hughes:

This is a suit, brought in 1911, to recover lands in the city of Seattle, county of King, state of Washington, and to quiet title. See Rem. & Bal. Code (Wash.) § 785. The plaintiff claimed title as heir, and grantee of other heirs, of Lars Torgerson Grotnes, who died intestate in the county of King, territory of Washington, in March, 1865. The defendant, the county of King, succeeded the county of King of the territory, which had control of the property pursuant to a decree of escheat which was passed by the probate court in May, 1869. The legislature of the territory had provided that in case of the death of an intestate leaving no kindred, his estate should escheat to the county in which it was situated. Washington Laws 1862–63, p. 262. [358] Demurrer was filed to the amended complaint on the grounds (among others) that the complaint did not state facts sufficient to constitute a cause of action, and that the action had not been com-

menced within the time limited by law. The demurrer was sustained and judgment dismissing the complaint was affirmed by the court of appeals. 122 C. C. A. 188, 203 Fed. 894.

After alleging title in fee in Lars Torgerson Grotnes, and the fact that he had acquired the land under the name of John Thompson (having changed his name to conceal his identity) through certain mesne conveyances from the grantee of the United States, the amended complaint set forth in detail the proceedings in the probate court, which may be summarized as follows: That on March 26, 1865, the probate court, upon an informal request of H. L. Yesler and J. Williamson, assumed to appoint Daniel Bagley administrator of the estate of John Thompson, deceased, the order reciting that the decedent had died in the county, intestate, leaving property subject to administration; that after certain intermediate proceedings the administrator presented his petition on February 12, 1869, stating that no heirs at law had been found after diligent search, and praying that the administrator might be discharged and that after due notice the estate might be turned over to the county or such further order made as might be meet; and that on May 26, 1869, after publication of notice for four weeks in a local newspaper, a final decree of distribution was entered which recited the proceedings and continued as follows:

"That said decedent died intestate in the county of King, Washington territory, on the — day of March, A. D. 1865, leaving no heirs surviving him;

. . . . . .

"There being no heirs of said decedent, that the entire estate escheat to the county of King, in Washington territory.

[359] "Now on this 26th day of May, A. D. 1869, on motion of said Daniel Bagley, administrator of said estate, and no exceptions or objections being filed or made by any person interested in the said estate or otherwise;

"It is hereby ordered, adjudged, and decreed: that all the acts and proceedings of said administrator, as reported by this court and as appearing upon the records thereof, be and the same are hereby approved and confirmed; and that after deducting said estimated expenses of closing the administration, the residue of said estate of John Thompson, deceased, not heretofore distributed, hereinafter particularly described, and now remaining in the hands of said administrator, and any other property not now known or discovered which may belong to the said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, to wit: The entire estate to the county of King, in Washington territory.

. . . . . .

"The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged, and decreed, to wit:

"1st. Cash, to wit: $343.83 gold coin.

"2d. And real estate, to wit: One hundred and sixty acres of land on Duwamish river, in King county, W. T., more particularly described in a certain deed from Joseph Williamson and William Greenfield to John Thompson, dated January 19th, A. D. 1865, and recorded in Volume 1 of the records of King county, W. T., on pages 458, 459, and 460.

"Third. A lease of said land to John Martin, dated March 5th, 1866, on which the entire rent reserved remains due and unpaid.

"Dated May 26th, 1869."

It was alleged that this decree was null and void, that the probate court was wholly without jurisdiction to pass [360] upon the title to the land described or to declare it escheated; that all claims to the land by defendant, and all its acts relating thereto, had been under this assailed decree, and that the defendant had no instrument or judgment purporting to evidence any title in it; that neither the defendant nor any other authority had instituted any suit or proceeding before any tribunal for the purpose of having an escheat declared or its claim of title confirmed. The acts of the county in relation to the land were set forth, the tracts involved being described as the "King County Farm," "King County Hospital Grounds," "King County Addition to the City of Seattle," "King County 2d Addition to the City of Seattle." The plaintiff did not seek to recover the lands which had been appropriated for railroad rights of way or highways, or that portion which had been sold to innocent purchasers, and it was also conceded that the county might retain the buildings and tangible betterments which it had placed upon the land, as stated.

At the outset, after alleging that the plaintiff was a subject of the King of Norway and that the matter in dispute exceeded in value the sum of $300,000, the amended complaint set forth that the controversy involved the construction of Amendments 5 and 14 of the Constitution of the United States, and of §§ 1851, 1907, and 1924 of the Revised Statutes of the United States (Comp. Stat. 1913, § 3438), relating to the territory of Washington.

It was further stated that the heirs of the decedent had no knowledge of his whereabouts or death until three years prior to

the beginning of the action, and that the heirs, and particularly the plaintiff, had been diligent since receiving this information in searching for the proofs of the decedent's identity and of their relationship.

Mr. Edward Judd argued the cause, and, with Messrs. Livingston B. Stedman and S. S. Langland, filed a brief for plaintiff in error:

Under our system of government all property that escheats in a territory goes to the United States.

Williams v. Wilson, Mart. & Y. 248; Etheridge v. Doe, 18 Ala. 565; Territory v. Lee, 2 Mont. 124, 6 Mor. Min. Rep. 248; Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792.

The organic law of the territory conveyed to it no property rights of the United States.

36 Cyc. 1171, 1177.

The territorial act giving escheated property to its counties trenched upon the primary disposal of the soil in a manner forbidden by the organic act.

Territory v. Lee, 2 Mont. 124, 6 Mor. Min. Rep. 248; King v. Ware, 53 Iowa, 97, 4 N. W. 858.

The territorial act giving escheated property to its counties had not, under the organic law, a title broad enough to cover the subject-matter.

Bradley Engineering & Mach. Co. v. Muzzy, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072; Harland v. Territory, 3 Wash. Terr. 131, 13 Pac. 453.

The sovereign does not take escheated property as a successor to the decedent. For failure of heirs the title of the decedent ceases and terminates; the original title of the sovereign revives, and the title of the sovereign is based upon its original ownership, and not upon the ownership of the decedent.

State v. Ames, 23 La. Ann. 71; Re Miner, 143 Cal. 194, 76 Pac. 968.

It is necessary to have a proceeding of "office found" before title to escheated lands can revest in the sovereign.

People ex rel. Atty. Gen. v. Roach, 76 Cal. 294, 18 Pac. 407; Re Miner, supra; Wilbur v. Tobey, 16 Pick. 180; Doe ex dem. Hayne v. Redfern, 12 East, 96; Hall v. Gittings, 2 Harr. & J. 125; Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 520; Jackson ex dem. Smith v. Adams, 7 Wend. 367; People v. Folsom, 5 Cal. 379; Peterkin v. Inloes, 4 Md. 175; University of North Carolina v. Harrison, 90 N. C. 385; Catham v. State, 2 Head, 553; People v. Fulton F. Ins. Co. 25 Wend. 218; Hammond v. Inloes, 4 Md. 138; Wiederanders v. State, 64 Tex. 133; Hamilton v. Brown, 161 U. S. 261, 40 L. ed. 694, 16 Sup. Ct. Rep. 585.

The territorial act defining the jurisdiction of the probate court did not cover escheats.

Stewart v. Lohr, 1 Wash. 343, 22 Am. St. Rep. 150, 25 Pac. 457; Re Alfstad, 27 Wash. 176, 67 Pac. 593; Re Belt, 29 Wash. 540, 92 Am. St. Rep. 916, 70 Pac. 74; Harris v. M'Kee, 4 Mart. N. S. 485.

The proceedings were insufficient, under the territorial laws, to give jurisdiction.

18 Cyc. 122.

The probate proceedings were not due process of law.

8 Cyc. 1080; Hamilton v. Brown, 161 U. S. 261, 40 L. ed. 694, 16 Sup. Ct. Rep. 585.

Mr. Robert H. Evans argued the cause, and, with Messrs. Alfred H. Lundin and John F. Murphy, filed a brief for defendant in error:

So far as the original complaint is concerned, jurisdiction in the district court depended entirely upon the diverse citizenship of the parties.

Hanford v. Davies, 163 U. S. 274, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

A case cannot be said to arise under the Constitution of the United States, or be controlled by Federal statute, unless its decision turns upon the construction to be given thereto.

Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476.

It must affirmatively appear from plaintiff's pleadings that the case is one substantially and really dependent upon the construction to be given the particular section of the Constitution or the Federal statute, and this must be asserted by plaintiff as an issue of fact in his pleadings in logical form, such as is required by the rules of good pleading.

Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974.

Plaintiff in error, by electing to carry his case for review to the circuit court of appeals, instead of directly to this court, if the case is really one involving the Constitution of the United States, has exhausted his right to have the decision of the district court against him reviewed on appeal, and, as a result thereof, this court is without jurisdiction.

Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 98, 57 L. ed. 1409, 33 Sup. Ct. Rep. 1003; Macfadden v. United States, 213 U. S. 291, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

Congress never disapproved any of the probate acts of Washington territory. They

are to be deemed valid unless so disapproved.

Clinton v. Englebrecht, 13 Wall. 434, 20 L. ed. 659.

The claim that the territorial legislature was without power to legislate upon the subject of escheats is based upon the restriction that no law should be passed interfering with the primary disposal of the soil. The county claims that this restriction has no possible application to the case. It was only intended by Congress to prevent the territorial legislature from passing laws interfering with the authority of Congress to direct the manner in which the public domain of the United States should be disposed of by the government.

Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Topeka Commercial Security Co. v. McPherson, 7 Okla. 332, 54 Pac. 489; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

Congress intended to, and did, leave the subject-matter of escheat to the several states and territories, and escheated property must go where the local statutes direct.

Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585.

The supreme court of Washington, as well as the local Federal courts, have recognized the validity of the territorial statutes of 1862, and the power of the territorial assembly to enact laws dealing with escheats.

Territory v. Klee, 1 Wash. 183, 23 Pac. 417; Pacific Bank v. Hannah, 23 C. C. A. 522, 59 U. S. App. 457, 90 Fed. 72; Re Sullivan, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71.

There is nothing in the organic act to prevent the territorial assembly from conferring jurisdiction over escheats or the distribution of estates of deceased persons in case of failure of kindred. The organic act places no restriction upon the territorial legislature from conferring the ordinary jurisdiction and powers upon its probate courts.

Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383.

Plaintiff in error contends that before the estate could be escheated, it was necessary, under the law, for the public authorities to bring some proceeding in the nature of an inquest of office, or office found, in some court other than the probate court. Such may have been the method pursued at common law, but whether this or some other method shall be resorted to in this country depends wholly upon the statutes of the particular state or territory where the property is situated.

Hamilton v. Brown, supra.

No one can claim a vested right before death of the intestate in the laws controlling the descent and distribution of property, and such laws and regulations are subject, like rules of the common law, to legislative change at any time.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

No different effect can be given to the decrees of probate courts, made within this jurisdiction, from that given to the decrees of other courts of record. Both are conclusive and binding.

Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 22 L. ed. 599.

Such effect has been given to the decrees of the probate courts of the state of Washington by the supreme court of the state.

Re Ostlund, 57 Wash. 359, 135 Am. St. Rep. 990, 106 Pac. 1116; Magee v. Big Bend Land Co. 51 Wash. 406, 99 Pac. 16.

Mr. Justice Hughes, after making the foregoing statement, delivered the opinion of the court:

The motion to dismiss must be denied. It sufficiently appears from the amended bill that jurisdiction did not depend solely upon the citizenship of the respective [362] parties, but that the controversy involved, with other questions, the construction of the act of Congress prescribing the authority of the territorial legislature. In this view, the decision of the circuit court of appeals is not final. Vicksburg v. Henson, 231 U. S. 259, 267, 58 L. ed. 209, 215, 34 Sup. Ct. Rep. 95.

The plaintiff in error contends that the land in question did not escheat to the county of King, territory of Washington, for the reasons (1) that the territory was not a sovereign, but a municipal corporation; (2) that the organic law of the territory conveyed to it no property rights of the United States; (3) that the act of the territorial legislature providing for escheat to counties was forbidden by the organic law; (4) that this legislative act was invalid because its title was not broad enough to cover the subject-matter; and (5) that there was never any office found.

There is, of course, no dispute as to the sovereignty of the United States over the territory of Washington, or as to the consequent control of Congress. As an organized political division, the territory possessed only the powers which Congress had conferred, and hence the territorial legislature could not provide for escheat unless such provision was within the granted authority. Sere v. Pitot, 6 Cranch, 332, 337, 3 L. ed. 240, 241; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 543, 7 L. ed. 242, 255; First Nat. Bank v. Yankton County, 101 U. S. 129, 133, 25 L. ed. 1046, 1047. The organic act (March 2, 1853, 10 Stat. at L. 172, 175, chap. 90, Comp. Stat. 1913,

§§ 3425, 3438; see Rev. Stat. §§ 1851, 1924, Comp. Stat. 1913, § 3438) provided as follows:

"Sec. 6. . . . That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the [363] laws passed by the legislative assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect: Provided, That nothing in this act shall be construed to give power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said territory; nor shall said legislative assembly authorize the issue of any obligation, scrip, or evidence of debt, by said territory, in any mode or manner whatever, except certificates for service to said territory. And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

This manifestly was not a grant of the property of the United States, but it was an authority which extended to "all rightful subjects" of legislation save as it was limited by the essential requirement of conformity to the Constitution and laws of the United States and by the restrictions imposed. The prohibition against interference "with the primary disposal of the soil" defined a limitation which had been established from the beginning in organizing [364] territorial governments. This provision was found in the ordinance passed by the Congress of the Confederation, April 23, 1784, for the government of the Western Territory (Amer. Cong. Pub. Journals, vol. 4, 1782–1788, p. 379), and it was re-enacted in the superseding ordinance of 1787 (art. 4, 1 Stat. at L. 52, note). It was incorporated either by appropriate reference[1] or by express statement[2] in the organic acts of the territories, and it was continued in substantially the same words in many of the enabling acts under which states were admitted to the Union.[3] For example, when Wisconsin was admitted, it was stipulated as a condition (9 Stat. at L. 58, chap. 89) that the state should "never interfere with the primary disposal of the soil within the same by the United States," —a condition which had its exact equivalent in the provision of other enabling acts that the states should "never interfere with the primary disposal of the public lands" lying within them (Arkansas, 5 Stat. at L. 51, chap. 100; Iowa, Florida, 5 Stat. at L. 743, chap. 48; California, 9 Stat. at L. 452, chap. 50). The restriction had reference to the disposition of the public lands of the United States, and neither as to state nor as to territory did these words purport to limit the legislative power, otherwise duly exercised, where property had passed into private ownership and there was no interference with the exclusive authority of Congress in dealing with the public domain. Carroll v. Safford, 3 How. 441, 461, 11 L. ed. 671, 680; Witherspoon v. Duncan, 4 Wall. 210, 218, 18 L. ed. 339, 342; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 164, 165, 29 L. ed. 845, 849, 850, 6 Sup. Ct. Rep. 670; [365] Crane v. Reeder, 21 Mich. 24, 74, 4 Am. Rep. 430; Oury v. Goodwin, 3 Ariz. 255, 260, 26 Pac. 376; Topeka Commercial Secur. Co. v. McPherson, 7 Okla. 332, 338–340, 54 Pac. 489. So far as "the primary disposal of the soil" was concerned, provision for escheat on the death of

[1] Territory south of the Ohio, 1 Stat. at L. 123, chap. 14; Mississippi, 1 Stat. at L. 549, chap. 28; Indiana, 2 Stat. at L. 58, chap. 41; Michigan, 2 Stat. at L. 309, chap. 5; Illinois, 2 Stat. at L. 514, chap. 13; Alabama, 3 Stat. at L. 371, chap. 59.

[2] E. g. Territory of Orleans, 2 Stat. at L. 284, chap. 38; Missouri, 2 Stat. at L. 747, chap. 95; Florida, 3 Stat. at L. 655, chap. 13; Wisconsin, 5 Stat. at L. 13, chap. 54; Iowa, 5 Stat. at L. 237, chap. 96; Oregon, 9 Stat. at L. 325, chap. 177; Minnesota, 9 Stat. at L. 405, chap. 121; New Mexico, 9 Stat. at L. 449, chap. 49; Utah, 9 Stat. at L. 454, chap. 51.

[3] E. g. Missouri, 3 Stat. at L. 547, chap. 22; Arkansas, 5 Stat. at L. 51, chap. 100; Iowa, Florida, 5 Stat. at L. 743, chap. 48; California, 9 Stat. at L. 452, chap. 50; Wisconsin, 9 Stat. at L. 58, chap. 89; Kansas, 12 Stat. at L. 127, chap. 20.

an owner in fee without heirs could not be deemed to be an interference, whether the provision was enacted by a territory or by a state.

The scope of the authority conferred upon territorial governments has frequently been described. Subject to the general scheme of local government defined by the organic act, and the special provisions it contains, and subject also to the right of Congress "to revise, alter, and revoke at its discretion," the local legislature has generally been intrusted "with the enactment of the entire system of municipal law." Hornbuckle v. Toombs, 18 Wall. 648, 655, 21 L. ed. 906, 907. "Rightful subjects" of legislation, except as otherwise provided, included all those subjects upon which legislatures had been accustomed to act. Maynard v. Hill, 125 U. S. 190, 204, 31 L. ed. 654, 656, 8 Sup. Ct. Rep. 723; Clinton v. Englebrecht, 13 Wall. 434, 442, 20 L. ed. 659, 661; Cope v. Cope, 137 U. S. 682, 684, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 604, 41 L. ed. 837, 843, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768. Unquestionably, authority was granted to the territory to legislate with respect to the devolution of real property on the death of the owner. Thus in Cope v. Cope, 137 U. S. 682, 684, 34 L. ed. 832, 833, 11 Sup. Ct. Rep. 222, where the validity of an act of the territorial legislature of Utah permitting inheritance by illegitimate children was sustained, it was said by the court, after referring to the restrictions of the organic act: "With the exceptions noted in this section, the power of the territorial legislature was apparently as plenary as that of the legislature of a state. Maynard v. Hill, 125 U. S. 190, 204, 31 L. ed. 654, 656, 8 Sup. Ct. Rep. 723. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress." Escheat on failure [366] of heirs was a familiar subject of legislation in the American commonwealths. The rule of the common law in this respect, as in others, was subject to modification, and adaptation to local conditions was essentially a matter of legislative policy. In the case of the territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own. The matter, however, remained a "rightful subject" of legislation, and Congress did not except it from the broad grant of legislative power. Assuming that it had authority, the legislative assembly of the territory of Washington at its first session provided in its article on "Descent of Real Estate" that "if the intestate shall leave no kindred, his estate shall escheat to the territory." Statutes of Washington Territory 1854, p. 306. Similar provision was made in the case of personalty. Id. p. 308. In 1860, it was enacted that if the intestate should leave no kindred his real estate should escheat to the county in which it was situated, and his personal estate to the county in which the administration was had. Washington Laws 1859–60, pp. 222, 224. These provisions were re-enacted in the "probate practice act" of 1863. Washington Laws 1862–63, pp. 262, 265. By the Code of 1881, the estate, on failure of heirs, was to escheat to the territory "for the support of the common schools" in the county in which the decedent resided or where the estate was situated. Sec. 3302, Eighth. It is significant that these acts, thus asserting the legislative power from the time of the organization of the territory until it became a state, were never disapproved by Congress.

It is urged that to sustain the legislative authority to enact legislation of this character would be contrary to the principles declared in the case of the Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792. But this contention is without basis. In that case, the suit was brought pursuant to an act of Congress, and it was pointed out that Congress had expressly declared in the earlier act of 1862 that all real [367] estate acquired by the corporation contrary to its provisions should "be forfeited and escheat to the United States." Id. p. 47. Our attention is also directed to statements in the opinions in Williams v. Wilson, Mart. & Y. 248, 252, and Etheridge v. Doe, 18 Ala. 565, 574, but neither of these cases involved the question of the validity of territorial legislation for escheat. In Territory v. Lee, 2 Mont. 124, 6 Mor. Min. Rep. 248, the act of the territory by which it was attempted to forfeit placer mines held by aliens was declared to be invalid, but the controlling consideration was that its provisions were repugnant to the authority and action of Congress with respect to the disposition of the public lands. See also King v. Ware, 53 Iowa, 97, 4 N. W. 858, 860. On the other hand, in Crane v. Reeder, 21 Mich. 24, 76, 4 Am. Rep. 450, the legislation of the territory of Michigan providing for escheat on failure of lawful heirs was found not to be in conflict with the ordinance of 1787 or with any act of Congress. And, so far as the question has been considered with regard to the territory of Washington, the authority of the legislature has been upheld. Pacific Bank v. Hannah, 32 C. C. A. 522, 59 U. S. App. 457, 90 Fed. 72, 79; see Territory v. Klee, 1 Wash. 183, 188, 23 Pac. 417.

It is also objected that the title of the act here involved was not sufficient under the last provision of § 6 of the organic act above quoted. Rev. Stat. § 1924. The statute under which the proceeding was had was entitled, "An act Defining the Jurisdiction and Practice in the Probate Courts of Washington Territory." Washington Laws 1862–63, p. 193. It covered the whole subject of probate practice, of wills, of descent, and of distribution. We are of the opinion that the matter of escheat for failure of heirs did have "proper relation" to the other matters embraced in the statute, and that the object was adequately expressed in the title within the meaning of the organic law. The objection that there was no "office found" is not substantial, save as it may be deemed to [368] raise the question whether there was compliance with the territorial legislation, which we shall presently consider. If the legislature had authority to establish its rule as to escheat, it was also competent for it suitably to provide as to the tribunal which should have jurisdiction, and the procedure for determining whether the rule was applicable in a particular case. Hamilton v. Brown, 161 U. S. 256, 263, 40 L. ed. 691, 695, 16 Sup. Ct. Rep. 585.

Concluding that escheat in the case of death of an owner without heirs was a rightful subject of legislation within the meaning of the organic act,—not inconsistent with the Constitution and laws of the United States, and not embraced within the stated exceptions,—and that the provision in the probate practice act was a valid exercise of the authority thus granted, we are brought to the question as to the jurisdiction of the probate court to enter the decree set forth in the amended complaint, and as to the effect of that decree.

Section 9 of the organic act (10 Stat. at L. 175, chap. 90; see Rev. Stat. § 1907) provided that the "judicial power" of the territory should be vested "in a supreme court, district courts, probate courts, and in justices of the peace," and that the jurisdiction of these courts, including the probate courts, should be "as limited by law." The territorial legislature, having the power to define the jurisdiction of the probate courts, provided in the act which was in force at the time of the proceedings in question that these courts should have original jurisdiction within their respective counties over probate proceedings, the granting of letters testamentary and of administration, and the settlement of accounts of executors and administrators (probate practice act of January 16, 1863, § 3; Washington Laws 1862–63, p. 199). On qualification, an administrator was entitled to the immediate possession of the real estate as well as of the personal estate of the deceased, and to receive the rents and profits until the estate was settled [369] or delivered over by order of the probate court to the heirs or devisees (id. § 165, p. 228). At any time subsequent to the second term of the probate court after the issue of letters, any heir might present his petition to the court, asking for his share of the estate (id. § 309, p. 256); and the act contained the following express provisions for distribution, which related to both real and personal property: "Sec. 317. Upon the settlement of the accounts of the executor, or administrator, or at any subsequent time, upon the application of the executor or administrator, or any heir, devisee or legatee, the court shall proceed to distribute the residue of the estate, if any, among the persons who are by law entitled.

"Sec. 318. In the decree the court shall name the person and the portion, or parts to which each shall be entitled; and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same in possession."

Those "by law entitled" to the real estate were described in § 340 [1] (id. pp. 261, 262), which gave the order of taking [370] according to relationship, and in the last paragraph provided for escheat to the county if there were no kindred. It does not seem to be disputed that under this act, if proceedings in a probate court were properly initiated, that court would have jurisdiction to enter a decree determining the interests of heirs and distributing the real estate to those of the kindred, if any, who were found to be entitled to take as provided in this section. This jurisdiction formerly exer-

[1] This section provided:

"Sec. 340. When any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, as follows:

"1st. In equal shares to his children, and to the issue of any deceased child, by right of representation, and if there be no child of the intestate living at the time of his death, his estate shall descend to all his other lineal descendants; and if all the same descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to representation.

"2d. If he shall leave no issue, his estate shall descend to his father."

(Then follow paragraphs 3d, 4th, 5th, 6th, and 7th with respect to kindred of different degrees.)

"8th. If the intestate shall leave no kindred, his estate shall escheat to the county in which such estate may be situate."

cised by the probate courts of the territory has been continued in the superior courts of the state, sitting in probate. Rem. & Bal. Code (Wash.) §§ 1587 et seq. See Stewart v. Lohr, 1 Wash. 341, 342, 22 Am. St. Rep. 150, 25 Pac. 457; Balch v. Smith, 4 Wash. 497, 500, 502, 30 Pac. 648; Hazelton v. Bogardus, 8 Wash. 102, 103, 35 Pac. 602; Re Sullivan, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71; Re Ostlund, 57 Wash. 359, 364, 366, 135 Am. St. Rep. 990, 106 Pac. 1116. Speaking of the essential nature of this proceeding for distribution, and describing the decree if rendered upon due process of law as final and conclusive, the court said in the case of Re Ostlund, 57 Wash. 359, 364, 366, 135 Am. St. Rep. 990, 106 Pac. 1116: "Its very object and purpose is to judicially determine who takes the property left by the deceased." See also Alaska Bkg. & S. D. Co. v. Noyes, 64 Wash. 672, 676, 117 Pac. 492; McDowell v. Beckham, 72 Wash. 224, 227, 130 Pac. 350; Krohn v. Hirsch, 81 Wash. 222, 226, 142 Pac. 647. But it is contended that the county, asserting escheat, did not claim as successor to the decedent; that the jurisdiction of the probate court ceased as soon as it ascertained that there were no heirs, and that it had no power to declare the escheat and decree distribution to the county. We cannot accede to this view. It is not the case, in a proper sense, of an attempt to determine the title of third persons, that is, of adverse claimants. Stewart v. Lohr, 1 Wash. 341, 342, 22 Am. St. Rep. 150, 25 Pac. 457. The provision for escheat to the county in case the intestate left no kindred was a part of the scheme of distribution defined by the act, and we cannot doubt that not only had the court the power to determine the interests of the [371] heirs in the real estate to be distributed, but it likewise had the power to determine whether there were heirs, and if it was found that there were none, to decree distribution according to the statute.

It is insisted that § 480 of the civil practice act of 1854 (p. 218) prescribed the procedure in relation to escheats; that is, it provided for the filing of an information by the prosecuting attorney in the district court and for proceedings like those in civil action for the recovery of property. This section applied whenever property should "escheat or be forfeited to the territory;" but in 1860, the civil practice act of 1854 was repealed (§ 500, Washington Laws 1859-60, p. 103), and in the provision which corresponded to § 480 of the former act the word "escheat" was struck out (§ 472, p. 98). In the civil practice act of 1863, this provision, without the reference to escheat, was continued (§ 519, Washington Laws 1862-63, p. 192), and it is found in the same form in the Code of 1881 (§ 713). It appears that from 1863 to the year 1907 (see Rem. & Bal. Code, § 1356) there was no provision in the laws of either the territory or the state in relation to escheat, save those found in the probate practice acts; and the act of 1907 did not disturb the jurisdiction of the court which had the administration of the estate. Referring to this, it is stated by the district judge that "the probate courts of the territory and the superior courts of the state have uniformly assumed jurisdiction in this class of cases, and the right of the state or county to appear in the probate proceeding and contest the rights of other claimants has been recognized by the highest court of the state." 196 Fed. p. 799, citing Re Sullivan, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71. See also Helm v. Johnson, 40 Wash. 420, 421, 82 Pac. 402.

Deeming it to be clear that the probate court had jurisdiction to declare an escheat and to distribute the real property to the county when it was found that the intestate had left no kindred (probate practice act 1863, §§ 317, 318, 340, 8th, p. 262), [372] we pass to the remaining question with respect to the proceedings that were actually taken in that court in connection with the property in controversy. It is objected that the petition for the appointment of an administrator was informal; that it did not set forth the jurisdictional facts; that it was signed by the persons not shown to have any interest in the estate, and asked for the appointment of another "stranger;" and that hence the court never acquired jurisdiction, and that its appointment of the administrator and its subsequent proceedings were null and void. But it is not disputed that the real property was within the county. The owner, a resident of that county, had died. The order of appointment recited that he had died intestate. As a court of record (id. § 5, p. 200) having capacity to administer, its jurisdiction over the subject—as has been said by the supreme court of the state of Washington with reference to the probate court of the territory[1]—"carries with it the presumption of the integrity of the judgment, the same as does the judgment of a court of general jurisdiction." Magee v. Big Bend Land Co. 51 Wash. 406, 409, 410, 99 Pac. 16. Despite the informality of the petition, the appointment of the administrator was not void, and, not being void, it is not sub-

[1] The reference is to the probate court of the territory as it existed under the Code of 1881; but its jurisdiction was not essentially different from that of the probate court under the earlier probate practice act.

ject to collateral attack. Ibid.; Grignon v. Astor, 2 How. 319, 339, 11 L. ed. 283, 291; Florentine v. Barton, 2 Wall. 210, 216, 17 L. ed. 783, 785; Comstock v. Crawford, 3 Wall. 396, 403, 18 L. ed. 34, 37; McNitt v. Turner, 16 Wall. 352, 366, 21 L. ed. 341, 348; Veach v. Rice, 131 U. S. 293, 314, 33 L. ed. 163, 170, 9 Sup. Ct. Rep. 730; Simmons v. Saul, 138 U. S. 439, 457, 34 L. ed. 1054, 1062, 11 Sup. Ct. Rep. 369; 4 Bacon, Abr. 96; Pick v. Strong, 26 Minn. 303, 3 N. W. 697; Morgan v. Locke, 28 La. Ann. 806; Riley v. McCord, 24 Mo. 265. It appears that subsequently the probate court, after opportunity had been afforded to discover [373] heirs, entertained a petition of the administrator for final account and distribution. The statutory notice (probate practice act 1863, § 319) was published and on the return day the proceeding was duly continued, and, on hearing, the decree was entered settling the account, finding that there were no heirs, and directing distribution of the real property, as described, to the county of King. This proceeding was essentially in rem. Re Ostlund, supra; Alaska Bkg. & S. D. Co. v. Noyes, 64 Wash. 672, 676, 117 Pac. 492; McDowell v. Beckham, 72 Wash. 224, 227, 130 Pac. 350; Krohn v. Hirsch, 81 Wash. 222, 226, 142 Pac. 647. It was competent for the court to inquire whether there were heirs, and, if there were such, to determine who were entitled to take according to the order prescribed by the statute, and also, if it was found that there were no heirs, to make the distribution to the county, as the statute required. It is apparent that there was no deprivation of property without due process of law. The court, after appropriate notice, did determine that there were no heirs, and its decree, being the act of a court of competent jurisdiction under a valid statute, bound all the world, including the plaintiff in error. It cannot be regarded as open to attack in this action. Grignon v. Astor, 2 How. 319, 339, 11 L. ed. 283, 291; Florentine v. Barton, 2 Wall. 210, 216, 17 L. ed. 783, 785; Caujolle v. Ferrié (Caujolle v. Curtiss) 13 Wall. 465, 474, 20 L. ed. 507, 512; Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 22 L. ed. 599; Simmons v. Saul, 138 U. S. 439, 457, 34 L. ed. 1054, 1062, 11 Sup. Ct. Rep. 369; Goodrich v. Ferris, 214 U. S. 71, 80, 81, 53 L. ed. 914, 918, 919, 29 Sup. Ct. Rep. 580.

As, in this view, the judgment of the court below must be affirmed, we do not find it necessary to consider the questions that have been argued with respect to the application of the statute of limitations.

Judgment affirmed.

[374] ROBERT MOODY & SONS, Appts.,
v.
CENTURY SAVINGS BANK.

(See S. C. Reporter's ed. 374-382.)

Appeal — to circuit court of appeals — bankruptcy case.

1. The appearance of the mortgagees in response to notice of the petition of the mortgagor's trustees in bankruptcy for the marshaling of assets, the sale of the encumbered property, and the application of the proceeds to the payment of all liens thereon, and their assertion of their conflicting rights under their respective mortgages, and their attempt to have them enforced against the proceeds, was the equivalent of an affirmative intervention, and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a "controversy" over which the circuit court of appeals was vested, by the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, Comp. Stat. 1913, § 1229), § 24, with the same appellate jurisdiction which, under the Judicial Code, § 128, it possesses in other cases.

[For other cases, see Appeal and Error, III. c, in Digest Sup. Ct. 1908.]

Marshaling assets — homestead — waiver.

2. The right to invoke the provisions of Iowa Code 1897, § 2976, under which a homestead, even when validly mortgaged, may be sold "only for a deficiency remaining after exhausting all other property" covered by such mortgage, is not strictly personal to the mortgagors, but may be asserted by a junior mortgagee in a proceeding to marshal assets as to the various mortgage liens, notwithstanding the subsequent waiver by the mortgagors of their homestead right.

[For other cases, see Marshaling Assets, in Digest Sup. Ct. 1908.]

[No. 70.]

Argued November 10 and 11, 1915. Decided December 13, 1915.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the District Court for the Southern District of Iowa, apportioning the pro-

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605: and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

On appellate jurisdiction of Federal Supreme Court in bankruptcy cases—see note to James v. Stone, 57 L. ed. U. S. 573.

On marshaling assets for benefit of mortgagor—see note to Newby v. Norton, 47 L.R.A.(N.S.) 302.

ceeds of the sale of a bankrupt's encumbered property. Affirmed.

See same case below, 126 C. C. A. 499, 209 Fed. 775.

The facts are stated in the opinion.

Mr. S. F. Prouty argued the cause, and, with Messrs. George F. Haid and Newton P. Willis, filed a brief for appellants:

The homestead was a defeasible right in the owner of the property, and it remained homestead just so long as the beneficiaries (the family) desired to continue it as such. Any act, therefore, which destroyed the homestead character of the property, also rendered inapplicable the statutory provision with reference thereto. So, abandonment by the selection of another homestead, a conveyance of the absolute fee by the husband and wife, or a waiver in writing of the homestead by husband and wife, would place the property in the same condition as other non-homestead property.

Davis, M. & Co. v. Kelley, 14 Iowa, 523; Godfrey v. Thornton, 46 Wis. 683, 1 N. W. 362.

The statute undoubtedly was enacted for the benefit of the owner of the homestead, and, like other provisions of law, may be waived by him.

Dilger v. Palmer, 60 Iowa, 121, 10 N. W. 763, 14 N. W. 134.

The supreme court of Iowa held in the case of Furman v. Dewell, 35 Iowa, 170, that where a judgment debtor moved from one parcel of land to another after the docketing of the judgment, but both of which parcels he owned before, the lien was enforceable against the old homestead only.

The appellee in the present case is in no position to assert any exemption which might at one time have existed with reference to the homestead property, because its rights are no greater or stronger than would be those of a purchaser of the homestead.

Barker v. Rollins, 30 Iowa, 413.

It was not within the power of the owner either to convey or otherwise confer upon a third person any of the rights acquired by him under the statute. The rights so conferred were purely personal. The statute does not pretend to create an estate, but simply attempts to confer upon the owner an exemption. Burns v. Keas, 21 Iowa, 259) or a valuable right (Sayers v. Childers, 112 Iowa, 680, 84 N. W. 938), for the purpose of securing to him a place of abode safe from eviction by his creditors.

Where a mortgage is executed on the homestead and other real estate, and, before foreclosure, the mortgagor sells and conveys the other real estate and a part of the homestead to others, he cannot insist, in a foreclosure proceeding, that the property so sold and conveyed by him shall be first exhausted before that part of the homestead which he retains shall be sold to pay the mortgage debt. The words "other property" in said section must be limited to property which belongs to the mortgagor at the time of foreclosure.

Dilger v. Palmer, 60 Iowa, 117, 10 N. W. 763, 14 N. W. 134.

Under the doctrine of this case it must be held that the Iowa court recognized the construction for which we contend, that the status of the property at the time of the sale determines the rights and liabilities of the parties, and if at that time all of the property subject to the mortgage is non-exempt property, then the whole of it may be sold, regardless of the statute.

If none of the property of the bankrupt came within the provisions of the Iowa statute, the case was one for the application of the equitable doctrine of marshaling assets; and, as between Johnson and Moody, Moody would have a right to first require the exhausting of the property on which homestead formerly existed by the Johnson mortgage before resorting to the fund or property upon which they had a common lien.

Pom. Eq. Jur. 3d ed. § 396; Re Hobson, 81 Iowa, 392, 11 L.R.A. 255, 46 N. W. 1095.

The right to marshal assets is not a fixed right, and is, therefore, more or less shifting, to adapt itself to subsequent as well as to prior equities.

Green v. Ramage, 18 Ohio, 428, 51 Am. Dec. 458; Richards v. Cowles, 105 Iowa, 741, 75 N. W. 648.

The court of appeals was without jurisdiction to consider the case upon an appeal.

Thompson v. Mauzy, 98 C. C. A. 457, 174 Fed. 614; Snow v. Dalton, 122 C. C. A. 161, 203 Fed. 845; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 291, 49 L. ed. 1051, 1055, 25 Sup. Ct. Rep. 693; Barto v. Stewart, 21 Wash. 605, 59 Pac. 480; Re Whitener, 44 C. C. A. 434, 105 Fed. 186; Holden v. Stratton, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45; Wynkoop, H. C. Co. v. Gaines, 227 U. S. 4, 8, 57 L. ed. 391, 393, 33 Sup. Ct. Rep. 214; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 120, 56 L. ed. 118, 120, 32 Sup. Ct. Rep. 67; Re Mueller, 68 C. C. A. 349, 135 Fed. 714.

Mr. William G. Harvison argued the cause, and, with Messrs. Horatio F. Dale and Thomas F. Stevenson, filed a brief for appellee:

The bank's right of appeal to the circuit court of appeals from the order of the district court in this case is allowed under the court of appeals act of March 3, 1891.

Re Loving, 224 U. S. 183, 56 L. ed. 725,

32 Sup. Ct. Rep. 446; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Re Friend, 67 C. C. A. 500, 134 Fed. 778; Martin v. Globe Bank & T. Co. 119 C. C. A. 363, 201 Fed. 31; Rode & Horn v. Phipps, 115 C. C. A. 316, 195 Fed. 414; Re Mueller, 68 C. C. A. 349, 135 Fed. 711; Brady v. Bernard, 95 C. C. A. 656, 170 Fed. 576; Morehouse v. Pacific Hardware & Steel Co. 100 C. C. A. 647, 177 Fed. 337.

Such right of appeal is also allowed by § 24a of the bankrupt act of 1898.

Hobbs v. Head & D. Co. 231 U. S. 692, 58 L. ed. 440, 34 Sup. Ct. Rep. 253; Lazarus v. Prentice, 234 U. S. 263, 58 L. ed. 1305, 34 Sup. Ct. Rep. 851; Greey v. Dockendorff, 231 U. S. 513, 58 L. ed. 339, 34 Sup. Ct. Rep. 166; Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491; Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 54 L. ed. 610, 30 Sup. Ct. Rep. 412; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008; First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Triumph Electric Co. v. Patterson, 127 C. C. A. 612, 211 Fed. 244; New Hampshire Sav. Bank v. Varner, 132 C. C. A. 631, 216 Fed. 721; Sterne v. Merchants' Nat. Bank, 133 C. C. A. 66, 216 Fed. 862; Thomas v. Woods, 26 L.R.A.(N.S.) 1180, 97 C. C. A. 535, 173 Fed. 585, 19 Ann. Cas. 1080; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Re Friend, 67 C. C. A. 500, 134 Fed. 778; Rode & Horn v. Phipps, 115 C. C. A. 316, 195 Fed. 414; Barnes v. Pampel, 113 C. C. A. 81, 192 Fed. 525; Brady v. Bernard, 95 C. C. A. 656, 170 Fed. 576; Re Mueller, 68 C. C. A. 349, 135 Fed. 711; Kirkpatrick v. Harnesberger, 118 C. C. A. 334, 199 Fed. 886; Thompson v. Mauzy, 98 C. C. A. 457, 174 Fed. 611; Re J. Jungmann, 108 C. C. A. 380, 186 Fed. 302; Morehouse v. Pacific Hardware & Steel Co. 100 C. C. A. 647, 177 Fed. 337.

Such right of appeal is also allowed by § 25a (3) of the bankrupt act of 1898.

Re Loving, 224 U. S. 183, 56 L. ed. 725, 32 Sup. Ct. Rep. 446; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 67; Coder v. Arts, 213 U. S. 223, 53 L. ed. 772, 29 Sup. Ct. Rep. 436, 16 Ann. Cas. 1008.

The action before the court is not a "proceeding in bankruptcy" proper. It is a "controversy arising in bankruptcy proceedings," or a "controversy arising in the settlement of the estate of a bankrupt." The right of appeal therein is allowed as in the last three propositions above stated.

Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491; Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 56 L. ed. 118, 32 Sup. Ct. Rep. 446; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Re Friend, 67 C. C. A. 500, 134 Fed. 778.

The waiver of homestead by the bankrupt and his wife was without effect as against the bank and its rights under its mortgage.

1. The homestead ordinarily is exempt from judicial sale, and in this case consists of 40 acres.

Re Bailey, 176 Fed. 990.

2. The homestead, being so exempt, did not pass to the trustees by virtue of the adjudication of bankruptcy.

Ibid.; Hull v. Dicks, 235 U. S. 584, 59 L. ed. 372, 35 Sup. Ct. Rep. 152.

The homestead was liable to sale in payment of the Johnson, or first, mortgage, but only after exhausting the remaining 920 acres covered thereby. The 920 acres of non-homestead land having sold for more than enough to pay the Johnson mortgage, the excess of proceeds of the 920 acres was properly applied upon the Moody, or second, mortgage. This left the homestead 40 acres subject to sale under the bank's mortgage only.

Taylor v. Trulock, 59 Iowa, 558, 13 N. W. 661.

By executing the bank's mortgage, the bankrupt and his wife, for a valuable consideration, conveyed to, or waived, their homestead right in favor of the bank. The bank, in legal effect, became a purchaser, for value, of the homestead, subject to the bankrupt's right to redemption only. The bankrupt had no power to subsequently again convey or waive the homestead to the bank's prejudice.

Re Gill, 79 Iowa, 296, 9 L.R.A. 126, 44 N. W. 553; Central Trust Co. v. Stepanek, 138 Iowa, 131, 15 L.R.A.(N.S.) 1025, 128 Am. St. Rep. 175, 115 N. W. 891; Boggs v. Douglass, 105 Iowa, 344, 75 N. W. 185; Linscott v. Lamart, 46 Iowa, 312.

The bank has the same rights under its mortgage upon the homestead, and as against Moody, that it has as against Johnson and against the bankrupt, because Moody has no right in the homestead, either

as a secured or as a general creditor. Under its mortgage, the bank steps into the shoes of, or is subrogated to the exemption rights of, the bankrupt.

Alley v. Bay, 9 Iowa, 509; Bolton v. Oberne, H. & Co. 79 Iowa, 278, 44 N. W. 547; Redfield v. Stocker, 91 Iowa, 383, 59 N. W. 270; Waugh v. Bridgeford, 69 Iowa, 336, 28 N. W. 626; Re Bailey, 176 Fed. 990; Linscott v. Lamart, 46 Iowa, 312.

Equity regards the substance, not the form. In fact, the bank had a lien on one fund only, the proceeds of the homestead.

11 Am. & Eng. Enc. Law, 2d ed. title, Equity, 184.

Marshaling of assets can only be applied where the creditor against whom the rule is invoked has two or more funds to look to, and his rights will not be prejudiced by the application of the rule.

Story, Eq. Jur. 12th ed. §§ 560, 642; 2 Pom. Eq. Jur. 1905, ed. § 1414; Re Hobson, 81 Iowa, 392, 11 L.R.A. 255, 46 N. W. 1095; Cutler v. Ammon, 65 Iowa, 281, 21 N. W. 604; Wolf v. Smith, 36 Iowa, 454; Clarke v. Bancroft, 13 Iowa, 320; Dickson v. Chorn, 6 Iowa, 19, 71 Am. Dec. 382; Tollerton v. Anderson, 108 Iowa, 217, 78 N. W. 822; Wallin v. Murphy, 117 Iowa, 640, 91 N. W. 930; Re Bailey, 176 Fed. 990; McArthur v. Martin, 23 Minn. 74; Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553; Dorr v. Shaw, 4 Johns. Ch. 17; Evertson v. Booth, 19 Johns. 486; Woolcocks v. Hart, 1 Paige, Ch. 185; Stevens v. Church, 41 Conn. 369; Shedd & Co. v. Bank of Brattleboro, 32 Vt. 709; Walker v. Covar, 2 S. C. 16; Denham v. Williams, 39 Ga. 312; Calloway v. People's Bank, 54 Ga. 572; Briggs v. Planters' Bank, Freem. Ch. (Miss.) 574; Emmons v. Bradley, 56 Me. 333; Herriman v. Skillman, 33 Barb. 378; Sweet v. Redhead, 76 Ill. 374.

Mr. Justice **Van Devanter** delivered the opinion of the court:

The facts bearing upon the questions presented by his appeal are these: On his voluntary petition Oscar M. Hartzell, a resident of Madison county, Iowa, was adjudged a bankrupt. He owned 960 acres of land in that county, 40 acres of which he and his family had been and were occupying as a homestead. Three mortgages in terms covering all the land had been given by him,—the first to Emma Johnson, the second to Moody & Son, and the third to the Century Savings Bank. His wife had joined in the first and third, but not in the second. After he was adjudged a bankrupt, he and his wife executed an instrument waiving and surrendering their right in the homestead, and authorizing the trustees in bankruptcy to take possession and dispose of the same for the benefit of all the creditors. At a later date the trustees filed in the bankruptcy proceeding a petition asserting title to all the land, reciting the existence of the mortgages and other asserted liens, and praying that the 960 acres be sold free of all liens, that the proceeds be held by the trustees subject to the further order of the court, that all persons asserting liens on any part of the land be required to set them up by answer, that certain of the asserted liens be declared void, and that as to the others the assets be marshaled. Acting upon this petition the court, with the assent of the parties in interest, directed that the land be sold as prayed, that all liens thereon be transferred to the proceeds, and that the latter be held by the trustees for the payment of whatever liens or claims might be established against the same. The lands were sold, all liens found to be superior to the three mortgages were paid out of the proceeds, and there remained a balance of $54,264.77, [376] which, although $13,683.94 in excess of what was required to pay the first mortgage, was insufficient to pay it and either of the others. Of this balance, $8,000 arose from the sale of the homestead. Moody & Son and the Century Savings Bank, both appearing in response to notice of the trustees' petition, asserted conflicting rights under their respective mortgages to a part of the proceeds. Although conceding that the first mortgage—that to Johnson—should be fully paid, they differed widely respecting the disposition of the proceeds of the homestead, Moody & Son asserting a right to have the same applied on the first mortgage, and to receive on their mortgage whatever remained of the proceeds of the other land, and the bank asserting a right to have the first mortgage satisfied from the proceeds of the other land, and to receive on its mortgage the proceeds of the homestead. Under the first contention Moody & Son would receive $13,683.94 and the bank nothing, while under the other, Moody & Son would receive $5,683.94 and the bank $8,000. The bankruptcy court rejected both contentions and held that the proceeds of the homestead and those of the other land should be proportionally applied in paying the first mortgage, that the balance then remaining from the sale of the homestead, being $2,947.22, should be paid on the bank's mortgage, and that the balance from the sale of the other land, being $10,736.67, should be paid on Moody & Son's mortgage. A decree was entered accordingly and the bank appealed to the circuit court of appeals, which, after overruling a motion challenging its jurisdiction, sustained the

bank's contention, and reversed the decree with instructions which were equivalent (see Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 240, 46 L. ed. 1144, 1145, 22 Sup. Ct. Rep. 881; Metropolitan Water Co. v. Kaw Valley Drainage Dist. 223 U. S. 519, 523, 56 L. ed. 533, 535, 32 Sup. Ct. Rep. 246) to directing a decree giving full effect to that contention. 123 C. C. A. 285, 204 Fed. 963; 126 C. C. A. 499, 209 Fed. 775. Moody & Son then appealed to this court.

[377] Whether the circuit court of appeals rightly sustained this jurisdiction turns upon whether this is one of those "controversies arising in bankruptcy proceedings" over which the circuit courts of appeals are invested, by § 24a of the bankruptcy act, with the same appellate jurisdiction that they possess in other cases under the Judicial Code, § 128 (36 Stat. at L. 1133, chap. 231, Comp. Stat. 1913, § 1120), or is a mere step in bankruptcy proceedings, the appellate review of which is regulated by other provisions of the bankruptcy act. If it is a controversy arising in bankruptcy proceedings, the jurisdiction of that court was properly invoked, as is also that of this court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the encumbered property, and the application of the proceeds to the liens in the order and mode ultimately fixed by the decree. True, it was begun by the trustees, and not by an adverse claimant, but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice of the trustees' petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention, and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings, and well within the letter and spirit of § 24a. Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 987, 24 Sup. Ct. Rep. 690; Knapp v. Milwaukee Trust Co. 216 U. S. 545, 553, 54 L. ed. 610, 613, 30 Sup. Ct. Rep. 412; Teft, W. & Co. v. Munsuri, 222 U. S. 114, 118, 56 L. ed. 118, 119, 32 Sup. Ct. Rep. 67; Houghton v. Burden, 228 U. S. 161, 165, 57 L. ed. 780, 782, 33 Sup. Ct. Rep. 491; Globe Bank & T. Co. v. Martin, 236 U. S. 288, 295, 59 L. ed. 583, 587, 35 Sup. Ct. Rep. 377.

Coming to the merits, the matter for decision is the proper application or disposition of the proceeds of the 40 acres which the bankrupt and his family occupied as a homestead when the mortgages were given and up to the time of the waiver before mentioned. The homestead [378] right in this land was a creation of the statutes of the state, and therefore to determine what bearing this right had upon the validity and operation of the mortgages we must turn to those statutes and the decisions of the supreme court of the state construing and applying them. The statutes are found in the Code of 1897, and are as follows:

"Sec. 2972. The homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary. . . .

"Sec. 2974. No conveyance or encumbrance of or contract to convey or encumber the homestead, if the owner is married, is valid, unless the husband and wife join in the execution of the same joint instrument, whether the homestead is exclusively the subject of the contract or not, but such contracts may be enforced as to real estate other than the homestead at the option of the purchaser or encumbrancer. . . .

"Sec. 2976. The homestead may be sold on execution for debts contracted prior to its acquisition, but in such case it shall not be sold except to supply any deficiency remaining after exhausting the other property of the debtor liable to execution. It may also be sold for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that it is liable therefor, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt. . . .

"Sec. 2981. The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it, but such changes shall not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead, made without the concurrence of the husband or wife, shall affect his or her [379] rights, or those of the children. The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been."

Counsel are agreed that under these statutes the mortgages to Johnson and the bank, in which the wife joined, became valid liens on the homestead as well as on the other land; that the intervening mortgage to Moody & Son, in which the wife did not join, was void as to the homestead, and became a valid lien only on the other land; that this mortgage remained void as to the homestead, notwithstanding the subsequent waiv-

er of the homestead right, and that its invalidity in that respect could be asserted by the bank as a subsequent mortgagee. We therefore come to the provision in § 2976 that the homestead, even where validly mortgaged, may be sold "only for a deficiency remaining after exhausting all other property" covered by the same mortgage. Whether only the mortgagors may claim the benefit of this provision, and they only while they retain the homestead, is the real point in dispute. Moody & Son insist that it merely confers on the mortgagors a personal privilege which they may exercise or waive, as they choose; that in this instance the privilege was surrendered or terminated when the homestead right was waived, and in consequence the provision has no bearing on the proper application or disposition of the proceeds of either the homestead or the other land. The bank, on the other hand, insists that the right to have this provision followed is not strictly personal to the mortgagors, but may be asserted by one to whom they transfer an interest in the homestead, such as a subsequent vendee or mortgagee, and that no act of theirs, done after the transfer, can prejudice the transferee in the exercise of this right. The solution of the question is not free from difficulty, but we are persuaded, as was the circuit court of appeals, that, in view of the decision of the supreme [380] court of the state in Linscott v. Lamart, 46 Iowa, 312, the bank's contention must be sustained.

The facts in that case, so far as now material, were these: One Ash owned 71 acres of land, 40 of which were his homestead. He and his wife mortgaged the entire tract to Lamart. Linscott subsequently obtained a judgment against Ash and purchased one half of the tract at a sale under the judgment. Later Ash and his wife sold and conveyed the entire tract to Lamart, it being understood that this should not extinguish the mortgage. Lamart went into possession and Linscott brought a suit to determine the rights of the parties in the land. Lamart prevailed and the supreme court affirmed the decree, saying: "Ash and his wife had the right to sell and convey the homestead to Lamart, and he has the right to hold it exempt from judicial sale on plaintiff's judgment." And, after holding the sale under the judgment void because it included part of the homestead, the court further said: "What, then, are the rights of the parties? If Ash had not conveyed to Lamart, upon foreclosure of the mortgage, the homestead could only 'be sold to supply the deficiency remaining after exhausting the other property' included in the mortgage. Lamart paid Ash some $1,400 for the whole tract, being more than twice the amount of the mortgage. No fraud is charged or shown, and as he had the right to purchase the homestead and hold it as against plaintiff's judgment, he should now have the right to have the proceeds of the land, aside from the homestead, applied in payment of his mortgage, to the exclusion of junior liens. In other words, it would be inequitable to put him in a worse position than he would be if he had not taken the title from Ash. The plaintiff, by this rule, is left in precisely the same position he would now occupy if Ash were still holding his homestead, and Lamart his mortgage." Thus, under the influence of the provision in § 2976, it was ruled [381] that the mortgage, which embraced the homestead and other land, could be satisfied out of the latter to the exclusion of a junior judgment lien embracing the other land, but not the homestead, and this although the mortgagors had sold the homestead and no longer had any right therein. This decision is more nearly in point than any other, and we think it shows that the right to invoke the provision in § 2976 is neither strictly personal to the mortgagors nor wholly terminated by their waiver of the homestead right. Moody & Son place some reliance upon Barker v. Rollins, 30 Iowa, 412, and Dilger v. Palmer, 60 Iowa, 117, 10 N. W. 763, 14 N. W. 134, although conceding that the cases are not closely in point. We think they are without present bearing. In the former a purchaser of a mortgaged homestead, who thereafter made the land his homestead, claimed that this entitled him to have the mortgage satisfied from other unmortgaged property of the mortgagor, and the claim was denied, the court observing: "*His* homestead was not within the contemplation of the parties to the contract sued on. The creditor might well be held to have contracted with reference to all the phases of homestead claimed by his debtor; but not as to any such claim by third parties, who should voluntarily purchase the property with full knowledge of the encumbrance upon it. They cannot intrude their rights upon the property to the prejudice of the creditor." In the other case a homestead was mortgaged with other land, and the mortgagors thereafter sold the latter to a third person, but retained the former. When it was sought to foreclose the mortgage, the mortgagors claimed that § 2976 entitled them to have the mortgage satisfied from the nonhomestead property, which they had sold, and the claim was rejected, the court holding that by their sale of the nonhomestead land they were estopped from insisting that it constituted the primary fund for the payment of the mortgage.

[382] Concluding, as we do, that the Circuit Court of Appeals rightly applied the local statutes as construed by the Supreme Court of the state, its decree is affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
P. J. CONCANNON and Wife.[1]

(See S. C. Reporter's ed. 382-388.)

Adverse possession — of railway right of way.

1. Adverse possession enjoyed after the passage of the act of April 28, 1904 (33 Stat. at L. 538, chap. 1782), confirming conveyances "hertofore made" of portions of the Northern Pacific Railroad Company's right of way outside the 200-foot limit, cannot be considered in determining whether the possession has continued long enough to ripen into title.

[For other cases, see Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

Error to state court — proper judgment — reversal — leaving local question open.

2. The Federal Supreme Court, when reversing a judgment of a state court which erroneously held that adverse possession enjoyed after the passage of the act of April 28, 1904 (33 Stat. at L. 538, chap. 1782), confirming conveyances "heretofore made" of portions of the Northern Pacific Railroad Company's right of way outside the 200-foot limit, could be considered in determining whether possession had continued long enough to ripen into title,—will leave open the question of adverse possession asserted to have been completed prior to the passage of that act which the state court did not dispose of because of the erroneous opinion which it entertained concerning the meaning of that act.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 87.]

Argued and submitted December 3, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Pierce County, in that state, in favor of defendants in an action of ejectment. Reversed and remanded for further proceedings.

See same case below, 75 Wash. 591, 135 Pac. 652.

The facts are stated in the opinion.

Mr. Charles W. Bunn argued the cause and filed a brief for plaintiff in error.

Mr. William H. Hayden submitted the cause for defendants in error.

Mr. Chief Justice White delivered the opinion of the court:

As the successor to the rights of the Northern Pacific Railroad Company, the Railway Company, plaintiff in error, sued to recover a piece of land alleged to be within the strip 400 feet wide granted by the act of Congress to the former company as a right of way. 13 Stat. at L. 365, chap. 217. The asserted right to a reversal of the decree which awarded the land to the defendant is based upon an error which it is asserted the court committed in interpreting an act of Congress. 33 Stat. at L. 538, chap. 1782.

To at once recur to a previous ruling concerning the power of the company to dispose of land embraced in the grant of right of way which undoubtedly led to the adoption of the act of Congress referred to, and additionally to refer to a decision concerning the significance of that act, rendered before this case arose, will make clear the question to be decided.

In Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, it became necessary to determine whether title by adverse possession under a state law could be acquired to any portion of the railroad's right of way. Applying the principles announced in Northern P. R. Co. v. Smith, 171 U. S. 261, 43 L. ed. 158, 18 Sup. Ct. Rep. 794, it was held that as the Railroad Company to which the right of way was originally granted was incapable [384] of conveying any part of the 400 feet strip composing its right of way, it followed that no possession adverse to the company could confer title, any state law to the contrary notwithstanding. About a year after this decision the act to which we have previously referred was adopted, the title and first section reading as follows:

An Act Validating Certain Conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company.

That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company, of land forming a part of the right of way of the Northern Pacific Railroad, granted by the government by any act of Congress, are hereby legalized, validated, and confirmed: Provided, That no such conveyance shall

[1] Stipulation was filed in Northern P. R. Co. v. Shade and Northern P. R. Co. v. Classen [Nos. 88, 89] that they should abide the event of this case.

NOTE.—On adverse possession of railroad right of way—see notes to Roberts v. Sioux City & P. R. Co. 2 L.R.A.(N.S.) 272; and Dulin v. Ohio River R. Co. L.R.A.1916B, 857.

have effect to diminish said right of way to a less width than one hundred feet on each side of the center of the main track of the railroad as now established and maintained.

The second and last section made the act operative only upon acceptance of its terms by the Northern Pacific Railway Company.

There was presented in Northern P. R. Co. v. Ely, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302, the question whether this statute gave validity to a title by adverse possession to a piece of land outside of the 200, but within the 400, feet of the right of way, where the possession relied upon was completed before the act was adopted, and therefore was adequate at that time under the state law to bar the title of the company. Although the statute only expressly embraced "conveyances heretofore made," it was decided that, in view of its remedial purposes, its provisions were applicable to the case in hand; that is, it was held that the word "conveyance" included also a sufficient adverse possession completed when the act was passed.

[385] As the land in controversy in this case is within the 400, but outside the 200, feet, the court below was right in concluding that it was within the provisions of the act if they were otherwise applicable. In determining such applicability, as it was found that at the time the act was passed the possession of the defendant had not existed for a sufficient length of time to bar the right of the railroad, the court came to consider whether the statute authorized the taking into view of adverse possession enjoyed after the passage of the act. Answering this inquiry from a consideration not only of the text of the act, but of the ruling in Northern P. R. Co. v. Ely, supra, it was decided that the statute intended to permit the consideration of such subsequent possession, and therefore the title by possession of the defendant, which was inadequate considering the state of things existing at the time of the passage of the statute, was decided to be valid as against the Railroad Company, in consequence of the effect given to the possession after the passage of the statute. 75 Wash. 591, 135 Pac. 652.

We are of opinion that this interpretation of the act is inconsistent with its text, and was erroneously supposed to be supported by the ruling in Northern P. R. Co. v. Ely. We say it is inconsistent with its text, because in express terms the validating power which the act exerted was made applicable only to "all conveyances heretofore made," and nothing in the context lends itself to the conclusion that Congress contemplated conferring on the Railway Company unlimited power in the future to dispose of its right of way, or to give the right to others to devest the railroad of the title to such right of way by future adverse possession. And this meaning of the act is aptly illustrated by its title, since it treats its provisions as only confirming conveyances theretofore made, and not as conferring power on the Railway Company to make conveyances of its right of way for the future.

[386] But the argument is that although this interpretation may, as an original question, be well founded, it is not open to adopt it consistently with the ruling in the Ely Case. The reasoning is this: The statute, it is said, if literally interpreted, only relates to conveyances, and not to adverse possession; but as adverse possession complete at the time of the passage of the act was brought within its scope by the ruling in the Ely Case, therefore the statute was in that case interpreted in a broad, and not a literal, sense. Giving to the statute this significance, the argument is that it is inconsistent to now hold that the statute does not include all conveyances and all possession without regard to whether they were made or perfected before or after the passage of the act. But this fails to consider that the ruling in the Ely Case related exclusively to a possession which had completely ripened at the time of the passage of the act, and therefore that case was concerned only with the subject with which the statute dealt; that is, rights hitherto acquired, and which were in a generic sense within the remedy which the statute was intended to afford,—the curing of infirmities in titles which had become complete prior to the passage of the act. Indeed, the opinion in the Ely Case shows that the reasoning by which it came to pass that the word "conveyances" in the statute also embraced titles by possession perfected before the passage of the act was but an application of the familiar rule that a remedial statute, where it is reasonably possible to do so, must be interpreted so as to embrace the remedies which it was obviously intended to afford. The difference, then, between that case and this, is that which exists between, on the one hand, interpreting the words of the statute so as to cause them to include things which are within its contemplation, and, on the other hand, adopting of an interpretation which would destroy the express limitations of the statute and cause it to accomplish a purpose which its text plainly demonstrates it was not intended to reach.

[387] It is urged that even if it be found that error was committed in interpreting the statute, nevertheless the judgment below should be affirmed, because it rests not alone upon the mistaken interpretation of

the statute, but also upon an independent state ground adequate to sustain it; that is, a finding that there had been possession adequate to bar the right of the Railway Company, completed before the adoption of the act. We are of opinion, however, that there is no ground upon which this proposition can rest since the court below, after finding that the defendant's possession before the act had not been for a sufficient time to bar the right of the Railway Company, and then considering whether an adequate lapse of time would not result from joining to the possession of the defendant the prior possession of other persons asserted to be predecessors in title of the defendant, did not pass upon that question. On the contrary, the court, after pointing out difficulties arising from what it considered to be infirmities in the proof concerning the nature and character of the possession of the alleged predecessors and their privity with the defendant, held that it was unnecessary to solve such difficulties because, under the statute, the defendant could complete the time necessary to bar the right of the Railway Company by resorting to possession enjoyed by him after the passage of the act.

Although from these considerations it results that our duty is to reverse because of the erroneous construction given to the act of Congress, and which was the sole basis of the decision below, we are of opinion that the order of reversal should not preclude the right in the court below to consider and pass upon, in the light of the statute as correctly construed, the question of adverse possession asserted to have been completed prior to the passage of the act, which, as we have seen, the court did not dispose of because of the erroneous opinion which it entertained concerning the meaning of the act of Congress; and our decree, [388] therefore, will leave that question open. The issue thus left open involves a question arising under the state law which should be passed upon primarily by the state court. In saying this, however, we must not be considered as holding that ultimate authority to review such question when passed upon would not exist in this court to the extent that such power to review may be essential to the enforcement of the provisions of the act of Congress in question. Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 251, 56 L. ed. 1074, 1076, 32 Sup. Ct. Rep. 822; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 609, 610, 59 L. ed. 745, 747, 748, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 437. See Gaar, S. & Co. v. Shannon, 223 U. S. 468, 470, 471, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236. It follows, subject to the reservation stated, that the judgment below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err.,
v.
R. W. GLENN.

(See S. C. Reporter's ed. 388–394.)

Error to state court — decision on non-Federal ground.

1. A decision of the highest state court, affirming a judgment against a terminal carrier in an action by a shipper for damages on account of a delay in transit, cannot be said to rest upon a local ground independent of the question of the validity under the Federal Constitution of the provisions of S. C. Civ. Code 1912, §§ 2754, 2755, making each carrier participating in a through shipment liable for loss or damage occurring anywhere *en route*, because the jury was instructed that there was a presumption which might be rebutted that the delay, if any, occurred on the line of the terminal carrier, where evidence offered by such carrier which would have a tendency to show that it was not in fault, and hence tending to rebut the presumption, was excluded from the consideration of the jury by a ruling that the statute imposed upon the terminal carrier the duty to respond to the shipper for the negligence of the initial carrier.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On liability of connecting carrier for loss beyond its own line—see notes to Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1; and Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

On the constitutionality of statutes restricting contracts and business, generally—see note to State v. Loomis, 21 L.R.A. 789.

Constitutional law — due process of law — freedom of contract — regulating liability of connecting carrier.

2. No rights under U. S. Const., 14th Amend., are infringed by the provisions of S. C. Civ. Code 1912, §§ 2754, 2755, under which all carriers participating in a through intrastate shipment are made the agents of each other with respect to the transportation, so that any of the carriers may be sued for loss or damage occurring on any part of the route, being given the right of recovery over against the carrier in fault.

[For other cases, see Constitutional Law, 441–499, 591–604, 870–876, in Digest Sup. Ct. 1908.]

[No. 91.]

Argued and submitted December 6, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Court of Common Pleas of Dillon County, in that state, in favor of a shipper in an action against a terminal carrier for damages growing out of delay in transit. Affirmed.

See same case below, 96 S. C. 357, 80 S. E. 898.

The facts are stated in the opinion.

Mr. P. A. Willcox argued the cause, and, with Mr. F. L. Willcox, filed a brief for plaintiff in error:

Stipulations like those against which this legislation was directed have at all times been recognized previous to the legislation as lawful and reasonable limitations. Previous to this legislation the initial carrier could not make a contract binding upon the terminal carrier.

Venning v. Atlantic Coast Line R. Co. 78 S. C. 49, 12 L.R.A.(N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983.

Previous to this legislation the liability of a common carrier terminated with its prompt delivery of the property in good order to the next connecting carrier, and likewise, it would seem, the liability of a connecting carrier terminated upon its prompt delivery of the property to the next connecting carrier, or to the consignee, in the same condition in which the property was received by it.

St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co. 104 U. S. 146, 26 L. ed. 679.

A citizen of the state of South Carolina has an inherent right to enter into a contract with a common carrier for the transportation of property over its own and connecting lines. He has an inherent right to make a contract for a fair consideration, passing to him, relieving the common carrier—whether initial or otherwise—from liability for the default of another, which has already occurred. This act, as enforced by the state supreme court, deprives a citizen of that right. It likewise deprives the common carrier of the reciprocal right to carry goods at a lower rate than would otherwise be applicable upon condition that it should not be liable for the default of another—possibly insolvent—common carrier.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128.

Messrs. P. A. Willcox, F. L. Willcox, and Henry Buck also filed a brief for plaintiff in error.

Mr. Frederick S. Tyler submitted the cause for defendant in error. Messrs. Joe P. Lane and L. B. Haselden were on the brief:

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals, or the public safety.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

There is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 202, 55 L. ed. 167, 180, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164.

The legislature or law-making powers are the judges of public policy, and when they have the constitutional power to legislate, public policy is what the statutes passed by them enact; and when the state has spoken through its legislature, there is no more room for speculation as to what the policy of the state is.

9 Cyc. 482.

The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legis-

lation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power.

McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206.

Will the Supreme Court of the United States declare unconstitutional an act of the legislature of South Carolina when it only affects matters within the borders of that state, and is a regulation in the best interests of the public, and is made in the interests of public policy?

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 206, 55 L. ed. 167, 182, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Noble State Bank v. Haskell, 219 U. S. 104-110, 55 L. ed. 112-116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Hurtado v. California, 110 U. S. 516-558, 28 L. ed. 232-246, 4 Sup. Ct. Rep. 111, 292; Patterson v. The Eudora, 190 U. S. 169, 179, 47 L. ed. 1002, 1007, 23 Sup. Ct. Rep. 821; Twining v. New Jersey, 211 U. S. 78, 127, 53 L. ed. 97, 117, 29 Sup. Ct. Rep. 14; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1; McLean v. Arkansas, 211 U. S. 547, 53 L. ed. 319, 29 Sup. Ct. Rep. 206; Billings v. Illinois, 188 U. S. 97, 104, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; Mobile County v. Kimball, 102 U. S. 691, 707, 26 L. ed. 238, 243; Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

Mr. Chief Justice White delivered the opinion of the court:

Sections 2754 and 2755 of the Civil Code of South Carolina (1912) provide in part as follows:

"All common carriers over whose transportation lines, [390] or parts thereof, any freight, baggage or other property received by either of such carriers for through shipment or transportation by such carriers on a contract for through carriage, recognized, acquiesced in or acted upon by such carriers, shall in this state, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be the contract of each of such common carriers; . . .

"For any damages for injury, or damage to, or loss, or delay of any freight, baggage or other property sustained anywhere in such through transportation over connecting lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

In November, 1911, these provisions being in force, Glenn, the defendant in error, through an agent, delivered to the Southern Railway Company at Chester, South Carolina, a carload of cattle for through shipment to Latta, South Carolina, on the Atlantic Coast Line Railroad. The Southern Railroad accepted the cattle, issued [391] a bill of lading for their shipment to Latta over its own and its connecting lines, and transported them over its own line to Columbia, South Carolina, where they were by it delivered to and accepted by the Atlantic Coast Line Railroad Company, by which company they were carried under the original bill of lading to Latta and there delivered to Glenn, the consignee. There was delay in the transit, and to recover damages on account of resulting injury to the cattle Glenn brought this suit against the Atlantic Line, alleging, conformably to the statute above quoted, that the Southern Railway, in so far as the shipment involved was concerned, was the agent of the defendant, and consequently asserting a right to recover from the defendant damages resulting from the negligence of the Southern Railway or of the defendant or both. The defendant denied this right and sought to escape all liability by establishing that it had promptly transported and delivered the cattle after receiving them from the Southern Railway, that the delay, if any, had not occurred on its line, and that by virtue of the following provision of the contract of shipment defendant was not responsible for any delay occurring on the line of the Southern Railway:

"That the responsibility, either as common carrier or warehouseman, of each car-

rier over whose line the property shipped hereunder shall be transported, shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several, and not joint; neither of the said carriers shall be responsible or liable for any act, omission, or negligence of the other carriers over whose lines said property is or is to be transported."

This defense was, on motion of the plaintiff, stricken by the court from the answer on the ground that the provision of the contract was void because in conflict with the statute which we have quoted, and rulings to the same effect were [392] made during the course of the trial in excluding evidence offered by the defendant, in refusing instructions by it requested, and in charging the jury that the provisions of the statute were applicable to the case, and that the defendant was liable for damage resulting from its own or the negligence of the Southern Railway. A judgment in favor of the plaintiff, rendered on the verdict of the jury, was affirmed by the court below, which held that the statute was rightly applied to the case and was not repugnant to the due process clause of the 14th Amendment (96 S. C. 357, 80 S. E. 898), and the correctness of that conclusion is the question for decision on this writ of error.

We first dispose of a motion to dismiss. It is based on the proposition that since the court instructed the jury that there was a presumption, which might be rebutted, that the damage to the cattle, if any, occurred on the line of the delivering carrier, that is, the defendant company, the jury might have found for the plaintiff wholly irrespective of the statute, and therefore the judgment rests upon an independent state ground broad enough to sustain it. But the want of foundation for the proposition is manifest when it is considered that evidence offered by the defendant which would have a tendency to show that no damage and no delay occurred on its line, and hence tended to rebut the presumption, was excluded from the consideration of the jury by the ruling of the court that the statute imposed upon the defendant the duty to respond to the plaintiff for the negligence of the Southern Railway. The motion is therefore denied.

Coming to the merits we are of the opinion that the case is controlled by Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. In that case the constitutionality of the act of Congress known as the Carmack amendment to the act to regulate commerce was considered, the question presented being whether Congress, under its power to regulate commerce, could make an initial carrier liable to [393] the holder of a bill of lading issued by it for a through interstate shipment of property over its own and connecting lines for a loss occurring after the property had been delivered by it to a connecting carrier, and while in the control of such carrier. It was decided that the act was a valid regulation of interstate commerce, and hence that no rights of the initial carrier secured by the 5th Amendment had been violated. It is true that case involved the power of Congress over interstate, while this concerns the power of a state over intrastate, commerce, but the reasoning by which the conclusion as to the existence of the power was sustained in that case compels a like conclusion with reference to the power of a state over commerce wholly within its borders. Indeed, in argument the controlling force in a general sense of the Riverside Case is conceded; but it is insisted that it can here have no application because liability is imposed by the state statute upon the terminal and intermediate carriers as well as the initial or receiving carrier; while in the Riverside Case the liability alone of the latter was under consideration. But it is obvious that this proposition challenges not the power, but the wisdom of exerting it, since in the nature of things the power to constitute an initial carrier the agent of the terminal carrier is not different from the power to make the terminal carrier the agent of the initial carrier. Of course we confine ourselves to the case before us and therefore do not decide what would be the rights of the terminal carrier if, against its will, it had been compelled to accept the cattle from the initial carrier in a damaged condition, or if they had never been delivered to it. These questions are not presented by the record, since it is not contended that the acceptance of the cattle by the Atlantic Coast Line was not voluntary. In fact, it is stated in the argument of the plaintiff in error that long prior to the shipment in question the statute had been construed by the court below to permit the connecting carrier, upon [394] accepting a shipment from an initial carrier, to repudiate the original bill of lading and issue a new one. Venning v. Atlantic Coast Line R. Co. 78 S. C. 42, 12 L.R.A.(N.S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983.

Affirmed.

J. C. HADACHECK, Plff. in Err.,
v.
C. E. SEBASTIAN, Chief of Police of the City of Los Angeles.

(See S. C. Reporter's ed. 394–414.)

Constitutional law — due process of law — police power — forbidding brickyards in designated area.

1. A municipal ordinance enacted in good faith as a police measure, prohibiting brickmaking within a designated area, does not take, without due process of law, the property of an owner of a tract of land within the prohibited district, although such land contains valuable deposits of clay suitable for brickmaking which cannot profitably be removed and manufactured into brick elsewhere, and is far more valuable for brickmaking than for any other purpose, and had been acquired by him before it was annexed to the municipality, and had long been used by him as a brickyard.

[For other cases, see Constitutional Law, IV. b, 5; IV. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — forbidding brickmaking in designated area.

2. Prohibiting by municipal ordinance the manufacture of brick within a designated area cannot be said to deny the equal protection of the laws to the owner of a brickyard within the prohibited district, where the record does not show that brickyards in other localities within the municipality where the same conditions exist are not regulated or prohibited, or that

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NOTE.—For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to municipal power over nuisances—see notes to Grossman v. Oakland, 36 L.R.A. 593; and Ex parte Lacey, 38 L.R.A. 640.

As to the constitutionality of statutes restricting contracts and business—see note to State v. Loomis, 21 L.R.A. 789.

As to the business of burning brick as a nuisance, see note to Phillips v. Lawrence Vitrified Brick & Tile Co. 2 L.R.A.(N.S.) 92.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

Validity of municipal regulation or prohibition of brick kilns or yards.

Very few cases involve this question.

A municipal ordinance making a yard where bricks are burned, within the city limits, and within 1,200 feet of any private residence or public schoolhouse or park, without permission, a nuisance, is void both for unreasonableness and as effecting an unconstitutional taking or destroying of private property without due process of law. Denver v. Rogers, 46 Colo. 479, 25 L.R.A.(N.S.) 247, 104 Pac. 1042.

But an ordinance prohibiting the erection of brick kilns in the corporate limits, by a city that has charter power to make and enforce the necessary police regulations and regulate the erection of all buildings and other structures within the corporate limits, is valid as against an action in mandamus to compel the city building inspector to issue a permit in violation thereof, in the absence of a showing that the enactment was an unreasonable and arbitrary invasion of individual rights under the guise of police regulations. State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376.

An ordinance of a town board of health prohibiting the exercise within the town limits of the trade or employment of excavating clay for the purpose of manufacturing bricks except upon premises "now owned and operated" by a specified brick company, without a permit, and without furnishing a bond conditioned upon the observance of the terms of the permit, was refused enforcement in Belmont v. New England Brick Co. 190 Mass. 442, 77 N. E. 504, as against the said brick company which was excavating clay from additional land acquired after the passage of the ordinance. The court said: "To make bricks requires clay, and the occupation of manufacturing them in which the defendant was engaged is not within the class of employments presumably offensive, or for which, under Rev. Laws, chap. 75, § 99, a license must be obtained before they can be prosecuted lawfully. Neither is this business generally recognized as directly harmful to the health or property of the community. But the prohibition that clay could not be dug for this purpose except out of land owned by the defendant when the order was passed might be indirectly sufficient to prevent the further transaction of its business for want of material; and if the acquisition of the additional land described in the bill from which clay could be dug became necessary, the prohibition might come very near to being a confiscation of property rights without compensation." The object of the ordinance, *viz.*, the prevention of the accumulation of stagnant water in the pits, forming breeding places for mosquitoes, could have been accomplished, the court said, without "an impairment of private rights so disproportionate with the gain to the public health as to make it unreasonable and therefore invalid."

other objectionable businesses are permitted within the same district.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — local law.

3. The decision of the highest court of a state that a municipal ordinance which is asserted to violate the Federal Constitution is within the city's charter powers, and is not forbidden by the state Constitution, is conclusive upon the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

[No. 32.]

Submitted October 22, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of California to review a judgment refusing relief by habeas corpus to a person convicted of violating a municipal ordinance prohibiting brickmaking within a designated area. Affirmed.

See same case below, 165 Cal. 416, L.R.A. 1916B, 1248, 132 Pac. 584.

The facts are stated in the opinion.

Mr. Emmet H. Wilson submitted the cause for plaintiff in error. Mr. C. C. De Garmo was on the brief:

If the ordinance purports to have been enacted to protect the public health, morals, or safety, but has no substantial relation to those objects, constitutional rights have been invaded, and it is the duty of the court so to adjudge.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The state, or any political subdivision thereof, when legislating for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and is not permitted to violate rights secured or guaranteed thereby.

Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The business of operating brickyards and manufacturing brick is a useful, necessary, and lawful occupation, and is not a nuisance *per se*.

Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669; State ex rel. Horakottle v. Board of Health, 16 Mo. App. 8; Phillips v. Lawrence Vitrified Brick & Tile Co. 72 Kan. 643, 2 L.R.A.(N.S.) 92, 82 Pac. 787; Denver v. Rogers, 46 Colo. 479, 25 L.R.A. (N.S.) 247, 104 Pac. 1042; Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 37 L.R.A. 381, 62 Am. St. Rep. 532, 47 N. E. 2, 18 Mor. Min. Rep. 674; Belmont v. New England Brick Co. 190 Mass. 442, 77 N. E. 504.

Therefore the city cannot prohibit the maintenance of a brickyard unless, by reason of the manner of its operation, it becomes a nuisance in fact.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Everett v. Council Bluffs, 46 Iowa, 66; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Re Sam Kee, 31 Fed. 680; Re Hong Wah, 82 Fed. 623; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Stockton Laundry Case, 26 Fed. 611; Denver v. Rogers, 46 Colo. 479, 25 L.R.A.(N.S.) 247, 104 Pac. 1042; Denver v. Mullen, 7 Colo. 345, 3 Pac. 697; Phillips v. Denver, 19 Colo. 184, 41 Am. St. Rep. 230, 34 Pac. 902.

The city council of the city of Los Angeles is not empowered to pass an ordinance making that a nuisance which is not a nuisance *per se*. The legislative declaration cannot alter the character of a business so as to make a nuisance of that which is not such in fact.

Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; Grossman v. Oakland, 30 Or. 478, 36 L.R.A. 593, 60 Am. St. Rep. 832, 41 Pac. 5; Re Sam Kee, 31 Fed. 680; Re Hong Wah, 82 Fed. 623; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Everett v. Council Bluffs, 46 Iowa, 66; Stockton Laundry Case, 26 Fed. 611.

The power possessed by the city to abate nuisances does not include power to prevent unless the business is a nuisance *per se*. Such things as become nuisances only because of the method of their operation cannot be stopped or suppressed, under the power to abate, except upon clear demonstration that they are nuisances.

Lake View v. Letz, 44 Ill. 81.

The mere legislative declaration of the existence of a nuisance will not be accepted as a fact by the courts.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Re Hong Wah, 82 Fed. 623; Stockton Laundry Case,

26 Fed. 611; Re Smith, 143 Cal. 371, 77 Pac. 180; Ex parte Sing Lee, 96 Cal. 357, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Hume v. Laurel Hill Cemetery, 142 Fed. 563; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 350, 71 Am. St. Rep. 75, 57 Pac. 153; Laurel Hill Cemetery v. San Francisco, 152 Cal. 472, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Freund, Pol. Power, § 63; Dill. Mun. Corp. 5th ed. § 666.

The determination by the legislative body of what is a proper exercise of the police power is neither final nor conclusive, but is subject to the supervision of the courts. Legislative judgment as to the reasonableness of an ordinance is not necessarily accepted by the courts.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Re Kelso, 147 Cal. 611, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 Sup. Ct. Rep. 198; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Re Smith, 143 Cal. 368, 77 Pac. 180; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; Laurel Hill Cemetery v. San Francisco, 152 Cal. 470, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; Freund, Pol. Power, § 144.

In cases of this kind the court must scrutinize the objects and purposes sought to be accomplished by the ordinance in question for the purpose of determining its validity. In so doing they are not limited to matters that appear upon the face of the ordinance, but may consider all the circumstances in the light of existing conditions.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Lake View v. Tate, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791; Ex parte Patterson, 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011; People v. Armstrong, 73 Mich. 288, 2 L.R.A. 721, 16 Am. St. Rep. 578, 41 N. W. 275; Oxanna v. Allen, 90 Ala. 468, 8 So. 79; Tugman v. Chicago, 78 Ill. 405; Cleveland, C. C. & St. L. R. Co. v. Connersville, 147 Ind. 277, 37 L.R.A. 175, 62 Am. St. Rep. 418, 46 N. E. 579; State v. Boardman, 93 Me. 73, 46 L.R.A. 750, 44 Atl. 118; Kosciusko v. Slomberg, 68 Miss. 469, 12 L.R.A. 528, 24 Am. St. Rep. 281, 9 So. 297; Crowley v. West, 52 La. Ann. 526, 47 L.R.A. 652, 78 Am. St. Rep. 355, 27 So. 53; Hume v. Laurel Hill Cemetery, 142 Fed. 552; Laurel Hill Cemetery v. San Francisco, 152 Cal. 472, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 236, 73 Pac. 987; Re Smith, 143 Cal. 370, 77 Pac. 180; Re Kelso, 147 Cal. 612, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 350, 71 Am. St. Rep. 75, 57 Pac. 153; Freund, Pol. Power, §§ 68, 138; Pieri v. Shieldsboro, 42 Miss. 493; Corrigan v. Gage, 68 Mo. 541; Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196.

Discriminatory legislation cannot be sustained even though enacted under color of sanitary power.

Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Freund, Pol. Power, § 138.

A law is not general or constitutional if it imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a person selected from the general body of those who stand in precisely the same relation to the subject of the law.

Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Bruch v. Colombet, 104 Cal. 347, 38 Pac. 45; Darcy v. San Jose, 104 Cal. 642, 38 Pac. 500; People v. Central P. R. Co. 105 Cal. 584, 38 Pac. 905; Cullen v. Glendora Water Co. 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047; Ex parte Clancy, 90 Cal. 553, 27 Pac. 411; Krause v. Durbrow, 127 Cal. 681, 60 Pac. 438.

The imposition of dissimilar regulations upon different persons engaged in the same business must be founded upon differences that will rationally justify the diversity of legislation.

Ex parte Jentzsch, 112 Cal. 474, 32 L.R.A. 664, 44 Pac. 803; Darcy v. San Jose, 104 Cal. 642, 38 Pac. 500; Ex parte Bohen, 115 Cal. 372, 36 L.R.A. 618, 47 Pac. 55; Ex parte Dickey, 144 Cal. 237, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; Phillips v. Denver, 19 Colo. 179, 41 Am. St. Rep. 230, 34 Pac. 902; Belmont v. New England Brick Co. 190 Mass. 442, 77 N. E. 504; Com. v. Maletsky, 203 Mass. 241, 24 L.R.A.(N.S.) 1168, 89 N. E. 245; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

The ordinance in question deprives the

plaintiff in error of his property without due process of law, and is therefore void.

Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62.

In order to sustain the validity of a municipal ordinance it is necessary for the court to determine that its provisions are reasonable.

Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Tugman v. Chicago, 78 Ill. 405; Lake View v. Tate, 130 Ill. 247, 6 L.R.A. 268, 22 N. E. 791; Oxanna v. Allen, 90 Ala. 468, 8 So. 79.

The ordinance is unreasonable because the severe measures adopted were not reasonably necessary for the prevention of the acts complained of in reference to the brickyard. Remedies other than confiscation of the property would have been effective.

Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Laurel Hill Cemetery v. San Francisco, 152 Cal. 472, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Hume v. Laurel Hill Cemetery, 142 Fed. 552; Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 349, 71 Am. St. Rep. 75, 57 Pac. 153; Judson v. Los Angeles Suburban Gas Co. 157 Cal. 168, 26 L.R.A.(N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247; Ex parte Sing Lee, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245.

The ordinance is unreasonable because, if any nuisance has existed, the same may be abated by regulatory rather than by suppressive and confiscatory measures. The business should be allowed to continue upon eliminating such features, if any, as constituted a nuisance.

Hume v. Laurel Hill Cemetery, 142 Fed. 564; Judson v. Los Angeles Suburban Gas Co. 157 Cal. 168, 26 L.R.A.(N.S.) 183, 106 Pac. 581, 21 Ann. Cas. 1247; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Chamberlain v. Douglas, 24 App. Div. 582, 48 N. Y. Supp. 710; Pach v. Geoffroy, 67 Hun, 401, 22 N. Y. Supp. 275; Yocum v. Hotel St. George Co. 18 Abb. N. C. 340; Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648.

The ordinance is unreasonable because it is not limited with reference to conditions and measures. The danger may be slight and remote, while the remedy—entire suppression—could not be more drastic.

Re Smith, 143 Cal. 371, 77 Pac. 180; Hume v. Laurel Hill Cemetery, 142 Fed. 564; Laurel Hill Cemetery v. San Francisco, 152 Cal. 472, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Freund, Pol. Power, § 143.

The ordinance is unreasonable because the means adopted is out of proportion to the danger involved. The restraint should not be disproportionate to the danger.

Los Angeles County v. Hollywood Cemetery Asso. 124 Cal. 350, 71 Am. St. Rep. 75, 57 Pac. 153; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 233, 73 Pac. 987; Hume v. Laurel Hill Cemetery, 142 Fed. 564; Freund, Pol. Power, §§ 150, 158.

The ordinance is unreasonable because the law will not take cognizance of petty inconveniences and slight grievances.

Freund, Pol. Power, § 178; Joyce, Nuisances, §§ 93, 96; Laurel Hill Cemetery v. San Francisco, 152 Cal. 470, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; Tuttle v. Church, 53 Fed. 422; Gilbert v. Showerman, 23 Mich. 448; McGuire v. Bloomingdale, 8 Misc. 478, 29 N. Y. Supp. 580; Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672.

The ordinance is discriminatory and unreasonable because the district was unreasonably and irrationally created.

Re Sam Kee, 31 Fed. 680; Stockton Laundry Case, 26 Fed. 611; Re Hong Wah, 82 Fed. 623; Re Smith, 143 Cal. 372, 77 Pac. 180; Freund, Pol. Power, § 179.

The police power cannot be used for the purpose of protecting property values.

Hume v. Laurel Hill Cemetery, 142 Fed. 565; Re Hong Wah, 82 Fed. 625; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Chicago v. Gunning System, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892; Ex parte Whitwell, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Ex parte Dickey, 144 Cal. 236, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Re Smith, 143 Cal. 368, 77 Pac. 180; Re Kelso, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Cooley, Const. Lim. 7th ed. 837.

Mr. Alber Lee Stephens submitted the cause for defendant in error. Messrs. Charles S. Burnell and Warren L. Williams were on the brief:

We submit the opinions and decisions of

the supreme court of the state of California upon the case here under consideration.

Ex parte Hadacheck, 165 Cal. 416, L.R.A. 1916B, 1248, 132 Pac. 584; Hadacheck v. Alexander, 169 Cal. 259, 147 Pac. 259.

Also other decisions of said court, passing upon the validity of similar ordinances prohibiting the maintenance of certain classes of business in residence districts.

Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Re Linehan, 72 Cal. 114, 13 Pac. 170.

The police power extends to all the great public needs.

Camfield v. United States, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864; Bacon v. Walker, 204 U. S. 311, 317, 51 L. ed. 499, 502, 27 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; Pound v. Turck, 95 U. S. 464, 24 L. ed. 527; Hannibal & St. J. R. Co. v. Husen, 96 U. S. 470, 24 L. ed. 530; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Bracey v. Darst, 218 Fed. 482.

Under what circumstances the police power should be exercised to prohibit the conduct of certain classes of business within a certain district is a matter of police regulation for the municipal authorities.

New Orleans v. Murat, 119 La. 1093, 44 So. 898; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

It is primarily for the legislative body clothed with the proper power, to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances, and of the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation.

Ex parte Hadacheck, 165 Cal. 416, L.R.A. 1916B, 1248, 132 Pac. 584; Ex parte Quong Wo, 161 Cal. 230, 118 Pac. 714; State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Re Smith, 143 Cal. 370, 77 Pac. 180; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 414, 58 L. ed. 1011, 1022, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 27 L.R.A.(N.S.) 260, 93 Pac. 70, 14 Ann. Cas. 1080; Ex parte Tuttle, 91 Cal. 591, 27 Pac. 933.

The reasons actuating the legislative body in enacting the regulation need not necessarily appear from a reading of the ordinance itself.

Grumbach v. Lelande, 154 Cal. 685, 98 Pac. 1059; Odd Fellow's Cemetery Asso. v. San Francisco, 140 Cal. 233, 73 Pac. 987; Ex parte Tuttle, 91 Cal. 591, 27 Pac. 933; Re Zhizhuzza, 147 Cal. 334, 81 Pac. 955.

The laws and policy of a state may be framed and shaped to suits conditions of climate and soil, and the exercise of the police power may and should have reference to the particular situation and needs of the community.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Bown v. Walling, 204 U. S. 320, 51 L. ed. 503, 27 Sup. Ct. Rep. 292; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Welch v. Swasey, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745.

It is not necessary that a business be a nuisance *per se* to be regulated.

Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Rhodes v. Dunbar, 57 Pa. 275, 98 Am. Dec. 221; Beadman v. Tredwell, 31 L. J. Ch. N. S. 892; Bareham v. Hall, 22 L. T. N. S. 116; Bamford v. Turnley, 3 Best. & S. 62, 31 L. J. Q. B. N. S. 286, 9 Jur. N. S. 377, 10 Week. Rep. 803; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

The question whether the classification of subjects for the exercise of the police power

is proper is not to be determined upon hard and fast rules, but must be answered after a consideration of the particular subject of litigation.

Re Stoltenberg, 165 Cal. 789, 134 Pac. 971.

Whenever a thing or act is of such a nature that it may become injurious to the welfare of the community if not suppressed or regulated, the legislative body may, in the exercise of its police power, make and enforce ordinances to regulate or prohibit, although it may never have been offensive or injurious in the past. The exercise of this power is not limited to regulation of such things as may have already become nuisances.

Odd Fellows' Cemetery Asso. v. San Francisco, 140 Cal. 231, 73 Pac. 987.

The length of time during which a business has existed in a certain locality does not make its prohibition for the future unconstitutional.

Tiedeman, State & Federal Control of Persons & Property; State ex rel. Russell v. Beattie, 16 Mo. App. 131; Sedgw. Stat. & Const. Law, 434; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 592, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Freund, Pol. Power, § 529; State ex rel. Horskottle v. Board of Health, 16 Mo. App. 8; Powell v. Brookfield Pressed Brick & Tile Co. 104 Mo. App. 713, 78 S. W. 648; Bushnell v. Robeson, 62 Iowa, 542, 17 N. W. 888; Baltimore v. Fairfield Improv. Co. 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; Harmison v. Lewiston, 46 Ill. App. 164; Com. v. Upton, 6 Gray, 473; Rhodes v. Dunbar, 57 Pa. 275, 98 Am. Dec. 221; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735.

Where the police power restricts constitutional rights, particularly as to property, the value of that property is not material to the issue.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Grumbach v. Lelande, 154 Cal. 684, 98 Pac. 1059; Western Indemnity Co. v. Pillsbury, — Cal. —, 151 Pac. 398; Erie R. Co. v. Williams, 233 U. S. 685, 700, 58 L. ed. 1155, 1161, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761.

The size of the territory affected by the ordinance is no criterion by which to be guided in judging of its discriminatory qualities.

Ex parte Quong Wo, 161 Cal. 226, 118 Pac. 714; Re Martin, 157 Cal. 57, 26 L.R.A. (N.S.) 242, 106 Pac. 235; Re Miller, 162 Cal. 687, 124 Pac. 427; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342.

That a statute will result in injury to some private interest does not deprive the legislature of power to enact it, though a statute is invalid where its purpose is primarily the destruction of property.

Enos v. Hanff, 98 Neb. 245, 152 N. W. 397.

The character and value of property contiguous to the business of plaintiff in error is very much to be considered.

State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376.

That similar conditions exist in other localities is no reason why an ordinance regulating and equally affecting everyone in a given locality should be declared unconstitutional.

Ex parte Tuttle, 91 Cal. 591, 27 Pac. 933; Re Smith, 143 Cal. 370, 77 Pac. 180; Re Zhizhuzza, 147 Cal. 334, 81 Pac. 955; Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714.

A statute enacted within the police power will not be adjudged invalid merely because omitted cases might have been properly included in the statute.

People v. Charles Schweinler Press, 214 N. Y. 395, L.R.A.—, —, 108 N. E. 639; People ex rel. Krohn v. Warden, 152 N. Y. Supp. 1136; State v. Olson, 26 N. D. 304, L.R.A.—, —, 144 N. W. 661; King v. Vicksburg R. & Light Co. 88 Miss. 456, 6 L.R.A. (N.S.) 1036, 117 Am. St. Rep. 749, 42 So. 204; Rochester v. Macauley-Fien Mill. Co. 199 N. Y. 207, 32 L.R.A.(N.S.) 554, 92 N. E. 641.

Every holder of property holds it under the implied liability that its use may be so regulated that it shall not encroach injuriously on the enjoyment of property by others, or be injurious to the community.

Pittsburg, C. C. & St. L. R. Co. v. Chappell, — Ind. —, 106 N. E. 403.

Brickyards and brick manufacturing plants, as well as all businesses which require the generation of smoke, soot, and gas, have universally been held to be objectionable and may be enjoined or regulated.

State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 40 L.R.A.(N.S.) 898, 135 N. W. 376; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 596, 20 Atl. 900; Booth v. Rome, W. & O. Terminal R. Co. 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 558, 35 N. E. 592; McMorran v. Fitzgerald, 106 Mich. 649, 58 Am. St. Rep. 511, 64 N. W. 569; King v. Vicksburg R. & Light Co. 88 Miss. 456, 6 L.R.A.(N.S.) 1036, 117 Am. St. Rep. 749, 42 So. 204; Rochester v. Macauley-Fien Mill. Co. 199 N. Y. 207, 32 L.R.A.(N.S.) 554, 92 N. E. 641; Powell v. Brookfield Pressed Brick & Tile Mfg. Co. 104 Mo. App. 713, 78 S. W. 648; Odd Fellows' Cemetery

Asso. v. San Francisco, 140 Cal. 226, 73 Pac. 987; Kirchgraber v. Lloyd, 59 Mo. App. 59.

The supreme court of California has determined as a fact, after considering the evidence (consisting of affidavits and counter-affidavits accompanying the petition and return), that the district surrounding petitioner's brickyard has become primarily a residence section, and that the occupants of neighboring dwellings are seriously discommoded by petitioner's operations.

Ex parte Hadacheck, 165 Cal. 416, L.R.A. 1916B, 1248, 132 Pac. 584.

The presumption is in favor of the validity of the ordinance, and this presumption has not been rebutted by any evidence produced by plaintiff in error, but, on the contrary, the evidence presented at the hearing of the petition for a writ of habeas corpus, by way of affidavits, shows that the ordinance was one that was necessary for the protection of the public health, comfort, safety, and welfare.

Ibid.

It is well settled that prohibition of industries in certain sections of cities is but a regulation, and is always so treated.

Ex parte Byrd, 84 Ala. 17, 5 Am. St. Rep. 328, 4 So. 397; Re Wilson, 32 Minn. 145, 19 N. W. 723; Shea v. Muncie, 148 Ind. 14, 46 N. E. 138; Cronin v. People, 82 N. Y. 318, 37 Am. Rep. 564; Newton v. Joyce, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; Ex parte Quong Wo, 161 Cal. 231, 118 Pac. 714; Little Rock v. Reinman-Wolfort Automobile Livery Co. 107 Ark. 174, 155 S. W. 105; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Ex parte Botts, — Tex. Crim. Rep. —, 44 L.R.A.(N.S.) 629, 154 S. W. 221.

The city has the right to regulate an occupation by confining the conducting thereof within prescribed limits.

Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714; Re Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130; Grumbach v. Lelande, 154 Cal. 679, 98 Pac. 1059; Ex parte Lacey, 108 Cal. 326, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; White v. Bracelin, 144 Mich. 332, 107 N. W. 1055, 8 Ann. Cas. 256; Strauss v. Galesburg, 203 Ill. 234, 67 N. E. 836; Shea v. Muncie, 148 Ind. 14, 46 N. E. 138; New Orleans v. Murat, 119 La. 1093, 44 So. 898; Little Rock v. Reinman-Wolfort Automobile Co. 107 Ark. 174, 155 S. W. 105; St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; Ex parte Botts, — Tex. Crim. Rep. —, 44 L.R.A.(N.S.) 629, 154 S. W. 221; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

Mr. Justice McKenna delivered the opinion of the court:

Habeas corpus prosecuted in the supreme court of the state of California for the discharge of plaintiff in error from the custody of defendant in error, chief of police of the city of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the city of Los Angeles which makes it unlawful for any person to establish or operate a brickyard or brickkiln, or any establishment, factory, or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him [405] and he was committed to the custody of defendant in error as chief of police of the city of Los Angeles.

Being so in custody he filed a petition in the supreme court of the state for a writ of habeas corpus. The writ was issued. Subsequently defendant in error made a return thereto, supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The chief justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to habeas corpus and that petitioner is the owner of a tract of land within the limits described in the ordinance, upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than $100,000 per acre, or about $800,000 for the entire tract for brickmaking purposes, and not exceeding $60,000 for residential purposes, or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property, and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was, at the time of purchase, outside of the limits of the city, and distant from dwellings and other habitations, and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid, he will be compelled to entirely abandon his

business and will be deprived of the use of his property.

[406] That the manufacture of brick must necessarily be carried on where suitable clay is found, and the clay cannot be transported to some other location; and, besides, the clay upon his property is particularly fine, and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brickyard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the state, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brickyard an extremely small amount of smoke is emitted from any kiln, and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brickyard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75 per cent of it is devoted to residential purposes; that the district described in the ordinance includes only about 3 square miles, is sparsely settled, and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brickyard.

That there are and were, at the time of the adoption of the ordinance, in other districts of the city thickly built up with residences brickyards maintained more detrimental to the inhabitants of the city. That a petition was filed, [407] signed by several hundred persons, representing such brickyards to be a nuisance, and no ordinance or regulation was passed in regard to such petition, and the brickyards are operated without hindrance or molestation. That other brickyards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brickyards, or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense, and is in violation of the Constitution of the state and the 14th Amendment to the Constitution of the United States.

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern, and its conduct will not create a nuisance.

There is an allegation that the ordinance, if enforced, fosters and will foster a monopoly, and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons, who are his competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition, as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of [408] petitioner, and it is alleged that there is another district in which brickyards are prohibited.

There was a denial of the allegations that the brickyard was conducted or could be conducted sanitarily, or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam, and dust arising from petitioner's brickmaking plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property, or that it contained deposits of clay, or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the supreme court dealt with the allegations, denials, and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss: "The district to which the prohibition was applied contains about 3 square miles. The petitioner is the owner of a tract of land, containing 8 acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed

to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery, and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose." [165 Cal. 418, L.R.A.1916B, 1248, 132 Pac. 584.]

The court considered the business one which could be regulated, and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that [409] petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return, and the evidence of the affidavits, the court said that the latter tended to show that the district created has become primarily a residential section, and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, is certainly sufficient to overcome any contention that the prohibition [of the ordinance] was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business . . . was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure, and that it was intended to discriminate against petitioner, or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature, and that the court, without regard to the fact shown in the return that there was another district in which brickmaking was prohibited, could not sustain the claim that the ordinance was not enacted in good faith, but was designed to discriminate against petitioner and the other brickyard within the district. "The facts before us," the court finally said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be; viz., a legitimate regulation, operating alike upon all who come within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many [410] cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 78, 59 L. ed. 1204, 1211, 35 Sup. Ct. Rep. 678. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511. The circumstances of the case were very much like those of the case at bar, and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brickyard here. They differ in [411] particulars, but they are alike in that which cause and justify prohibition in defined localities,— that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it, "and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a

nuisance in fact and in law." And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between Reinman v. Little Rock and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found, and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility, but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive "from a financial standpoint." But upon the evidence the supreme court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brickyard, and not from the deprivation of the deposits of clay, and distinguished Ex parte Kelso, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. [412] The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of." The court expressed the view that the removal could be regulated, but that "an absolute prohibition of such removal under the circumstances" could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error;" and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district, and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain [413] businesses having mechanical power, and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination, and upon which, nevertheless, we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions; and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the supreme court, and we find nothing to justify it.

It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the supreme court of the state, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge

that it does [414] not exactly accommodate the conditions, or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

We do not notice the contention that the ordinance is not within the city's charter powers, nor that it is in violation of the state Constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the supreme court of the state.

Judgment affirmed.

ELI P. WILLIAMS, Elmer Williams, and Charles H. Williams, Plffs. in Err.,
v.
BEN F. JOHNSON.

(See S. C. Reporter's ed. 414–421.)

Constitutional law — impairing contract obligations — due process of law — Indian allotments.

Congress, in the exercise of its plenary control over Indians, could, notwithstanding the contract and due process of law clauses of the Federal Constitution, provide, as it did in the act of April 21, 1904 (33 Stat. at L. 204, chap. 1402), that the restrictions on alienation by allottees of Indian blood under the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), which that act imposes, could be removed by the Secretary of the Interior upon application to the Indian agent in charge if the latter should be satisfied, upon a full investigation, that the removal of the restrictions was for the interest of the allottee.

[For other cases, see Constitutional Law, IV. b, 5; IV. g, 2; Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 110.]

Submitted December 6, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Grady County, in that state, in favor of plaintiff in a suit to quiet title. Affirmed.

See same case below, 32 Okla. 247, 122 Pac. 485.

The facts are stated in the opinion.

Messrs. **Eli P. Williams**, Elmer Williams, and Charles H. Williams, *in propriis personis*, submitted the cause for plaintiffs in error:

Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee.

Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

The Choctaw and Chickasaw Nations have complete title except that said Nations have no right to transfer or alienate the land except to the United States, or with its consent.

Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578.

Where Congress has passed an act, and property rights or contract rights are acquired under said act, thereafter Congress is without power to pass an act annulling or in any way affecting the rights so acquired under the former act of Congress.

Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 Sup. Ct. Rep. 627.

Mr. **Reford Bond** submitted the cause for defendant in error. Messrs. Alger Melton and Adrian Melton were on the brief:

No contract or agreement can exist as between the government and these Indians by reason of the treaty.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Choctaw Nation v. Hitchcock, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; Starr v. Long Jim, 227 U. S. 613, 57 L. ed. 670, 33 Sup. Ct. Rep. 358.

[416] Mr. Justice **McKenna** delivered the opinion of the court:

Suit to quiet title, brought by Johnson, defendant in error, in the district court of Grady county, state of Oklahoma, against plaintiffs in error.

The contention of defendant in error is that the land was an allotment to one Selin Taylor, a member of the Choctaw Tribe of Indians by blood; that on November 22, 1904, a patent was duly issued to him, executed by the proper officers of that Nation and the Chickasaw Nation, and the United

NOTE.—Generally as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

On power of Congress over Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

States, and that at the time of the allotment the land was inalienable.

On February 9, 1906, the United States Indian agent issued to Taylor a certificate (No. 2458) removing Taylor's disabilities respecting the alienation of the land, and on February 16th Taylor conveyed the land by warranty deed to C. B. Campbell, and the latter and his wife, on March 13th following, conveyed the land by like deed to Johnson. The deeds were duly recorded.

On November 15, 1906, Taylor and his wife conveyed the land by warranty deed to James E. Whitehead, and on October 22, 1909, Whitehead conveyed the land to one McNeill, who, on the 25th of that month, conveyed to Johnson.

Johnson's petition alleged that the claim of title of the defendants (plaintiffs in error here) was based upon a power of attorney covering the land, executed by Taylor on March 11, 1907, and charged that the power of attorney constituted a cloud upon his (Johnson's) title.

The answer of the defendants admitted the allotment to Taylor and the execution of the various instruments of conveyance from him and his grantees to Johnson, and alleged that Taylor received his allotment under an act of Congress of July 1, 1902, known as an "Act to Ratify and Confirm an Agreement with the [417] Choctaw and Chickasaw Tribes of Indians, and for Other Purposes" [32 Stat. at L. 641, chap. 1362], and that the act was called an "agreement" and was ratified by Congress and the voters of those tribes, and was a binding contract upon the United States and the Indians of those tribes, and particularly Taylor. That Taylor is not a ward of the United States and was not at the time the land was allotted, and that by an act of Congress of March 3, 1901 (31 Stat. at L. 1447, chap. 869) Taylor was made a citizen of the United States, with the rights, privileges, and immunities of such.

That the Choctaw and Chickasaw Nations, and not the United States, are the grantors in the patent to Taylor, and imposed restrictions upon him against the alienation of the land, and have not consented to the removal of those restrictions. That the deeds executed by Taylor under which Johnson claimed title were in violation of such restrictions and therefore void. That the patent to Taylor was issued by authority of § 29 of the act of Congress of June 28, 1898 (30 Stat. at L. 495, chap. 517), and contained the following clause: "Subject, however, to the provisions of the act of Congress approved July 1st, 1902 (32 Stat. at L. 641, chap. 1362)."

That Taylor and the defendants claim title to the land under that agreement and patent; that the restrictions imposed upon the alienation of the land were for the protection and benefit of the members of the tribes; that Taylor was a full-blood Choctaw Indian and a member of the Choctaw tribe, did not understand the English language, was wholly ignorant of land values, was in need of and entitled to the protection and benefit of the restrictions so imposed; and that such "protection was of great value and was to him property as much as the land itself."

That the deeds executed by Taylor to Campbell and Whitehead were in open violation of the restrictions against alienation in the act of Congress of July 1, 1902, supra, under which Taylor was allotted the land, and also in [418] violation of the restrictions upon alienation contained in the patent from the Choctaw and Chickasaw Nations to him, and were executed under an unconstitutional act of Congress approved April 21, 1904 (33 Stat. at L. 204, chap. 1402). That the object of that act of Congress and of the certificate to Taylor was to remove the restrictions upon the alienation of the land, and that they impair the obligation of the contract or binding agreement "upon the United States and upon the Choctaw and Chickasaw Nations and upon all Choctaws and Chickasaws," and especially Selin Taylor, and are repugnant to the act of Congress under which Taylor was allotted the land, and also to the Constitution of the United States and the clause in the 5th Amendment thereof which provides that no person shall be deprived of his property without due process of law. A cancelation of the deeds was prayed, the annulment of the interest of Johnson in the land and the rents thereof, and judgment for the possession of the land.

A demurrer to the answer was sustained, and defendants (plaintiffs in error) declining to plead further, a decree was entered quieting Johnson's title to the land. Upon appeal the judgment was sustained by the supreme court of the state, and error was prosecuted from this court.

The record presents the general question, Was the land alienable by Taylor? This depends upon the validity of certificate No. 2458, issued to Taylor, and that again on the validity of the act of Congress of April 21, 1904 (33 Stat. at L. 204, chap. 1402). This act removed the restrictions imposed by the act of July 1, 1902, upon allottees of either of the Five Civilized Tribes who were not of Indian blood, and provided for the removal by the Secretary of the Interior of all restrictions upon the alienation of all other allottees of said tribes (with certain exceptions) upon application to the Indian agent in charge of such tribes, if the agent

was satisfied, upon full investigation of each individual [419] case, that the removal of restrictions was for the interest of the allottee.

The certificate shows that the application was made by Taylor, and yet plaintiffs in error assert the invalidity of both certificate and act because they are, it is contended, repugnant to the act of Congress of July 1, 1902 (32 Stat. at L. 641, chap. 1362), which, it is contended, constituted a contract between the United States and the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws; that the restriction upon alienation was a protection to Taylor "against his own improvident acts," that it was "not a personal privilege and repealable," but was "an incident attached to the land itself," and "was to him property as much as the land itself."

The act of July 1, 1902, is entitled, "An Act to Ratify and Confirm an Agreement with the Choctaw and Chickasaw Tribes of Indians, and for Other Purposes." It recites that "in consideration of the mutual undertakings here contained, it is agreed" that (§ 16) all land shall be alienable after issue of patent in certain quantities and at certain times, "provided that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value;" that (§ 68) "no act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations;" and, further (§ 73), that "this agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw Tribes in the manner following: . . ."

It is conceded by plaintiffs in error that an act of Congress can supersede a prior treaty, but they insist that it is [420] well settled "that Congress is without power to change a contract or agreement for a valuable consideration with an individual Indian allottee." Choate v. Trapp, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565, and Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, are cited, and incidentally Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578, and Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494.

The cases do not apply. It has often been decided that the Indians are wards of the nation, and that Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation. Marchie Tiger v. Western Invest. Co. supra. Against this ruling Choate v. Trapp does not militate. In the latter case it was decided that taxation could not be imposed upon allotted land a patent to which was issued under an act of Congress containing a provision "that the land should be nontaxable" for a limited time; and, excluding the application of the Marchie Tiger Case, it was said that exemption from taxation "and nonalienability were two separate and distinct objects." And further, "One conveyed a right and the other imposed a limitation." The power to do the latter was declared, and it was said "the right to remove the restriction [limitation upon alienation] was in pursuance of the power under which Congress could legislate as to the status of the ward, and lengthen or shorten the period of disability. But the provision that the land should be nontaxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma."

Jones v. Meehan, supra, is an instance of the same principle, and is not opposed to the power of Congress to remove restrictions upon alienation. And there is nothing antagonistic to the cited cases in Mullen v. United States, supra.

A question was intimated in the Marchie Tiger Case whether a [421] grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress, and it is still more questionable whether plaintiffs in error can be heard to urge the rights of the Choctaw and Chickasaw Nations. However, we may reserve opinion. Those nations are not parties to this suit and no contract rights of Taylor have been violated.

Judgment affirmed.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, and Frank Drake, Plffs. in Err.,

v.

DANIEL C. WHITEAKER.

(See S. C. Reporter's ed. 421-425.)

Error to state court — scope of review — removal of causes.

1. Whether or not the petition states a

NOTE.—On error to state court where removal to Federal court was sought—see note to Williams v. First Nat. Bank, 54 L. ed. U. S. 626.

cause of action against a resident joined as codefendant with a nonresident is a matter of local law which is not open on a writ of error from the Federal Supreme Court, presenting the question whether the joinder was fraudulently made for the purpose of preventing a removal to a Federal court.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

Removal of causes — separable controversy — fraudulent joinder.

2. The motive of plaintiff in joining an impecunious resident railway employee as a codefendant with a nonresident railway corporation in a negligence suit is not material upon the question of the right of the latter to remove the cause to a Federal court if such defendants are jointly liable under the local law.

[For other cases, see Removal of Causes, IV. c, in Digest Sup. Ct. 1908.]

Removal of causes — fraudulent joinder — sufficiency of petition.

3. Allegations in the petition by which a nonresident railway company joined as codefendant with a resident employee in a negligence suit seeks to remove the case to a Federal court on the ground of fraudulent joinder are insufficient if they merely traverse the allegations upon which the liability of the resident defendant is rested, where no negligent act or omission personal to the railway company is charged in the petition in the state court, which, tested by the local law, states a case of joint liability, the company's liability, like that of the employee, being in effect based upon his alleged negligence.

[For other cases, see Removal of Causes, IV. b; VI. d, in Digest Sup. Ct. 1908.]

[No. 111.]

Submitted December 6, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Clinton County, in that state, in favor of plaintiff in an action against a foreign railway company and a resident employee, which the corporate defendant had attempted to remove to a Federal court. Affirmed.

See same case below, 252 Mo. 438, 160 S. W. 1009.

The facts are stated in the opinion.

Messrs. Paul E. Walker and M. L. Bell submitted the cause for plaintiffs in error:

A simple and conclusive test of the sufficiency of the allegations of the petition for removal and the accompanying affidavits is whether or not such facts, if pleaded in an answer, would have been subject to demurrer on the ground that, as a matter of law, and being admitted to be true, they would not be a defense so far as the defendant Drake is concerned.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656.

If the state court had granted the removal, and the plaintiff in the Federal court had filed a motion to remand without taking direct issue on the facts alleged in the petition for removal and acompanying affidavits, the motion to remand would have been but the filing of a demurrer, which would have raised only the legal question whether, upon the facts stated in the petition for removal and accompanying affidavits, a case for removal was made out.

Kentucky v. Powers, 201 U. S. 1, 33–35, 50 L. ed. 633, 648, 649, 26 Sup. Ct. Rep. 387, 5 Ann. Cas. 692; Dishon v. Cincinnati, N. O. & T. P. R. Co. 66 C. C. A. 345, 133 Fed 471; Hunter v. Illinois C. R. Co. 110 C. C. A. 459, 188 Fed. 649; Gibson v. Chesapeake & O. R. Co. 131 C. C. A. 332, 215 Fed. 26.

The state court has no power to try questions of fact arising upon the petition, but must accept the facts therein alleged as true.

Foster, Fed. Pr. 5th ed. § 554.

In holding that the question for determination was confined to the consideration of whether the petition on its face stated a joint cause of action, the Missouri courts ignored the long and well settled rule to the contrary.

Black's Dillon, Removal of Causes, §§ 76, 101; Moon, Removal of Causes, § 177; Stone v. South Carolina, 117 U. S. 430, 432, 29 L. ed. 962, 963, 6 Sup. Ct. Rep. 799; Carson v. Hyatt, 118 U. S. 279, 287, 30 L. ed. 167, 169, 6 Sup. Ct. Rep. 1050; Burlington, C. R. & N. R. Co. v. Dunn, 122 U. S. 513, 515, 516, 30 L. ed. 1159, 1160, 7 Sup. Ct. Rep. 1262.

Where the facts stated in the petition for removal show a cause properly removable from a state to a Federal court, the state court has no jurisdiction to pass finally upon them; that right is only for a Federal court, it having the exclusive province of passing upon such questions of fact.

As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Sloane v. Anderson, 29 L. ed. U. S. 899; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346; Merchants' Cotton Press & S. Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195; and Torrence v. Shedd, 36 L. ed. U. S. 528.

On fraud in joining a resident as codefendant with a nonresident defendant for the purpose of preventing a removal to the Federal courts on the ground of diverse citizenship, see note to Boatmen's Bank v. Fritzlen, 22 L.R.A.(N.S.) 1235.

Texas & P. R. Co. v. Eastin, 214 U. S. 153, 159, 53 L. ed. 946, 950, 29 Sup. Ct. Rep. 564; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; Iowa C. R. Co. v. Bacon, 236 U. S. 305, 310, 59 L. ed. 591, 593, 35 Sup. Ct. Rep. 357; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 113, 57 L. ed. 1090, 1095, 33 Sup. Ct. Rep. 684; Rea v. Standard Mirror Co. 158 N. C. 24, 73 S. E. 116; Donovan v. Wells, F. & Co. 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 368; Hunter v. Illinois C. R. Co. 110 C. C. A. 459, 188 Fed. 648; Gibson v. Chesapeake & O. R. Co. 131 C. C. A. 332, 215 Fed. 26; Boatman's Bank v. Fritzlen, 75 Kan. 488, 22 L.R.A.(N.S.) 1235, 89 Pac. 915, 68 C. C. A. 288, 135 Fed. 650, 653, 212 U. S. 364, 373, 53 L. ed. 551, 557, 29 Sup. Ct. Rep. 366.

The fact that, following an improper refusal of a state court to grant a removal, a jury returns a joint verdict against both the nonresident and the resident defendants, is of no importance.

Whitcomb v. Smithson, 175 U. S. 635, 638, 44 L. ed. 303, 305, 20 Sup. Ct. Rep. 248; Illinois C. R. Co. v. Outland, 160 Ky. 714, 170 S. W. 48; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101.

So, it has been held by this court that a decision upon the trial in a state court, after a petition for removal has been denied, to the effect that there is no liability against the resident defendant, does not show that the case was removable at the time the original petition therefor was filed, nor does it make it removable at the time of such ruling by the trial court.

Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; Alabama G. S. R. Co. v. Thompson, 200 U. S. 217, 50 L. ed. 447, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Lathrop, S. & H. Co. v. Interior Constr. & Improv. Co. 215 U. S. 246, 251, 54 L. ed. 177, 179, 30 Sup. Ct. Rep. 76; American Car & Foundry Co. v. Kettlehake, 236 U. S. 311, 315, 316, 59 L. ed. 594, 596, 597, 35 Sup. Ct. Rep. 355.

The action of a court or jury upon the merits of a controversy cannot control or be persuasive upon a consideration of the question of jurisdiction. It is fundamental, as this court has so frequently held, that the question of jurisdiction must be determined by and only by the record as it stood at the time the petition for removal and its accompanying documents were filed.

Sears v. Atchison, T. & S. F. R. Co. 163 Mo. App. 711, 147 S. W. 860.

The decision of this court in Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 185, 186, 51 L. ed. 430, 435, 436, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757, seems conclusive of the situation now before the court.

See also Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 154, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278.

Mr. Paul E. Walker filed a separate brief for plaintiffs in error:

False and fraudulent devices conceived for the purpose of preventing a litigant from exercising a guaranteed right of removal have been unequivocally condemned.

Arapahoe County v. Kansas P. R. Co. 4 Dill. 277, Fed. Cas. No. 502; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 185, 186, 51 L. ed. 430, 435, 436, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 154, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278.

The verdict of the jury in the state court against both defendants cannot be taken as proof that the removal was properly denied. It has long been the settled law that neither the decision of a court nor the verdict of a jury, either for or against a resident defendant, can be considered in the determination of the question of jurisdiction upon a petition for removal. A ruling or decision on the merits cannot relate back and determine the correctness of a ruling on the question of jurisdiction.

Whitcomb v. Smithson, 175 U. S. 635, 638, 44 L. ed. 303, 305, 20 Sup. Ct. Rep. 248; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 316, 54 L. ed. 208, 211, 30 Sup. Ct. Rep. 101; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 217, 50 L. ed. 441, 447, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Lathrop, S. & H. Co. v. Interior Constr. & Improv. Co. 215 U. S. 246, 251, 54 L. ed. 177, 179, 30 Sup. Ct. Rep. 76; American Car & Foundry Co. v. Kettelhake, 236 U. S. 311, 315, 316, 59 L. ed. 594, 596, 597, 35 Sup. Ct. Rep. 355.

Messrs. James P. Gilmore and Pross T. Cross submitted the cause for defendant in error:

The petition for removal was properly denied.

Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278; Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101; Southern R. Co. v. Miller, 217 U. S. 209, 54 L. ed. 732, 30 Sup. Ct. Rep. 450; Alabama G. S. R. Co. v.

Thompson, 200 U. S. 206-216, 50 L. ed. 441-446, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147.

On removal, the only question to consider was whether there was a real intention to get a joint judgment, and whether there was colorable ground for it, shown as the record stood at the time the removal was denied.

Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250.

Under the petition and the Missouri law, unless plaintiff obtained a judgment against the servant defendant he could not recover against the railway company, and plaintiff will be presumed to have joined the servant in good faith, and with the intent to get a joint judgment.

McGinnis v. Chicago, R. I. & P. R. Co. 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 Ann. Cas. 656; Whiteaker v. Chicago, R. I. & P. R. Co. 252 Mo. 438, 160 S. W. 1009.

Where a master and servant are joined as defendants, and a judgment is sought against the master on the sole ground of the servant's negligent acts, then any claim of fraud and falsehood in joining the servant goes to the merits of the action as an entirety, and not to the joinder, and indicates that plaintiff's case is ill founded as to all the defendants.

Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278.

All doubts are to be resolved in favor of the jurisdiction of the state court. No presumption can be indulged in favor of the jurisdiction of the Federal court.

Mexican Nat. R. Co. v. Davidson, 157 U. S. 208, 39 L. ed. 675, 15 Sup. Ct. Rep. 563; Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; Shaw v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935.

The state court is not ousted of jurisdiction unless the cause is properly removable. Federal jurisdiction cannot be inferred, but it must appear positively upon the face of the pleadings.

Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; Bors v. Preston, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; National S. S. Co. v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Southern R. Co. v. Carson, 194 U. S. 138, 8 L. ed. 909, 24 Sup. Ct. Rep. 609.

The joint liability of the defendant under the pleadings is a matter of state law, and the decision of the highest court of the state will not be reversed by the Federal Supreme Court on the question of fraudulent joinder to prevent removal.

Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 57 L. ed. 1090, 33 Sup. Ct. Rep. 684; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147; Illinois C. R. Co. v. Sheegog, 215 U. S. 308, 54 L. ed. 208, 30 Sup. Ct. Rep. 101.

Mr. Justice McKenna delivered the opinion of the court:

Action for damages, brought against the Chicago, Rock Island, & Pacific Railway Company and Frank Drake, as defendants, in the circuit court of Clinton county, state of Missouri.

The action was for personal injuries inflicted upon defendant in error by Drake, who was a conductor on a train of the railway company. It is alleged that Drake, "while acting in the line of his duties to defendant railway company, as such conductor and agent, and in the course of his employment, approached plaintiff (who was then sitting on the top of one of the cars in said train) . . . and wrongfully and unlawfully" kicked him from the train while it was running at a high rate of speed, plaintiff being without fault. The injuries received were detailed, and judgment was prayed for $15,000.

The railway company filed a petition for removal of the case to the United States circuit court for the western district of Missouri, in which it was alleged that the controversy was between citizens of different states, the plaintiff in the action being a citizen of Missouri and the railway company a citizen of Illinois. That the alleged cause of action was a separable controversy capable of determination between the plaintiff and the railway company; that Drake was joined as defendant for the sole and fraudulent purpose of preventing the company from removing the action from the state court, and thereby defeating the jurisdiction of the United States circuit court. [424] That plaintiff did not have and could not have had any cause of action against Drake or upon which to base a recovery against him, all which was known to plaintiff at the time of the institution of the action; that Drake was a man of small means, having but little property from which a judgment could be recovered, while the railway company had property more than sufficient to pay the amount sued for. That any act of negligence on the part of Drake was

an act of the railway company, and it was accordingly responsible and liable for the same. That plaintiff, when he instituted the action, had no reasonable hope, intention, or expectation of recovering any judgment against Drake.

A bond was duly tendered and the petition was accompanied by two affidavits which in effect contradicted the allegations of the petition as to Drake by showing that he was not on top of the train, and could not have attempted nor have done the acts charged against him.

The petition for removal was denied and the case subsequently tried to a jury which returned a verdict for plaintiff in the sum of $8,500, upon which judgment was entered It was affirmed by the supreme court of the state.

There is but one question presented: the correctness of the ruling upon the petition for removal to the United States circuit court. The railway company assails the ruling in an elaborate argument and by an industrious review of cases. In reply recent decisions of this court need only be considered.

The supreme court of the state decided that the petition stated a cause of action against Drake and the railway company, and whether it did, we said in Chicago, R. I. & P. R. Co. v. Schwyhart, 227 U. S. 184, 57 L. ed. 473, 33 Sup. Ct. Rep. 250, was a matter of state law. We held further that "the motive of plaintiff, taken by itself, does not affect the right to remove," and that "if there is a joint liability he has an [425] absolute right to enforce it, whatever the reason that makes him wish to assert the right." In that case as in this there was a petition for removal on the ground of fraudulent joinder of defendants to defeat Federal jurisdiction. The cases are substantially parallel.

In Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278, it was decided that it is not enough to assert that there was a fraudulent joinder of defendants, but there must be "a statement of facts rightly engendering that conclusion;" and that "merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith." And "it was not such," it was said, "unless it was without any reasonable basis."

There is nothing more than a traverse of the cause of action in the present case. The attempt was made to show that Drake could not have been guilty as charged because he was elsewhere on the train. The language of the cited case is again applicable: "As no negligent act or omission personal to the railway company was charged, and its liability, like that" of its employee, "was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants."

We conclude here as we concluded there, that the plaintiff had a right of action under the law of the state and to insist upon Drake's presence as a real defendant "as upon that of the railway company." There was no error, therefore, in the ruling of the Supreme Court, and its judgment is affirmed.

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[426] ROME MILLER, Plff. in Err.,
v.
EMIL J. STRAHL.

(See S. C. Reporter's ed. 426-435.)

Constitutional law — police power — regulating innkeeper's duty in case of fire.

1. The requirement of Neb. Rev. Stat. 1913, § 3104, that innkeepers in case of fire shall give notice of the same to all guests and inmates at once, and shall do all in their power to save such guests and inmates, cannot be said to exceed the state's police power as applied to a case where, through the failure to make any adequate investigation, a guest was permitted to sleep for two hours after there were indications that a fire existed, awaking only to find that all means of escape, except by a rope which proved too weak to sustain his weight, were cut off by the density of the smoke, and the absence of employees from their posts.

[For other cases, see Constitutional Law, IV. c, in Digest Sup. Ct. 1908.]

Note.—For a discussion of police power, generally—see notes to State v. Marshall, 1 L.R.A. 151; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

On the liability of an innkeeper for injuries caused by lack or insufficiency of fire protection—see note to Ritter v. Norman, 43 L.R.A.(N.S.) 661.

Generally, as to liability for injuries caused by lack or insufficiency of fire escapes—see notes to Rose v. King, 15 L.R.A. 160; Yall v. Snow, 10 L.R.A.(N.S.) 177; Arnold v. National Starch Co. 21 L.R.A. (N.S.) 178; and West v. Inman, 39 L.R.A. (N.S.) 744.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

Constitutional law — due process of law — uncertainty of statute.

2. There is no such uncertainty in the requirement of Neb. Rev. Stat. 1913, § 3104, that innkeepers in case of fire shall "do all in their power" to save guests and inmates, as to render the statute invalid under U. S. Const., 14th Amend., as wanting in due process of law.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — regulating duty of innkeepers in case of fire.

3. Singling out hotels having more than fifty rooms as proper subjects for regulations respecting the duty of hotel keepers towards guests and inmates in case of fire, as is done by Neb. Rev. Stat. 1913, § 3104, does not render the statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 458.]

Argued November 29, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Douglas County, in that state, in favor of plaintiff in an action against a hotel keeper to recover for personal injuries sustained by a guest during a fire. Affirmed.

See same case below, 97 Neb. 820, 151 N. W. 952.

The facts are stated in the opinion.

Mr. Edgar M. Morsman, Jr., argued the cause and filed a brief for plaintiff in error:

Requiring a person to do all in his power to save another fails to point out to such person with sufficient clearness the course of conduct to be pursued, and furnishes no criterion whereby such person can judge his acts. Therefore fine, imprisonment, and payment of damages for failure to do all in one's power to save another deprives a person of liberty and property without that due process of law guaranteed by the Constitution of the United States.

Collins v. Kentucky, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; State v. Mann, 2 Or. 238; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; United States v. Capital Traction Co. 34 App. D. C. 592, 19 Ann. Cas. 68; Brown v. State, 137 Wis. 543, 119 N. W. 338; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Railroad Commission v. Grand Trunk Western R. Co. 179 Ind. 255, 100 N. E. 852; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 331; Czarra v. Medical Supervisors, 25 App. D. C. 443; Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301.

A master must furnish his employee a safe place in which to work; and, failing to do so, must respond in damages. But, having furnished a safe place, the master cannot be made liable because he fails to risk his own safety to save the servant. An innkeeper may be made responsible for damage done by fire, but, not being made responsible therefor, he cannot be held liable because he fails to risk his own safety in order to save his guest unharmed.

Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Gastenau v. Com. 108 Ky. 473, 49 L.R.A. 111, 94 Am. St. Rep. 386, 56 S. W. 705; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240.

Requiring that the keepers of inns having more than fifty rooms shall awaken and notify guests of fire, and do all in their power to save them unharmed from fire, denies the equal protection of the laws to such innkeepers, as compared with the keepers of inns having less than fifty rooms.

Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675.

Mr. H. C. Brome argued the cause, and, with Messrs. Clinton Brome and H. S. Daniel, filed a brief for defendant in error:

The 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances, both in the privileges and liabilities imposed.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; McLean v. Arkansas, 211 U. S. 546, 53 L. ed. 318, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675.

It is not enough that a state law, as written, is capable of a construction that

would render it repugnant to some provision of the Constitution of the United States, to authorize this court to pronounce it invalid. If the law, as construed by the courts of the state, does not offend against constitutional provisions, then it must be held valid here.

Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Soper v. Lawrence Bros. Co. 201 U. S. 371, 50 L. ed. 792, 26 Sup. Ct. Rep. 473; Gatewood v. North Carolina, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424.

It will be time enough to consider whether or not the penal provisions of the Nebraska innkeepers act are enforceable when that question arises.

Wyatt v. McCreery & Co. 126 App. Div. 650, 111 N. Y. Supp. 86; Wolf v. Smith, 149 Ala. 457, 9 L.R.A.(N.S.) 338, 42 So. 824.

The legislative enactment complained of is a valid and salutary exercise of the police power of the state. Barring specific requirements, all property designed to promote the public health and safety, it does no more than declare the common-law duty of the innkeeper with respect to his guests. The supreme court of the state of Nebraska has given the law a sensible and proper construction. As construed by that court, there is no danger that plaintiff in error will be compelled to endanger his life or that of his employee in performing the duties imposed upon him or them.

United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Clancy v. Barker, 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 98 N. W. 440, 103 N. W. 446, 8 Ann. Cas. 682, 15 Am. Neg. Rep. 594, 18 Am. Neg. Rep. 173.

Mr. Justice McKenna delivered the opinion of the court:

Action for the recovery of $15,000 on account of injuries sustained by defendant in error while a guest at the hotel of plaintiff in error, caused by the negligence of the latter and in violation of a law of the state of Nebraska.

Plaintiff in the case, defendant in error here, alleges that the plaintiff in error was the proprietor and operator of what is known as the Millard Hotel, located in Omaha, Nebraska, and that, as such, he received and entertained [429] defendant in error as a guest for hire; that on the night of January 22, 1911, and during the morning of January 23, defendant in error occupied a room on the fourth floor of the hotel; that the hotel had more than fifty rooms and was four or more stories high; that between midnight and dawn, January 23, 1911, a "hostile fire" broke out in the hotel, which, it is alleged, by reason of the negligence of plaintiff in error, was not properly discovered or controlled, and a portion of the hotel was burned, the halls thereof filled with smoke and gases, endangering the lives of the guests and inmates; that plaintiff in error and his servants failed and neglected to awaken the guests or give them notice of the fire, and that by reason thereof defendant in error was injured by the smoke and gases in attempting to escape from the hotel.

The specifications of negligence are as follows:

(1) Failure to maintain a competent night watchman; that the hotel was not properly patrolled, examined, or inspected, and that its employees negligently failed to be at their posts of duty to respond to the warnings given them.

(2) Plaintiff in error did not maintain an efficient or sufficient system of fire gongs for arousing guests, that he did not, as soon as the fire was discovered, ring or cause to be rung a fire gong on the fourth floor, or ring or cause to be rung a telephone in the room of defendant in error, or in any other way awaken, arouse, or notify him of the existence of the fire.

(3) Plaintiff in error did not notify defendant in error of the location of the stairway leading from the fourth floor; that the hotel did not have a sufficient number of stairways; that plaintiff in error failed to operate the elevator, failed to respond to defendant in error's demand to be removed, and failed to have any light, sign, or notice indicating the location of the elevator.

(4) Defendant in error's room was furnished with a [430] rope which plaintiff in error represented could be used for the purpose of a fire escape, but that it was too small and insufficient for such purpose, and that proper directions were not given for its use as a means of escape. Defendant in error attempted to escape by means of this rope and in doing so suffered bodily injuries.

There were general denials of these allegations and averments of negligence on the part of defendant in error which directly, it is averred, contributed to and caused his injuries, and without which, it is further averred, he would not have received them. A knowledge of or means of knowledge of the plans of the hotel and means of ingress and egress were averred, and also the equipment of the hotel lights in its halls, notices and fire escapes.

The case was tried to a jury which returned a verdict for defendant in error in

the sum of $6,500, upon which judgment was entered. It was affirmed by the supreme court of the state.

The supreme court in its opinion says: "It is undisputed that the smell of smoke was detected by one of the employees in the hotel about 1:30 A. M., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter, might be burning there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts, together with the testimony relating to the fire gongs, fire escapes, and the general conduct of appellant's agents, were all properly submitted to the jury." [97 Neb. 823, 151 N. W. 952.]

The court decided that there was a common-law liability upon a hotel keeper "to protect his guests from danger when it is reasonably within his power to do so," and cited besides, § 3104 of the Revised Statutes of the state, 1913, which reads as follows:

"In hotels or lodging houses containing more than fifty [431] rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

The statute is attacked on the ground that it contravenes the Constitution of the state (with which we have no concern) and the Constitution of the United States. As a foundation for the contention plaintiff in error asserts that the trial court, whose action was affirmed by the supreme court of the state, specifically instructed the jury that plaintiff in error "and all his employees and the night watchman at the hotel owed" to defendant in error "the *active duty after the fire had broken out* [italics counsel's] as follows: (a) To notify him (Strahl) of the existence of the fire so that he might escape unharmed. (b) To do all in their power to save him (Strahl) from the fire, and that failure to perform either of these duties made Rome Miller [plaintiff in error] liable in damages. In other words, the trial court construed the act of 1883, above mentioned, so as to make Rome Miller liable for the penalty mentioned in the act (fine, imprisonment, and liable for damages) in the event (1) either he or the watchman or any employee in the hotel *failed to do all in their power* to save Emil J. Strahl from the fire [432] free of injury or (2) either the proprietor of the hotel (Miller), the watchman, or any other employee, failed to awaken and notify Strahl of the existence of the fire."

Plaintiff in error admits that the state of Nebraska may "without limit" prescribe "regulations having reference to the performance of acts and the taking of precaution prior to the time when a fire breaks out." But counsel says, "After the fire breaks out, we deny that the legislature, under its police power, can compel the innkeeper or the watchman, or any employee, to do any act which involves a risk to the life and liberty of such person." Such limitation of the police power is expressed in various ways, and that it is not within such power to compel a watchman or other employee to remain in a burning building "for the purpose of doing all in their power to save the lives of the guests, and for the purpose of awakening the guests and notifying them of the fire," such lives being, it is added, "just as precious and valuable to the state as is the life of the guest."

We need not pause to consider differences between the value of lives to the state, or whether one life is more precious than another to the state, or of more concern to the state to preserve than the other. It is quite certain that he who assumes duties may be required to perform them. When plaintiff in error engaged in the business of hotel keeper he undertook its obligations, and we need not consider whether the statute exacts from him and his employees heroic conduct, and not much more need be said in answer to the contentions of plaintiff in error.

The command of the statute is that in case of a fire the keepers of hotels must give "notice of the same to all guests and inmates thereof at once, and to do all in their power to save such guests and inmates." Could the statute exact less? It is the dictate of humanity, and gets nothing from its expression as a legal obligation except a penalty for its violation, and the facts of the case reject [433] any charge that it was enforced to the extent of risk of the life of anybody or to the injury of anybody.

Plaintiff in error was charged with certain acts of omission, the jury found that he was guilty as charged, and the finding was sustained by the trial and supreme courts. We may say without particular review that they were plain violations of duty required by the statute. There was an especially significant fact: the fire was detected by one of the employees of the hotel about 1:30 A. M., and later a guest called the attention of the clerk to the smell of smoke. The clerk was moved by this warning to look into a cuspidor, and no further; and this was two hours before defendant in error awoke to find the halls filled with smoke. The neglect cannot be magnified by comment. If the action of a clerk under such circumstances would be a discharge of duty to one guest it would be a discharge of duty to many guests; if to men, then to women and children, and the tragedy which might result appalls the imagination. But to one or many the duty to investigate when the existence of a fire is indicated or suspected is clear. It is to be remembered that in the case at bar there were indications of fire at 1:30 A. M., and that at 3:30 defendant in error awoke to find the halls filled with smoke. He could get no response to his calls by telephone; he sought the elevator, but it was not running, and, not knowing the location of the stairway, he returned to his room and attempted to escape by means of a rope fire escape. These facts and others referred to by the court justified the jury in concluding that plaintiff in error did not do all in his power to save defendant in error.

It is entirely aside from the questions in the case and the requirements of the statute to consider the dismays and perils of an extreme situation, and what then might be expected of courage or excused to timidity. It was one of the purposes of the statute to preclude such extremity. [434] It requires careful inspection of conditions, especially through the night, to detect the existence of fire, and prompt action if it is detected. Had these requirements been observed in the present case, defendant in error would not have been permitted to sleep in a burning hotel for two hours until means of escape were cut off by the density of the smoke and the absence of the employees of the hotel from their posts—except by a rope, which proved too weak to sustain his weight.

Plaintiff in error contends further that the statute "is lacking in due process of law" because "it fails to prescribe any fixed rule of conduct." The argument is that the requirement "to do all in one's power" fails to inform a man of ordinary intelligence what he must or must not do under given circumstances.

Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that "men are differently constituted," some being "abject cowards, and few only are real heroes;" that the brains of some people work "rapidly and normally in the face of danger while other people lose all control over their actions." It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised then the doing of "all in one's power" as determined by the circumstances?

The case falls, therefore, under the rule of Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780, and not under the rule of International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853.

It is objected that, as the statute is directed to keepers of hotels having more than fifty rooms, and does not apply to keepers of hotels having less, it therefore discriminates against the former and deprives them of the equal protection of the laws. The contention is untenable. McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Williams v. Arkansas, 217 [435] U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 Sup. Ct. Rep. 617.

Judgment affirmed.

EX PARTE JESSE W. UPPERCU, Petitioner.

(See S. C. Reporter's ed. 435–441.)

Records — access to sealed depositions and exhibits.

1. The right of any litigant of access to depositions and exhibits on file in another cause which contain evidence material to

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Note.—As to when mandamus is the proper remedy, generally—see notes to United States ex rel. International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie, 3 L.R.A. 54; Burnsville Turnpk. Co. v. State, 3 L.R.A. 265; State ex rel. Charleston, C. & C. R. Co. v. White-

his case cannot be defeated by an order of the court sealing such depositions and impounding the exhibits, where neither the parties to the original action nor the deponents have any privilege.
[For other cases, see Record, in Digest Sup. Ct. 1908.]

Mandamus — access to judicial records — other remedy.

2. The right to require by mandamus that petitioner be afforded access to depositions and exhibits containing evidence material to his case which are on file in an action brought by the United States in a Federal district court, but which are sealed by the order of that court, is not defeated because of an order not appealed from, rejecting his motion for leave to inspect such depositions, on the ground that such motion was made in the original case and that he was not a party to it, nor by the subsequent denial of the government's motion to vacate or modify the court's order so as to allow the depositions to be used, to which denial exceptions were taken which have not yet been heard by the circuit court of appeals.
[For other cases, see Mandamus, II. b, in Digest Sup. Ct. 1908.]

[No. 14, Original.]

Argued December 6, 1915. Decided December 20, 1915.

ORIGINAL PETITION for a Writ of Mandamus to enforce petitioner's right of access to certain depositions and exhibits on file in an action, but sealed by order of a Federal District Court. Rule made absolute.

The facts are stated in the opinion.

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sides, 3 L.R.A. 777; and Ex parte Hurn, 13 L.R.A. 120.

Right of access to judicial records.

The right of a litigant to inspect judicial records which concern him seems unquestioned.

Thus, plaintiff in an action for malicious prosecution is entitled to inspect and make a copy of the information taken by a justice of the peace on which the warrant for the arrest was granted. Welch v. Richards, Barnes, 468.

And plaintiff in an action of trespass and false imprisonment may inspect the book of proceedings of the court in which he was sued and was taken in execution, but only so far as they relate to the suit against himself. Wilson v. Rogers, 2 Strange, 1242.

And the record of proceedings on an inquest, or to discover the murderer, under Tex. Code Crim. Proc. Acts, 941, 942, in which testimony of the witnesses is taken down, is a public document which one accused of murder has a right, on proper motion, to inspect and use. Jenkins v. State, 45 Tex. Crim. Rep. 173, 75 S. W. 312.

A person indicted for homicide is entitled to inspect the testimony taken at the coroner's inquest, which, conformably to Conn. Rev. Laws 1888, § 2011, had been reduced to writing and lodged with the clerk of the superior court, since, if not a public record, it is a public document relating to matters of public interest, and required by law to be kept by a public officer, who is the custodian of the records of judicial proceedings and other public documents. And a different ruling is not demanded because of §§ 2009, 2016, which authorize the inquest or any part of it to be in private, and empower the coroner to keep the witnesses separate. Daly v. Dimock, 55 Conn. 579, 12 Atl. 405.

The committing magistrate or his clerk, if the latter has official charge of the criminal complaint on which the warrant of arrest issued, must, under N. Y. Code Crim. Proc. §§ 188, 205, permit the accused's attorney to inspect such complaint,—and this although a different attorney appeared for the prisoner at the time of his arrest. People ex rel. Steinhardt v. Fuller, 15 N. Y. Crim. Rep. 344, 68 N. Y. Supp. 742.

Some of the cases go so far as to extend this right of access to anyone.

Thus, it has been held that the transcript of record on appeal and all the papers and documents relating thereto, upon filing with the clerk of the appellate court become public judicial records to which all persons have the right of access. Ex parte Drawbaugh, 2 App. D. C. 404.

And, in Nash v. Lathrop, 142 Mass. 29, 6 N. E. 559, it was held that any person, though not a citizen, had a right of access to the opinions of the supreme court of Massachusetts.

On the other hand, it has been held that a party is not entitled to the inspection of judicial records unless some satisfactory reason is given. Rex v. Maidstone, 6 Dowl. & R. 334.

An unlimited right of a citizen of the United States to inspect and examine all the records and papers belonging to the court does not exist, said the court in Re McLean, 2 Flipp. 512, Fed. Cas. No. 8,877.

So, the clerk of a court may refuse to furnish a copy of the proceedings in a divorce suit for newspaper publication, in the absence of any statutory provision on the subject. Re Caswell, 18 R. I. 835, 27 L.R.A. 82, 49 Am. St. Rep. 814, 29 Atl. 259.

Parties to pending suits may, under the direction of the court, lawfully withhold the records and papers in the case so as to prevent examination by a newspaper reporter until the case is made public by the consent of the parties or by proceedings in open court. Schmedding v. May, 85 Mich. 1, 24 Am. St. Rep. 74, 48 N. W. 201.

But the rules and practice of the Patent Office furnish no warrant for ordering that the files relating to an appeal from the Patent Office to the court of appeals of the District of Columbia shall be preserved in secrecy, and directing the clerk not to permit said files or any part thereof to be inspected except on request of appellant or

Mr. Alvin Cushing Cass argued the cause and filed a brief for petitioner:

The writ of mandamus is the proper remedy.

Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; Re Pollitz, 206 U. S. 331, 51 L. ed. 1083, 27 Sup. Ct. Rep. 729; Re Grossmayer, 177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; Re Hohorst, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

Court records are inherently public, and, subject to reasonable regulations, any person showing a legitimate interest (and this is liberally construed) has the common-law right of full disclosure.

Sloan Filter Co. v. El Paso Reduction Co. 117 Fed. 504; Bell v. Commonwealth Title Ins. & T. Co. 189 U. S. 131, 47 L. ed. 741, 23 Sup. Ct. Rep. 569.

Mr. Frank W. Knowlton argued the cause, and, with Messrs. Charles F. Choate, Jr., and James Garfield, filed a brief for respondent:

A writ of mandamus will never be granted where there is another adequate legal remedy open to the petitioner. It cannot be used, for example, to perform the functions of an appeal or a writ of error.

Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722; Ex parte Harding, 219 U. S. 363, 55 L. ed. 252, 37 L.R.A. (N.S.) 392, 31 Sup. Ct. Rep. 324; Re Pollitz, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; Chandler v. Pailthorp, 97 Mich. 621, 57 N. W. 189.

A writ of mandamus can never be used to control the judicial discretion of a subordinate court.

Ex parte Roe, 234 U. S. 70, 58 L. ed. 1217, 34 Sup. Ct. Rep. 722; Re Winn, 213 U. S. 458, 468, 53 L. ed. 873, 877, 29 Sup. Ct. Rep. 515.

Though mandamus may be used under appropriate circumstances to compel a court to decide an issue, it cannot be used to dictate how such issue shall be decided. Consequently, it cannot compel the reviewing or vacating of a judgment, decree, or order already made, on the ground that the issue was wrongly decided.

Ex parte Morgan, 114 U. S. 174, 29 L. ed. 185, 5 Sup. Ct. Rep. 825; Ex parte Schwab, 98 U. S. 240, 25 L. ed. 105; Ex parte Loring, 94 U. S. 418, 24 L. ed. 165; Chiera v. Brevoort, 97 Mich. 638, 57 N. W. 193.

The act of a court suppressing or refusing to suppress a deposition, being judicial, will not be controlled by mandamus.

Ex parte Elston, 25 Ala. 72; 26 Cyc. 205.

A writ of mandamus will never be granted unless the petitioner has a clear and specific right to be enforced by it.

Re Key, 189 U. S. 84, 47 L. ed. 720, 23 Sup. Ct. Rep. 624; Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49.

Depositions differ from other public documents which are required to be open to the inspection of all.

Wigmore, Ev. § 2111 (3); Myers v.

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his attorneys, or upon special order of the court, first obtained after notice to appellant's attorneys. Such files are subject to public inspection like those in any other case. Ex parte Drawbaugh, supra.

Statutes exist in some jurisdictions extending the right of inspection to any person.

Under a West Virginia statute "the records and papers of every court shall be open to the inspection of any person." State ex rel. Clark v. Long, 37 W. Va. 266, 16 S. E. 578.

But this does not mean that inspection is for everyone for pastime, whim, or fancy. The person seeking it must have some interest and the purpose of the inspection must be legitimate. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927, 2 Ann. Cas. 74.

The books containing docket or minute entries of the judgments and decrees of the Federal circuit and district courts were by statute "open to the inspection of any person." Re McLean, supra.

The docket of a justice of the peace wherein judgments are recorded is a public record within the meaning of Neb. Comp. Stat. chap. 74, declaring that "all citizens of this state and all other persons interested in the examination of the public records, are hereby fully empowered and authorized to examine the same, free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business." State ex rel. Newby v. Ellsworth, 61 Neb. 444, 85 N. W. 439.

And the sustaining of an objection to the use of a copy of a stenographic report of evidence in another trial, because the party using the same had refused to allow inspection, was error, since the original was open to the inspection of either party, and either or both could have obtained a copy of the same. Spielman v. Flynn, 19 Neb. 342, 27 N. W. 224.

Any citizen may, without payment of fee, inspect and make memoranda for purposes of newspaper publication of the contents of a marriage license docket kept by the clerk of the orphans' court. The docket, under the local statutes, is a public record, and the record therein of the issuance of a license is the record of a judicial act, the clerk's decision for or against the license being as much a judgment as any other act involving the exercise of judicial conduct. Marriage License Docket, 4 Pa. Dist. R. 162.

See, however, Kalamazoo Gazette Co. v.

Roberts, 35 Fla. 255, 17 So. 358; Re McLean, 2 Flipp. 512, Fed. Cas. No. 8,877; Re Cincinnati Enquirer, Fed. Cas. No. 2,719; Beale v. Thompson, 8 Cranch, 70, 3 L. ed. 491; Gross v. Coffey, 111 Ala. 474, 20 So. 428; House v. Camp, 32 Ala. 549; Moore v. M'Cullough, 6 Mo. 444; Weeks, Depositions, § 365.

A court has power and discretion to suppress depositions:

(1) For irregularities in the taking or return.

Dunkle v. Worcester, 5 Biss. 102, Fed. Cas. No. 4,162.

(2) For containing scandalous matter.

Re Caswell, 18 R. I. 835, 27 L.R.A. 82, 49 Am. St. Rep. 814, 29 Atl. 259.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of mandamus to direct the judges and clerk of the district court for the district of Massachusetts to allow the petitioner access to depositions and exhibits on file in a certain case, but now sealed by order of the court. The facts alleged, shortly stated, are as follows: The case referred to was an action by the government against the Dwight Manufacturing Company for penalties under the immigration act of February 20, 1907, chap. 1134, 34 Stat. at L. 898, Comp. Stat. 1913, § 4242. On June 22, 1914, it was compromised by the payment of $50,000 and the action was discontinued. In pursuance of a previous agreement with the Secretary of Commerce and Labor the petitioner was paid $25,000 for services rendered in the suit. He now is sued by one Pachinakis for 45 per cent of that sum upon an allegation of title to the amount. It is alleged that the testimony of Pachinakis in one of the depositions will show that he swore that he had "no interest or right in or expectation to those moneys;" that Pachinakis was the principal violator of the law, and that his present claim is an attempt to profit by his own wrong, and against public policy. The petitioner also is sued by an employee of Henry C. Quinby, the attorney in both suits, upon an assigned claim of William H. Garland for $3,750, in respect of services of Garland in the former action, Garland having been a salaried Assistant United States Attorney until January, 1914, and thereafter until the end of the action special [439] counsel for the government, and, as the petitioner believes, having been fully paid by the government. The petitioner expects to prove from the papers on file that Garland's services were rendered to the government alone, and not to him; that Garland's claim for additional compensation is against public policy; and that it is exorbitant as well as unjust. Quinby is Garland's lawyer, and is employed by Pachinakis upon Garland's advice by an arrangement between the two.

When the former action was compromised, Judge Dodge, the respondent, made an order, "both parties consenting, that all depositions herein be sealed by the clerk and

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Kalamazoo County Clerk, 148 Mich. 460, 111 N. W. 1070, where the court, while holding that the records of marriage licenses and returns in the county clerk's office could not be withheld from inspection by newspaper reporters, manifestly regarded such records as "public," not "judicial."

The county records as filed, which, by Mass. Pub. Stat. chap. 37, § 13, are ordered to be open for public inspection and examination, and of which any person may take copies, are the records and files of the county, not of the courts of the commonwealth within and for that county. Cowley v. Palsifer, 137 Mass. 392, 50 Am. Rep. 318.

Written instructions from the attorney for an execution creditor to the sheriff with reference to the enforcement of the execution are not "public records or other matters in the office" of the sheriff which, under Cal. Pol. Code § 1032, are required to be open to inspection by any citizen of the state, nor are they "public writings" which, under Cal. Code Civ. Prov. § 1892, every citizen has a right to inspect. Whelan v. Superior Ct. 114 Cal. 548, 46 Pac. 468.

An inspection of the justice's files and memoranda was refused before he had made up his record, although the local statute provided that the justice shall keep a record, and his "books" of records shall be at all times subject to the inspection of persons interested. Perkins v. Cummings, 66 Vt. 485, 29 Atl. 675.

The user of an alleged patented device has such an interest in a suit in which the novelty of the invention and validity of the patent are in issue that he may inspect and obtain copies of the testimony and documents on file, and the court will not permit such right to be defeated by allowing a withdrawal of the testimony and exhibits from the files upon a settlement and dismissal of the suit. Sloan Filter Co. v. El Paso Reduction Co. 117 Fed. 504.

Cases bearing upon the right of access for private abstract purposes are not here included, that question being the subject for consideration in a note to Bell v. Commonwealth Title Ins. & T. Co. 47 L. ed. U. S. 741.

Nor does this note include the right to inspect grand jury minutes—as to which see note to State v. Rhoads, 27 L.R.A. (N.S.) 558.

Generally, on the right to inspect public records, see note to Re Caswell, 27 L.R.A. 82.

retained in the files of his office, subject to the right of either party to inspect the same, and that all exhibits be impounded with the clerk, subject to the same right of either party to inspect them." After the first presentation of the claim of Pachinakis, the petitioner's counsel made a motion in the former action for leave to inspect the above-mentioned depositions. The United States assented, although Garland, when referred to as the Assistant Attorney last in charge of the matter, advised against it. The former defendant opposed the motion and it was denied, seemingly and as was understood by the petitioner's counsel, on the ground that the petitioner was not a party to the cause. Subsequently the United States District Attorney made a motion that the order be vacated or modified so as to allow the depositions to be used, and, after a denial, renewed the motion with a fuller statement of grounds, suggesting a misapprehension at the former hearing. This motion also was denied and exceptions were taken that have not yet been heard by the circuit court of appeals.

It appears from what we have said that there are documents present within the jurisdiction that furnish evidence material to the petitioner's case. The general principle is that he has a right to have them produced. [**440**] It does not matter whether they have been used in the original cause or not, or to whom they belong. The right to evidence to be obtained from an existing object does not depend upon having an interest in it, or, in a case like this, upon having an interest in the original cause, or upon the object being admissible or inadmissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing. The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule. We discover none here. Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been as against the public at large. But, as the custodian could not obey the summons of a magistrate to produce the documents without encountering the command of his immediate superior, the orderly course is to obtain a remission of that command from the source from which it came,—a remission which, in our opinion, it is the duty of the judge to grant.

The only other question is whether there is any technical difficulty in the way of this court ordering what in its opinion justice requires and what otherwise the petitioner may not be able to obtain. The previous proceedings do not stand in his way. The rejection of his motion on the narrow ground that it was made in the former action and that he was not a party to it did not require to be followed up, and that of the government, although in his interest by reason of his being particularly concerned in a general act of justice being done, does not confine him to a proceeding in which he is not master of the cause. [**441**] The assertion of his rights requires no particular formality. It would have been enough if, on the attention of the court being called to the matter, it had directed that the order should not be construed as affecting those who otherwise had a right to copies of the papers. It is enough for this court that it has been intimated with sufficient clearness that the order has a wider scope and is to be applied as against him. As against the petitioner the order has no judicial character, but is simply an unauthorized exclusion of him by virtue of de facto power. The proceeding is not for delivery of the papers upon a claim of title, but simply to remove the unauthorized impediment and to correct an act in excess of the jurisdiction of the lower court. We are of opinion that the authority of this court should be exercised in this case.

Rule absolute.

BI-METALLIC INVESTMENT COMPANY, Plff. in Err.,
v.
STATE BOARD OF EQUALIZATION, and Elias M. Ammons, James B. Pearce, M. A. Leddy, Roady Kenehan, and Fred Farrar, as Members, etc., et al.

(See S. C. Reporter's ed. 441–446.)

Error to state court — scope of review — construction of state Constitution and laws.

1. The proper construction of the Constitution and laws of a state is not for the Federal Supreme Court to determine on a writ of error to a state court.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme

Error to state court — scope of review — local law.

2. The Federal Supreme Court, on a writ of error to a state court to review a decree directing the dismissal of a suit in equity, may not consider the question whether or not the state court could have thrown out the suit on the ground that there was an adequate remedy at law, where the highest state court treated the merits as legitimately before it.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing — tax matters.

3. An order of the Colorado Tax Commission and State Board of Equalization, requiring the local taxing officer to make a 40 per cent increase in the assessed valuation of all taxable property in the city and county of Denver, is not wanting in due process of law because no opportunity to be heard was given to the individual taxpayers, nor to any city or county official other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law.

[For other cases, see Constitutional Law, 725–744, in Digest Sup. Ct. 1908.]

[No. 116.]

Argued December 7 and 8, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Colorado to review a decree which, reversing a decree of the District Court of the City and County of Denver, in that state, directed the dismissal of a suit to enjoin the enforcement of an order of the State Tax Commission and State Board of Equalization, increasing the valuation of taxable property in Denver. Affirmed.

See same case below, 56 Colo. 512, 138 Pac. 1010.

The facts are stated in the opinion.

Mr. Horace Phelps argued the cause and filed a brief for plaintiff in error:

In matters of taxation the proceedings for assessment of property are necessarily summary in their nature, but where the tax is laid against the property according to value, there must be provision for such notice and hearing as are appropriate in such cases.

Hagar v. Reclamation Dist. 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485.

It is essential to due process that notice and a hearing be demandable as a matter of right, not granted as a mere matter of favor or grace, and that the hearing be before an officer or board or tribunal having jurisdiction to hear and determine the matter and to give appropriate relief.

Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289.

The action of the Colorado Tax Commission and the State Board of Equalization complained of here constituted a reassessment of all property affected thereby.

Gray, Limitations of Taxing Power, § 1295, p. 639; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; Carney v. People, 210 Ill. 434, 71 N. E. 365; People v. Cosmopolitan L. Ins. Co. 246 Ill. 448, 92 N. E. 922; Overing v. Foote, 65 N. Y. 269; Douglas v. Westchester County, 172 N. Y. 309, 65 N. E. 162; Tolman v. Salomon, 191 Ill. 204, 60 N. E. 809.

Even if the power of reassessment or revaluation were vested in and could lawfully be exercised by either or both of those boards, the reassessment or raise in valuation could only be made upon notice and hearing, or opportunity to be heard.

Gray, Limitations of Taxing Power, § 1295; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. ed. 616, 620; Gale v. Stat'er, 47 Colo. 72, 105 Pac. 858; State Revenue Agent v. Tonella (Adams v. Tonella) 70 Miss. 714, 22 L.R.A. 346, 14 So. 17; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; People ex rel. Barnard v. Wemple, 117 N. Y. 77, 22 N. E. 761; Meyers v. Shields, 61 Fed. 716.

There was no hearing; there was no notice; the rights of the property owner were ignored; and the decision of the supreme court of the state, sustaining the order of the boards, was state action depriving the taxpayer of property without due process

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Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

of law, in violation of the provisions of the 14th Amendment.

Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463.

Mr. **Fred Farrar**, Attorney General of Colorado, and Mr. **Norton Montgomery** argued the cause and filed a brief for defendant in error the State Board of Equalization:

It is acknowledged that the right to tax is a sovereign power, and that the power of the legislature in adopting laws for taxation and the procedure therefor is plenary, limited only by the express inhibitions of national and state Constitutions.

Cooley, Const. Lim. 6th ed. chap. 7; Newman v. People, 23 Colo. 306, 47 Pac. 278; Bellingham Bay Improv. Co. v. New Whatcom, 172 U. S. 320, 43 L. ed. 463, 19 Sup. Ct. Rep. 873.

Even though it should be conceded that the plaintiff in error was denied by the statutes of Colorado due process of law, still it would not have been entitled to judgment unless it had further shown that it had brought itself within some of the recognized heads of equity jurisprudence.

Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941; State R. Tax Cases, 92 U. S. 575, 613, 23 L. ed. 663, 673.

In determining what is meant by due process of law, a marked distinction is recognized in cases involving general taxes, from cases involving other subject-matters, the authorities and decisions holding that matters involving general taxes should be given a most liberal construction.

Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; McGehee, Due Process of Law, p. 232; Cooley, Taxn. 3d ed. 53–55; McMillen v. Anderson, 95 U. S. 41, 24 L. ed. 335; Kelly v. Pittsburgh, 104 U. S. 79, 26 L. ed. 658; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 425, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114.

County boards of equalization, as well as state boards of equalization, have the right to raise or lower the assessed valuation of all property within a particular district or county without notice to each or any owner of such property.

State ex rel. Jennings Bros. Invest. Co. v. Armstrong, 19 Utah, 117, 56 Pac. 1079; Territory v. First Nat. Bank, 10 N. M. 203, 65 Pac. 172; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Suydam v. Merrick County, 19 Neb. 155, 27 N. W. 142; Carrico v. Crocker, 38 Okla. 440, 133 Pac. 183.

Mr. **James A. Marsh** argued the cause, and, with Mr. George Q. Richmond, filed a brief for defendant in error Clair J. Pitcher:

The constitutional guaranty of due process of law was not afforded to the plaintiff in error.

Gale v. Statler, 47 Colo. 74, 105 Pac. 858; Brown v. Denver, 7 Colo. 311, 3 Pac. 455; People ex rel. State Normal School v. State Bd. of Equalization, 20 Colo. 220, 37 Pac. 964; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Central of Georgia R. Co. v. Wright, 207 U. S. 138, 52 L. ed. 141, 28 Sup. Ct. Rep. 47; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; Taylor v. Louisville & N. R. Co. 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; Carney v. People, 210 Ill. 434, 71 N. E. 365; Hovey v. Elliott, 167 U. S. 414, 42 L. ed. 220, 17 Sup. Ct. Rep. 841; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Glidden v. Harrington, 189 U. S. 258, 47 L. ed. 801, 23 Sup. Ct. Rep. 574; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; Hagar v. Reclamation Dist. 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 752; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 318, 43 L. ed. 461, 19 Sup. Ct. Rep. 205; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; Walsh v. State, 142 Ind. 357, 33 L.R.A. 392, 41 N. E. 65; Lehman v. Robinson, 59 Ala. 219; Cleghorn v. Postlewaite, 43 Ill. 431; Tolman v. Salomon, 191 Ill. 204, 60 N. E. 809; State ex rel. Ziegenhein v. Spencer, 114 Mo. 574, 21 S. W. 837; Phillips v. New Buffalo Twp. 64 Mich. 683, 31 N. W. 582; Winona & St. P. R. Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; Weyerhaeuser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Gallup v. Schmidt, 183 U. S. 305, 46 L. ed. 212, 22 Sup. Ct. Rep. 162; Coe v. Armour Fertilizer Works, 237 U. S. 413, 424, 59 L. ed. 1027, 1031, 35 Sup. Ct. Rep. 625; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force and the defendant Pitcher, as assessor of Denver, from obeying, an order of the boards, increasing the valuation of all taxable property in Denver 40 per cent. The order [444] was sus-

tained and the suit directed to be dismissed by the supreme court of the state. 56 Colo. 512, 138 Pac. 1010. See 56 Colo. 343, 138 Pac. 509. The plaintiff is the owner of real estate in Denver, and brings the case here on the ground that it was given no opportunity to be heard, and that therefore its property will be taken without due process of law, contrary to the 14th Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the state Constitution and laws was an unwarranted surprise, and on the other, that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the supreme court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way,—that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county, the owner has had his opportunity to protest and appeal as usual in our system of taxation (Hagar v. Reclamation Dist. 111 U. S. 701, 709, 710, 28 L. ed. 569, 572, 573, 4 Sup. Ct. Rep. 663), so that it must be assumed that the property [445] owners in the county all stand alike. The question, then, is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663, at least, as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state Constitution had declared that Denver had been undervalued as compared with the rest of the state, and had decreed that for the current year the valuation should be 40 per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708, [446] a local board had to determine "whether, in what amount, and upon whom" a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed.

DAYTON COAL & IRON COMPANY, Limited, Plff. in Err.,

v.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, Nashville, Chattanooga, & St. Louis Railway Company, and Western & Atlantic Railroad Company.

(See S. C. Reporter's ed. 446-451.)

Error to state court — scope of review — jurisdiction below.

1. The judgment of the highest state

court ordering a bill and cross bill to be dismissed for want of jurisdiction is conclusive upon the Federal Supreme Court on writ of error unless the denial of a Federal right is involved.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

Carriers — establishing joint rates — restriction to published tariffs.

2. A through freight rate duly filed by the initial carrier with the Interstate Commerce Commission became on its effective date the lawful through joint rate, and the only one which the connecting carrier might lawfully receive or the shipper properly pay, where such connecting carrier received the new tariff and stamped and filed it, and, without giving any formal notice to the initial carrier of its acceptance, which was not at that time required by the Interstate Commerce Commission, acted upon such tariff, insisting that the new rate was the legal one, although it permitted a shipper to make payments at the old rate.

[For other cases, see Carriers, III. g, in Digest Sup. Ct. 1908.]

[No. 81.]

Argued November 12, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Tennessee to review a decree which, reversing a decree of the Chancery Court of Hamilton County, in that state, directed the dismissal of the original bill and cross bill in a suit between shipper and carrier over the right of the latter to enforce a new through joint freight rate. Affirmed.

See same case below, 183 S. W. 739.

The facts are stated in the opinion.

Mr. G. H. West argued the cause, and Mr. W. B. Miller filed a brief for plaintiff in error:

The state court had jurisdiction to inquire whether the original joint and lawfully established rate from Cartersville to Dayton, *via* Chattanooga, had been changed in the manner required by the act, and if so, what change therein resulted.

Claflin v. Houseman, 93 U. S. 130–143, 23 L. ed. 833–840; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 131, 59 L. ed. 873, 35 Sup. Ct. Rep. 484; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760.

An agreed joint rate may not be changed by the initial carrier over the protest of a party thereto.

Camden Iron Works v. United States, 85 C. C. A. 585, 158 Fed. 561; Black Horse Tobacco Co. v. Illinois C. R. Co. 17 Inters. Com. Rep. 588; Judson, Interstate Commerce, 2d ed. §§ 313, 314; Louisville & N. R. Co. v. Dickerson, 112 C. C. A. 295, 191 Fed. 709; Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830.

Mr. M. M. Allison argued the cause for defendant in error the Cincinnati, New Orleans, & Texas Pacific Railway Company.

Mr. Joseph E. Brown argued the cause, and, with Messrs. Foster V. Brown, Frank Spurlock, and Claude Waller, filed a brief for defendants in error the Nashville, Chattanooga, & St. Louis Railway Company and the Western & Atlantic Railroad Company:

The courts of Tennessee cannot relieve the plaintiff in error from the controlling effect of the rate filed with the Commission by the defendant in error. The plaintiff in error could only be relieved from the binding force of this rate by the action of the Interstate Commerce Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

The publication and filing of the rate of 70 cents per ton by the defendant in error, covering the transportation of iron ore between the points named therein, so long as it remained uncanceled by the Interstate Commerce Commission, was as fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by an act of Congress. After the filing of this rate it became the absolute duty of the defendant in error to assess and collect the freight charges specified therein, and it would have been unlawful for it to have collected any other or different rate.

United States v. New York C. & H. R. R. Co. 212 U. S. 509, 53 L. ed. 629, 29 Sup. Ct. Rep. 309; Armour Packing Co. v. United States, 209 U. S. 56, 83, 52 L. ed. 681, 695,

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to the right of a carrier to recover difference between rate charged shipper and proper rate—see note to Central R. Co. v. Mauser, 49 L.R.A.(N.S.) 92.

28 Sup. Ct. Rep. 428; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915B, 593.

The quotation of a rate, or a contract for a rate, less than the established rate, or one afterwards established by the carrier, is not binding upon the carrier.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Armour Packing Co. v. United States, 209 U. S. 56, 83, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Illinois C. R. Co. v. Henderson Elevator Co. 226 U. S. 441, 57 L. ed. 290, 33 Sup. Ct. Rep. 176; Boston & M. R. Co v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 99, 59 L. ed. 855, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494.

An actual concurrence is not necessary to the lawfulness or validity of a joint freight rate.

United States v. New York C. & H. R. R. Co. 212 U. S. 509, 53 L. ed. 629, 29 Sup. Ct. Rep. 313.

Since the enactment of the act to regulate commerce and the amendments thereto the Interstate Commerce Commission has uniformly exercised the jurisdiction and power to determine the reasonableness and legality of interstate freight rates, and has held that joint through rates are legal, although not concurred in by the carriers named in the schedule.

Robertson Paper Co. v. Boston & M. R. Co. 21 Inters. Com. Rep. 254.

Participation by one of several carriers in a rate named in tariffs filed by others is evidence of the lawful rate as against such participating carrier, and the initial line publishing such a tariff thereby becomes responsible to the shipper under the tariff.

Camden Iron Works v. United States, 85 C. C. A. 585, 158 Fed. 561; Chicago, B. & Q. R. Co. v. United States, 85 C. C. A. 194, 157 Fed. 830; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316.

Mr. Justice Day delivered the opinion of the court:

The Dayton Coal & Iron Company, Limited, hereinafter called the Dayton Company, filed its bill in the chancery court at Chattanooga, Tennessee, seeking to enjoin the Cincinnati, New Orleans, & Texas Pacific Railway Company, generally known as, and hereinafter called, the Southern Railway, from prosecuting a certain suit in the United States circuit court for the southern district of Ohio, brought by the Southern Railway against the Dayton Company to recover upon certain shipments of iron ore which it was alleged had been shipped at a tariff of 70 cents per ton, being 10 cents more per ton than the Dayton Company contended was the true rate on such shipments. The difference amounted to $4,933.08, for which sum the Federal suit was brought.

The shipments of iron ore were made from Carterville, and other points in Georgia, to Dayton, Tennessee, the Nashville, Chattanooga, & St. Louis Railway Company, operating the Western & Atlantic Railroad Company, being the initial carrier. The bill averred that the Dayton Company had a defense against the action in the Federal court, partly legal and partly equitable, and that the [448] Nashville, Chattanooga, & St. Louis Railway Company and the Western & Atlantic Railroad Company were necessary and proper parties to the determination of the controversy, and were not within the jurisdiction of the Federal court. It was further charged that the freight contract was binding upon all the parties for 60 cents per ton, and that each and all of the defendants were bound by that rate.

The Southern Railway answered, setting up, among other things, that, according to the requirements of the Federal act to regulate commerce, as amended in 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563], the Nashville, Chattanooga, & St. Louis Railway duly filed and published a schedule known as "Tariff I. C. C. #1351A," showing the joint rate for the transportation of iron ore from Cartersville, Georgia, and nearby points, to Dayton, Tennessee, to be 70 cents a ton, and that that tariff became effective on March 5th, 1907; that the Southern Railway was named as one of the parties to this joint tariff, and it and the other defendants were bound by it and prohibited by law from charging more or less than the tariff named and filed; that after the tariff went into effect on March 5th, 1907, the Southern Railway billed to the Dayton Company iron ore shipped from Cartersville, Georgia, and from Emerson & Rogers, Georgia, to Dayton, Tennessee, covered by the through tariff rate, filed as aforesaid, at the rate of 70 cents per ton, and insisted and still insists upon the payment of that rate; that the

Dayton Company, insisting that the rate was 10 cents over the legal rate, had settled its freight bills monthly, making a deduction of 10 cents by an arrangement with the Southern Company; that the Dayton Company refused to pay this difference, and therefore the suit was brought in the United States circuit court for the southern district of Ohio, and that before answering in that suit complainant had filed the present bill, though the suit in the United States court was still pending and [449] undetermined. The other railroad companies defendants also filed an answer, making like allegations as to the making and filing of the 70-cent rate, effective March 5th, 1907.

The Southern Railway filed a cross bill, in which it again set up the alleged legal effect of the filing of the 70-cent rate to take effect on March 5th, 1907, averring that it had paid the Nashville, Chattanooga, & St. Louis Railway Company its proportion of said rate, and that the difference between the 60- and 70-cent rate was due to it from the Dayton Company, and asked that it be given judgment upon its cross bill against that company on that account for the sum of $4,933.08; or, if it should be determined that it was not entitled thereto, because of the illegality of the published rate, made and insisted upon by the Nashville, Chattanooga, & St. Louis Railway Company, that it have judgment for that amount against its codefendant, the Nashville, Chattanooga, & St. Louis Railway Company. Answers were filed to this cross-bill.

Upon hearing, the chancery court determined the case in favor of the complainant, holding that the 70-cent rate was illegal, inequitable, and unenforceable, and that the complainant was entitled to the 60-cent rate, as contended for by it; and enjoined the Southern Railway from prosecuting its suit in the Federal court except for certain items not included in the controversy about the rates, and held that upon the cross bill the Southern Railway was entitled to recover from the Nashville, Chattanooga, & St. Louis Railway Company the 10 cents per ton which the latter company had received because of ore shipped by complainant from Cartersville and other southern points to Dayton, Tennessee, under color and by reason of the 70-cent rate. Upon appeal, the supreme court of Tennessee reversed the decree of the chancery court, and held that the 70-cent rate was [450] the legal rate in force from and after March 5th, 1907, and that if it had jurisdiction to determine the case it would so decide. For reasons set forth in its opinion, however, it reached the conclusion that, because of the acts of Congress concerning the Interstate Commerce Commission, there was no jurisdiction to entertain the original bill, and that it and the cross bill must be dismissed. It is to reverse this decision that the writ of error in this case was sued out.

The supreme court of Tennessee is, of course, the ultimate judge of the extent of its jurisdiction, and unless a denial of Federal rights is involved, its decision upon that subject is final and conclusive. From what we have already said, however, it is apparent that the real Federal question involved in this controversy concerns the right of the Southern Railway to enforce the 70-cent rate on the shipments of iron ore from Cartersville and other points in Georgia to Dayton, Tennessee. Upon this point the supreme court reached the conclusion that the 70-cent rate was the only legal rate in force at the time of the shipments; that it was filed with the Interstate Commerce Commission on February 2d, 1907, to take effect on March 5th, 1907; that it was thus filed by the Nashville, Chattanooga, & St. Louis Railway Company and duly received and stamped by the Southern Railway as the connecting carrier; and that the last-named railroad concurred in the tariff by receiving freight under that schedule and making settlements under it. This made the rate a joint one, in accordance with the rulings of the Interstate Commerce Commission at that time, and under the interstate commerce act there could be no departure from this published rate.

Our examination of the record (Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316) satisfies us that upon this question of the legal effect of the filed tariffs and the consequent establishment of the 70-cent rate the supreme [451] court of Tennessee was clearly right. It appears that the 70-cent rate was duly filed by the Nashville, Chattanooga, & St. Louis Railway Company with the Interstate Commerce Commission; that it became effective upon March 5th, 1907; that the connecting carrier, the Southern Railway, received the tariff and stamped and filed it, and acted upon it, insisting that 70 cents was the legal rate, although permitting the Dayton Company to make payments at the rate of 60 cents per ton. Such payments could not have the effect to modify the right of the parties to insist upon the legal rate as filed and published. True, the Southern Railway did not formally inform the initial carrier of its acceptance of this tariff; nor was this necessary. United States v. New York C. & H. R. R. Co. 212 U. S. 509, 53 L. ed. 629, 29 Sup. Ct. Rep. 313. This practice of acceptance without formal notice

was recognized by the Interstate Commerce Commission, as appears by its orders set out in the record, until the order of the Commission in May, 1907, requiring acceptance to be specifically given and certified to the Commission, thus avoiding the confusion and misunderstandings which arose under the former practice.

That it is essential to the maintenance of uniform rates and the avoidance of rebates and preferential treatment that the tariff rates filed with the Commission according to the interstate commerce act, while in force, shall be the only rates which the carrier may lawfully receive or the shipper properly pay is too thoroughly settled by the former decisions of this court to require further discussion. The principle is stated and many previous cases in this court cited in a case decided at the last term,—Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 97, 98, 59 L. ed. 853, 855, L.R.A.1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494.

It follows that the Supreme Court of Tennessee did not err, in so far as any Federal right is involved, in the judgment rendered dismissing the bill.

Affirmed.

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[452] CHICAGO & ALTON RAILROAD COMPANY, Plff. in Err.,
v.
JOSEPH M. WAGNER.

(See S. C. Reporter's ed. 452–458.)

Error to state court — Federal question — release of one joint tort feasor.

1. The contention that an agreement by a railway employee that his acceptance of "benefits for injury" from a railway company's relief department shall release the company from all liability for damages growing out of such injury, athough it may be invalid as to such company under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8661), § 5, operates to discharge another railway company as a joint tort feasor from its common-law liability, presents no Federal question which may be reviewed by the Federal Supreme Court on writ of error to a state court, where the latter court held that the release, being invalid as to the employing company, was not available as a defense to the other company.

[For other cases, see Appeal and Error, 2072–2123, in Digest Sup. Ct. 1908.]

Joint tort feasors — release of one — effect of employers' liability act.

2. An agreement by a railway employee that his acceptance of "benefits for injury" from the railway company's relief department shall release the company from all liability for damages growing out of such injury, which would be invalid as to the employing company under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8661), § 5, if sued under that act by an employee engaged at the time of injury in interstate commerce, must also be deemed invalid in an action by such employee against another railway company which, because of such agreement, seeks to escape its common-law liability for the injury on the theory that it was a joint tort feasor, and that the release of one joint tort feasor is the release of all, since it is impossible to determine whether the employing company is discharged except by determining what would happen were it sued.

[Matters as to joint tort feasors, see Joint Creditors and Debtors, in Digest Sup. Ct. 1908.]

[No. 375.]

Submitted November 29, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Appellate Court of that state for the First District, modifying, and affirming as modified, a judgment of the Superior Court of Cook County in favor of plaintiff in a personal-injury suit. Affirmed.

See same case below, 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

The facts are stated in the opinion.

Messrs. Silas H. Strawn, Edward W. Everett, and J. Sidney Condit submitted the cause for plaintiff in error:

Section 5 of the employers' liability act is inapplicable in this case because plaintiff was not an employee of defendant.

Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to the effect of release of one joint tort feasor on liability of other—see note to Abb v. Northern P. R. Co. 58 L.R.A. 293.

On the constitutionality, application, and effect of the Federal employers' liability act—see note to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Section 5 of the employers' liability act does not invalidate a release, resultant to a joint tort feasor from the acceptance of relief benefits under a relief contract.

Robinson v. Baltimore & O. R. Co. supra.

The misapplication of § 5 of the employers' liability act, and the denial of plaintiff's asserted construction thereof, present a Federal question giving this court jurisdiction.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 499, 58 L. ed. 1062, 1068, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 292, 52 L. ed. 1061, 1066, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471; Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21; Straus v. American Publishers' Asso. 231 U. S. 222, 58 L. ed. 192, L.R.A. 1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 67, 44 L. ed. 673, 674, 20 Sup. Ct. Rep. 545; Buel v. Van Ness, 8 Wheat. 312, 321, 5 L. ed. 624, 626; Matthews v. Zane, 4 Cranch, 382, 2 L. ed. 654.

Where the highest court of the state assumes that the record sufficiently presents for its decision a question of Federal right, this court will take jurisdiction.

Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 Sup. Ct. Rep. 671; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 148, 52 L. ed. 143, 146, 28 Sup. Ct. Rep. 34; San José Land & Water Co. v. San José Ranch Co. 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; Montana ex rel. Haire v. Rice, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; Home for Incurables v. New York, 187 U. S. 157, 47 L. ed. 118, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 32 Sup. Ct. Rep. 446.

Mr. James C. McShane submitted the cause for defendant in error:

The state court's holding that plaintiff's acceptance of benefits from the Burlington relief department did not operate as a release, or satisfaction, to defendant, does not present a Federal question.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477–488, 56 L. ed. 1171–1176, 32 Sup. Ct. Rep. 790; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Chesapeake & O. R. Co. v. McDonald, 214 U. S 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

The release was void as between the parties to it, and, consequently, it could not operate as a valid release to defendant.

McMullen v. Hoffman, 174 U. S. 654, 43 L. ed. 1123, 19 Sup. Ct. Rep. 839; 6 R. C. L. § 215, p. 819.

Mr. Justice Hughes delivered the opinion of the court:

Joseph M. Wagner brought this action in the superior court of Cook county, Illinois, against the Chicago & Alton Railroad Company to recover damages for injuries alleged to have been sustained through its negligence. At the time of the accident, he was employed by the Chicago, Burlington, & Quincy Railroad Company as a conductor in charge of a switching crew, and was engaged in moving cars over a track of the Chicago & Alton Railroad Company in Chicago,—the track being used by the Burlington company under an arrangement with the Alton company. He was injured by striking a semaphore post which, as he alleged, was in dangerous proximity to the track. The Burlington company was not a party to the suit. In defense, the Alton company proved that Wagner was a member of the relief department of the Burlington company, to which the employees of that company made monthly contributions, and that in his agreement with that company it was provided that his acceptance "of benefits for injury" should operate "as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury." The Alton company was not thus associated with the Burlington company, and the release by its terms did not run to it. But it was insisted that the Burlington company was a [455] joint tort feasor with the Alton company, and hence that release to the former would operate to discharge the latter. It was found by the state court that after the injury Wagner had accepted from the relief fund of the Burlington company the sum of $1,231 as benefits, and that there

had been paid in his behalf for hospital bills, etc., $1,349.59; and it was further found that the contribution of the Burlington company did not exceed 15 per cent of this amount, or $387.09. In rebuttal (and over the defendant's exception) Wagner introduced evidence that at the time of the accident he was engaged as the employee of the Burlington company in interstate commerce, and he contended that the agreement for the release of that company through acceptance of benefits from the relief fund was invalid under § 5 of the employers' liability act (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8661). The trial court refused to give a peremptory instruction in favor of the Alton company, and also denied a request to instruct the jury, in substance, that if it found that Wagner had accepted payment from the Burlington company in satisfaction of his claim against that company arising from the injury, such acceptance would be a bar to this action against the Alton company. The court did charge that if the Alton company was found to be guilty, it should not be credited with any sum which the Burlington company had paid. To these rulings the Alton company excepted. A verdict was rendered against it for $15,000, and judgment was entered accordingly. The appellate court, first district, required a remittitur of $387.09, the amount found to have been contributed by the Burlington company to the benefits received, and affirmed the judgment for the remainder. 180 Ill. App. 196. And the judgment for the reduced amount was affirmed by the supreme court of the state. 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

The jurisdiction of this court is invoked upon the ground that, in refusing to give effect to the release, the state court misconstrued § 5 of the employers' liability [456] act.[1] St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 57 L. ed. 1179, 1185, 33 Sup. Ct. Rep. 858.

The action was not brought under that act. There were allegations in the original declaration to the effect that Wagner, at the time of the injury, was engaged in interstate commerce as an employee of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the Federal statute; and this indeed was manifest, as the Burlington company was not a party to the action, and the Alton company was not the plaintiff's employer. Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 91, 59 L. ed. 849, 851, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1. It was tried as a common-law action on the case.

It was also undisputed that the Alton company was not a party to the contract for release, or associated in the Burlington's relief department. Section 5 of the Federal act has plainly no application to releases given to those who are not employers (Robinson v. Baltimore & O. R. Co. supra), and we do not understand that there was any contention or ruling to the contrary in the state court. The Alton company simply claimed the benefit of the release to the Burlington company upon the ground that the Burlington company was a joint tort feasor. But the rule invoked, that the release of one joint tort feasor is a release of all, is a rule of the common law, —in this case, of the [457] common law of Illinois. Chicago v. Babcock, 143 Ill. 358, 366, 32 N. E. 271. That is, assuming that the Burlington company was the employer, and that the contract for its discharge from liability for this injury through the acceptance of benefits from its relief department was invalid under § 5 of the employers' liability act, the question whether that release, thus invalid as against the Burlington company, would operate to discharge the Alton company as a joint tort feasor from its common-law liability, was not, and we do not find that it was held to be, a matter of Federal law. The supreme court of the state said upon this point, after stating that there was no valid release to the plaintiff's employer: "If it" (the release) "was not valid so far as the Burlington company was concerned, it was clearly invalid as to the plaintiff in error, and constituted no defense to this action." This, as we view it, was but to say that the release could not aid the Alton company for the very plain reason that the alleged joint tort feasor had not been discharged. The state law did not recognize the discharge of the defendant by virtue of a release of a joint

[1] This section is as follows:

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

tort feasor which, under the law applicable thereto, was found to be without validity.

The only Federal question which it can be said was decided was with respect to the validity of the release as between Wagner and the Burlington company. It is urged that § 5 was wholly inapplicable in an action brought against a third person to enforce a liability not created by the Federal act. The argument is, in substance, that in this action against the Alton company, inasmuch as it is not brought to enforce the liability imposed by the Federal statute, § 5 cannot be considered for any purpose; that is, that under § 5 the release can be deemed to be invalid only so far as it is actually used to protect the Burlington company from liability in a suit against it under the act. This involves, we think, a fundamental misconception. It is, of course, impossible to determine [458] whether a joint tort feasor is discharged except by asking what would happen if he were sued. The liability created by the act arose when the injury was received, and it is clear that if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 613, 56 L. ed. 911, 916, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892. When, therefore, the Alton company sought to escape from liability, otherwise existing under the state law, by reason of a release to the Burlington company, it was entirely competent for the plaintiff to show the nature of his employment and that the asserted release was within the Federal statute, and could not operate as a discharge of the Burlington company with respect to the injury sustained. And the state court found upon abundant evidence that Wagner was engaged as an employee of that company in interstate commerce when he was hurt.

There was thus no misconstruction of the Federal act in holding that the contract between Wagner and the Burlington company, and his acceptance of benefits thereunder, did not release the latter from liability for the injury, and that under § 5 that company, assuming it to be a joint tort feasor, would merely have the right to set off any sum which it had contributed to the benefits received; and there was no denial by the state court of any Federal right in declining to treat the relief contract, and the acceptance of benefits, as a discharge of the Alton company.

Judgment affirmed.

[459] INTER-ISLAND STEAM NAVIGATION COMPANY, Limited, Plff in Err.,

v.

J. J. BYRNE and Daniel Kaleiki.

(See S. C. Reporter's ed. 459–463.)

Execution — exemptions — seamen's wages.

The exemption of seamen's wages from attachment, given by the act of June 7, 1872 (17 Stat. at L. 262, chap. 322, Comp. Stat. 1913, § 8287), § 61, re-enacted as U. S. Rev. Stat. § 4536, Comp. Stat. 1913, § 8325, was repealed as to seamen engaged in the coastwise trade by the provisions of the act of June 9, 1874 (18 Stat. at L. 64, chap. 260, Comp. Stat. 1913, § 8291), that none of the provisions of the earlier act "shall apply to sail or steam vessels engaged in the coastwise trade."

[For other cases, see Execution, II. a, in Digest Sup. Ct. 1908.]

[No. 288.]

Submitted November 29, 1915. Decided December 20, 1915.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a judgment of the District Court of Honolulu in favor of plaintiff in a garnishment suit. Affirmed.

See same case below, 22 Haw. 160.

The facts are stated in the opinion.

Mr. Charles R. Hemenway submitted the cause for plaintiff in error. Mr. E. W. Sutton was on the brief.

Messrs. Frank E. Thompson and John W. Cathcart submitted the cause for defendants in error.

Mr. Justice McReynolds delivered the opinion of the court:

Defendant in error Byrne brought suit against Kaleiki in the district court of Honolulu and served the navigation company with a garnishee summons in accordance with the local statute. Answering, the company set up that Raleiki was hired directly by it (not through a shipping commissioner) as a mate on the "Claudine," plying only in the interisland coast trade, and asked a discharge because of the exemption from attachment of seamen's wages by § 4536, Revised Statutes of the United States (Comp. Stat. 1913, § 8325). The trial court held that subsequent legislation excluded seamen engaged in such coastwise [460] trade from the exemption, and rendered judgment against both Kaleiki and

NOTE.—As to exemption of seamen's wages from attachment—see note to Tod v. Kentucky Union R. Co. 18 L.R.A. 310.

the company. This action was affirmed by the supreme court of the territory of Hawaii (22 Haw. 160), and the cause is here upon writ of error.

By a comprehensive act containing sixty-eight sections, approved June 7, 1872, and entitled, "An Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States, to Superintend the Shipping and Discharge of Seamen Engaged in Merchant Ships Belonging to the United States, and for the Further Protection of Seamen," chap. 322, 17 Stat. at L. 262, Comp. Stat. 1913, § 8287. Congress prescribed regulations concerning the employment, wages, treatment, and protection of seamen. Section 61 reads as follows: "That no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of such wages, or of salvage made prior to the accruing thereof, shall bind the party making the same, except such advanced securities as are provided for in this act." Without material modification in language, this became § 4536 of the Revised Statutes (Comp. Stat. 1913, § 8325), enacted into law June 22, 1874, with the following limitation—§ 5601 Comp. Stat. 1913, § 10,598): "The enactment of the said revision is not to affect or repeal any act of Congress passed since the 1st day of December one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such facts vary from, or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith."

The act of June 9, 1874, chap. 260, 18 Stat. at L. 64, Comp. Stat. 1913, § 8291, "in reference to the operations of the shipping commissioners' act, approved [461] June seventh, eighteen hundred and seventy-two," provided: "That none of the provisions of an act entitled 'An Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States to Superintend the Shipping and Discharge of Seamen Engaged in Merchant Ships Belonging to the United States, and for the Further Protection of Seamen' shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

The understanding of Congress concerning the effect of the repealing act of 1874 is indicated by subsequent legislation referred to below.

Section 2 of an act approved June 19, 1886, chap. 421, 24 Stat. at L. 79, Comp. Stat. 1913, § 8138, specified that "shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade . . . at the request of the master or owner of such vessel," etc.

"An Act to Amend the Laws Relative to Shipping Commissioners," approved August 19, 1890, chap. 801, 26 Stat. at L. 320, Comp. Stat. 1913, § 8293, declared that when a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, as authorized by § 2, act of 1886 above, an agreement shall be made with each seaman in the same manner as provided by §§ 4511 and 4512, Rev. Stat. Comp. Stat. 1913, §§ 8300 and 8302 (both from the act of 1872); and it further provided that other sections of the Revised Statutes (not including § 4536), also originally in the act of 1872, shall extend to and embrace such vessel to the same extent as if mentioned therein.

By an act approved February 18, 1895, chap. 97, 28 Stat. at L. 667, Comp. Stat. 1913, § 8293, [462] the act of 1890, supra, was so amended as to render applicable to seamen in the coastwise trade when shipped by a shipping commissioner certain other sections of the Revised Statutes, including § 4536, from the act of 1872; and it further provided, "but in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner: Provided, That the clothing of any seaman shall be exempt from attachment."

The act of March 3, 1897, chap. 389, 29 Stat. at L. 687, 689, Comp. Stat. 1913, §§ 8293, 8296, amends the foregoing act of 1895 by adding another section of the Revised Statutes to those therein enumerated.

Plaintiff in error maintains: "The words in the act of 1874 'none of the provisions . . . shall apply to said or steam vessels engaged in the coastwise trade' are apt in their application to many of the sections in the act of 1872, as, for example, §§ 4511 to 4519, inclusive (Comp. Stat. 1913, §§

8300–8310). These words are not such as would be expected if § 4536 (Comp. Stat. 1913, § 8325) was intended to be referred to, for there is nothing in that section which applies to vessels or the duties of masters and owners under the shipping commissioners' act. As we view it, § 4536 remained unaffected by the act of 1874, neither specifically nor by reasonable implication repealed as to seamen in the coastwise trade."

The fundamental purpose of the act of 1872 was to afford protection to seamen in respect to their treatment and wages. The act of 1874 by its express terms rendered the provisions of the earlier act inapplicable to vessels in the ordinary coastwise trade (United States v. The Grace Lothrop, 95 U. S. 527, 532, 24 L. ed. 514, 515), and the suggested narrow construction would tend to defeat the particular end in view,—the relief of vessels making relatively short [463] voyages, with frequent opportunities for reaching ports, from burdensome requirements not then deemed essential to the welfare of seamen employed thereon. Certainly, we think, the provisions in the act of 1872 having direct reference to wages (including those in § 4536, Rev. Stat. Comp. Stat. 1913, § 8325), because of their intimate connection with the navigation of vessels, must be considered as applicable thereto and therefore included within the scope of the amendment of 1874. Subsequent legislation clearly indicates that Congress entertained this view. It would be difficult to account for the acts of 1886, 1890, 1895, and 1897, supra, upon any other theory.

The particular point now presented was reserved in Wilder v. Inter-Island Steam Nav. Co. 211 U. S. 239, 245, 53 L. ed. 164, 29 Sup. Ct. Rep. 58, 15 Ann. Cas. 127. It has become of less importance since the act of March 4, 1915, chap. 153, 38 Stat. at L. 1164, 1169, wherein the provisions of § 61 of the act of 1872 were re-enacted.

The judgment of the court below is affirmed.

CATHERINE C. REESE, Administratrix of the Estate of Garrett Tracy Reese, Deceased, Plff. in Err.,

v.

PHILADELPHIA & READING RAILWAY COMPANY.

(See S. C. Reporter's ed. 463–466.)

Appeal — withdrawing case from jury — when not error.

The conclusions of the two lower courts that the evidence was insufficient to carry to the jury the question of negligence in an action for death brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), will not be disturbed by the Federal Supreme Court where the evidence shows that the deceased, a capable, experienced fireman in a night switching crew operating in a properly lighted yard, who was acquainted with the conditions, was killed by coming in contact with a freight car standing on a parallel track while, with his engine in motion, he was attempting, about midnight, to procure drinking water at a tap on the side of the tender at a point in the yard where both tracks were occupying a highway, and were closer together than the standard distance.

[For other cases, see Appeal and Error, VIII. m, 6; Trial, VI. b, in Digest Sup. Ct. 1908.]

[No. 608.]

Argued December 1, 1915. Decided December 20, 1915.

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania, granting a nonsuit in an action brought under the Federal employers' liability act. Affirmed.

See same case below, 140 C. C. A. 660, 225 Fed. 518.

The facts are stated in the opinion.

Mr. George Demming argued the cause and filed a brief for plaintiff in error:

Inasmuch as the next duty to be performed by the engine was to pull a train of loaded cars from the Noble street yard to Berks street, which hauling was part of the journey or trip of this train of cars, and of which train of cars two cars were destined to points outside the state, and the engine was actually on its road to perform this duty, the engine and its crew, including the dead fireman, were engaged in interstate commerce.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C, 153; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

Although a municipality, under exceptional circumstances, can require a railroad to replace its two tracks in a crowded street with one track (Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696), yet it would seem to be clearly beyond its police power to attempt to regulate railroad tracks on a public street in such a way as to endanger the life and limb of railroad employees. This would be injustice and oppression, and therefore unlawful.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

If a local or municipal regulation, ordinance, direction, or supervision did require the placing of tracks so close together as to violate the standard of safety, such local or municipal regulation, ordinance, direction, or supervision would be improper, unlawful, and unenforceable, because it would be imposing an arbitrary and unreasonable requirement upon interstate commerce.

Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 229, 59 L. ed. 931, P.U.R. 1915C, 309, 35 Sup. Ct. Rep. 560.

Such a regulation, if it did exist, would be an unfair one, and an unreasonable exercise of the police power, in that it would deny the railroad employees the equal protection of the law guaranteed by the 14th Amendment of the Federal Constitution, and therefore could not be sustained and should not be obeyed.

Atchison, T. & S. F. R. Co. v. Vosburg, 238 U. S. 56, 59 L. ed. 1199, L.R.A.1915E, 953, 35 Sup. Ct. Rep. 675; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753; Southwestern Teleg. & Teleph. Co. v. Danaher, 238 U. S. 482, 59 L. ed. 1419, L.R.A.1916A, 1208, P.U.R.1915D, 571, 35 Sup. Ct. Rep. 886; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869.

It might be pleaded that to properly construct and maintain the tracks on this street and thereby safeguard the lives and limbs of employees would involve great expense. But it has been held that a railroad cannot escape a duty by pleading the expense of its performance.

Chicago, B. & Q. R. Co. v. Railroad Commission, supra.

A railroad company is bound to anticipate and to provide against that which is a regular custom or habit of its employees in the line of their duties. A normal response to a call of nature, while on duty, is entirely proper, and inseparably connected with that duty, so far as responsibility of the employer is concerned.

26 Cyc. 1250; Taylor, B. & H. R. Co. v. Taylor, 79 Tex. 104, 23 Am. St. Rep. 316, 14 S. W. 918; Keenan v. Flemington Coal Co. 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th Series, 164, 10 Scot. L. T. 409; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16; Elliott v. Rex, 6 W. C. C. 27; Jarvis v. Hitch, — Ind. App. —, 65 N. E. 608; Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96; Neice v. Farmers' Co-Op. Creamery & Supply Co. 90 Neb. 470, 133 N. W. 878; Houston & T. C. R. Co. v. Turner, 99 Tex. 547, 91 S. W. 562; 1 Bradbury, Workmen's Compensation Cases, pp. 419–452 inclusive; also footnotes to Milwaukee v. Althoff, 4 N. C. C. A. 122; Heldmaier v. Cobbs, 96 Ill. App. 315, 195 Ill. 172, 62 N. E. 853; Thomas v. Wisconsin C. R. Co. 108 Minn. 485, 23 L.R.A.(N.S.) 954, 122 N. W. 456; Carnegie Steel Co. v. Rowan, 30 Ohio C. C. 202; Adams v. Southern R. Co. 166 Ala. 449, 51 So. 987.

Where a railroad company for nine years without objection permitted its employees to ride on its engines and the steps thereof in the discharge of their duties, it was held to be charged with knowledge of their custom in doing so, and negligent in permitting obstructions so close to the track as to strike such employees.

Heilig v. Southern R. Co. 152 N. C. 469, 67 S. E. 1009.

It is thoroughly competent and proper to prove the custom, usage, and continuous practice of employees, and both the master and servant are bound thereby.

Prescott v. Ball Engine Co. 176 Pa. 459, 53 Am. St. Rep. 683, 35 Atl. 224.

Where it is customary for the brakemen to ascend to and descend from the tops of the cars by the side ladders instead of the end ladders, a railroad company is negligent if it permits obstructions so close to the tracks as to strike them in so doing.

Georgia P. R. Co. v. Davis, 92 Ala. 300, 25 Am. St. Rep. 47, 9 So. 252; Chicago & I. R. Co. v. Russell, 91 Ill. 298, 33 Am. Rep. 54; Allen v. Burlington, C. R. & N. R. Co. 57 Iowa, 623, 11 N. W. 614; Sisco v. Lehigh & H. R. R. Co. 75 Hun, 582, 27 N. Y. Supp. 671; Texas & P. R. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942; Riley v. West Virginia C. & P. R. Co. 27 W. Va. 145; Central Trust Co. v. East Tennessee, V. & G. R. Co. 73 Fed. 661.

The nonsuit entered by the lower court cannot be sustained upon the ground of the assumption of risk on the part of the deceased fireman.

Stewart v. Central R. Co. 235 Pa. 311, 84

Atl. 38; Dwyer v. St. Louis & S. F. R. Co. 52 Fed. 87; West v. Chicago, B. & Q. R. Co. 103 C. C. A. 293, 179 Fed. 801; Chesapeake & O. R. Co v. Cowley, 92 C. C. A. 201, 166 Fed. 283; Chicago, M. & St. P. R. Co. v. Donovan, 87 C. C. A. 600, 160 Fed. 826; San Francisco & P. S. S. Co. v. Carlson, 89 C. C. A. 45, 161 Fed. 851 (low appliance); Pennsylvania R. Co. v. Jones, 59 C. C. A. 87, 123 Fed. 753 (absence of bumper); Pittsburgh, S. & N. R. Co. v. Lamphere, 69 C. C. A. 542, 137 Fed. 20 (low trestle); Gila Valley, G. & N. R. Co. v. Lyon, 203 U. S. 465, 51 L. ed. 276, 27 Sup. Ct. Rep. 145 (defective buffer); 26 Cyc. 1240, 1250; Norfolk & W. R. Co. v. Beckett, 90 C. C. A. 25, 163 Fed. 479; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; Harvey v. Texas & P. R. Co. 92 C. C. A. 237, 166 Fed. 385, affirmed in 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321.

With all the inferences which might be deduced from the testimony, there are several views, at least, which can be properly taken of the facts in the case, which would completely exonerate the dead fireman of all blame from negligence, as well as assumption of risk.

Kreigh v. Westinghouse, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; Deserant v. Cerillos Coal R. Co. 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Chicago R. I. & P. R. Co. v. Brown, 229 U. S. 317, 319, 321, 57 L. ed. 1204–1206, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 45, 37 L. ed. 642, 643, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518.

Mr. **William Clarke Mason** argued the cause, and, with Mr. Charles Heebner, filed a brief for defendant in error:

The record is barren of sufficient evidence upon which to sustain a verdict based upon negligence on the part of the railway company.

Baltimore & O. R. Co. v. Newell, 116 C. C. A. 428, 196 Fed. 866.

Mr. Justice **McReynolds** delivered the opinion of the court:

Relying upon the Federal employers' liability act, plaintiff in error brought suit against the railway company in the district court to recover damages for her husband's death, alleged to have resulted from the negligent and improper construction and maintenance of its tracks in too close proximity to each other.

At the conclusion of plaintiff's testimony, the trial court, finding "no evidence of negligence or neglect to provide him [the employee] with a safe place to work as to the act he was performing at that time," entered a nonsuit and afterwards refused to take it off. This was affirmed by the circuit court of appeals (140 C. C. A. 660, 225 Fed. 518) upon the ground that the railroad "did not fail in its duty to provide the deceased with a reasonably safe place to work;" and the sole question for our consideration is whether any other conclusion could be legitimately drawn from the facts disclosed.

[**465**] For use in shifting freight cars and making up trains, the defendant maintains as a part of its Noble street yard, two parallel tracks running north and south along Front street, Philadelphia, from which other tracks, curves, and turnouts lead into different freight sheds, warehouses, etc. These were located and are maintained under an ordinance of the city according to plans duly approved by its officials. At and near the place of the accident the street is almost entirely occupied by them. The distance between such north and south tracks is much less than the general standard adopted by the company, and box cars moving thereon have barely enough room to pass. These conditions are obvious and have existed for fifteen years or more.

Deceased was a capable, experienced fireman in a night switching crew operating in the yard, which was properly lighted, and acquainted with the general conditions described. The cause was tried upon the theory that about midnight, November 18, 1912, while his engine was moving 5 miles per hour along one of the parallel tracks, he attempted to procure drinking water at a tap in the side, near the bottom, and 3 feet from the front of the tender; that in

doing so his body was extended outside the line of both tender and engine and crushed by contact with a freight car standing on the other parallel track; and that the railway negligently constructed and maintained these tracks too near each other.

The rule is well settled that a railroad company is not to be held as guarantying or warranting absolute safety to its employees under all circumstances, but is bound to exercise the care which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures. A failure to exercise such care constitutes negligence. Union P. R. Co. v. O'Brien, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Myers v. Pittsburgh Coal Co. 233 U. S. 184, 191, 58 L. ed. 906, 910, 34 Sup. Ct. Rep. 550. A railroad yard [466] where trains are made up necessarily has a great number of tracks and switches close to one another (Randall v. Baltimore & O. R. Co. 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322); and certainly the mere existence of such conditions is not enough to support an inference of negligence where, as here, it is necessary to utilize a public street. Both the District Court and the Circuit Court of Appeals felt constrained to hold the evidence insufficient to carry the question of negligence to the jury, and, having examined the record, we are unable to say that they reached a wrong result. The judgment is affirmed.

Mr. Justice **Hughes** and Mr. Justice **Pitney** are of the opinion that upon the question of the defendant's negligence,—the only question upon which the court below ruled,—there was sufficient evidence to go to the jury, and therefore dissent.

UNITED STATES OF AMERICA, Appt.,
v.
HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT et al. (No. 289.)

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT et al., Appts.,
v.
UNITED STATES OF AMERICA. (No. 332.)

(See S. C. Reporter's ed. 466–478.)

Appeal — dismissal — moot case.

1. The moot character of the controversy because of the existence of the European War prevents the Federal Supreme Court from deciding on the merits an appeal from a decree presenting the question whether the provisions of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), are violated by a combination of steamship companies to monopolize Trans-Atlantic transportation.

[For other cases, see Appeal and Error, VII. i, 2, in Digest Sup. Ct. 1908.]

Evidence — judicial notice — existence of war.

2. The Federal Supreme Court takes judicial notice of the existence of the present European War.

[For other cases, see Evidence, I. d, in Digest Sup. Ct. 1908.]

Appeal — judgment — reversing without prejudice.

3. The Federal Supreme Court, instead of dismissing an appeal from a decree of a Federal district court adverse to the government's contention that a combination of steamship companies to monopolize Trans-Atlantic transportation violates the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), because the controversy has become a moot one in view of the European War, will reverse the decree and remand the case with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the anti-trust act.

[For other cases, see Appeal and Error, 5491–5493, in Digest Sup. Ct. 1908.]

[Nos. 289 and 332.]

Argued November 3 and 4, 1915. Decided January 10, 1916.

CROSS APPEALS from the District Court of the United States for the Southern District of New York to review a decree granting a portion only of the relief sought by the United States in a suit under the anti-trust act against Trans-Atlantic steamship companies. Reversed and remanded, with directions to dismiss the bill without prejudice.

See same case below, 216 Fed. 971.

The facts are stated in the opinion.

Assistant to the Attorney General **G. Carroll Todd** argued the cause, and, with Special Assistant to the Attorney General Thurlow M. Gordon, filed a brief for the United States:

The case has not become moot by reason of the European War.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31

NOTE.—As to judicial notice—see note to Olive v. State, 4 L.R.A. 33.

Sup. Ct. Rep. 279; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 399, 131 Fed. 415; United States v. Prince Line, 220 Fed. 230.

Mr. Charles P. Spooner argued the cause, and, with Messrs. John C. Spooner and James L. Bishop, filed a brief for the Hamburg-American Steamship Company et al.

Mr. Lucius H. Beers argued the cause, and, with Mr. Allan B. A. Bradley, filed a brief for the Cunard Steamship Company et al.

Mr. Charles C. Burlingham argued the cause, and, with Mr. Roscoe H. Hupper, filed a brief for the American Line et al.:

Among the parties are corporations of Great Britain, Germany, Belgium, and Russia, countries now at war, by reason of which the agreement, being in effect a partnership between these corporations, is absolutely at an end and all further transactions under it are void and illegal. All commercial intercourse between these parties has been prohibited, as can be judicially noticed.

Montgomery v. United States, 15 Wall. 395, 21 L. ed. 97; United States v. Lapène, 17 Wall. 601, 21 L. ed. 693, 7 Moore, International Law Dig. 244, 250.

This court will not entertain moot cases or cases in which the issues have already been settled by lapse of time or otherwise.

Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Buck's Stove & Range Co. v. American Federation of Labor, 219 U. S. 581, 55 L. ed. 345, 31 Sup. Ct. Rep. 472; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 451, 55 L. ed. 797, 809, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; Wingert v. First Nat. Bank, 223 U. S. 670, 56 L. ed. 605, 32 Sup. Ct. Rep. 391; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Flour Inspectors v. Glover, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; California v. San Pablo & T. R. Co. 149 U. S. 308, 37 L. ed. 747, 13 Sup. Ct. Rep. 876; San Mateo County v. Southern P. R. Co. 116 U. S. 138, 29 L. ed. 589, 6 Sup. Ct. Rep. 317; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611.

Mr. Joseph Larocque argued the cause, and, with Messrs. William G. Choate and Nelson Shipman, filed a brief for the North German Lloyd et al.

Mr. Ralph James M. Bullowa filed a brief for the Russian East Asiatic Steamship Company et al.

Mr. Chief Justice White delivered the opinion of the court:

The United States, on January 4th, 1911, commenced this suit to prevent the further execution of an agreement to which the defendants were parties and which it was charged constituted the foundation of an illegal combination in violation of the anti-trust act (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820). The relief asked, moreover, in the nature of things embraced certain subsidiary agreements made during the course of the execution of the main contract, in furtherance of its alleged prohibited result. The principal agreement was made in 1908, to last until February 28, 1911, but was to continue in force thereafter from year to year unless not later than December 1st of each year a notice of the intention not to continue was given. On December 3, 1910, however, just a month before this suit was filed, the agreement in question was renewed for a period of five years.

We give from the argument on behalf of the United States a statement of the corporate defendants to the bill, some of whom had become parties to the alleged illegal combination by subsidiary agreement or agreements made at a later date than the original contract.

1. "The Allan Line Steamship Company, Limited, hereafter called the 'Allan Line,' a British corporation, operating from Portland, Boston, and Philadelphia to London, Liverpool, and Glasgow and return.

[469] 2. "International Mercantile Marine Company, a New Jersey corporation, operating from New York and Philadelphia to Liverpool and Southampton and return.

3. "Its ships, together with those of its subsidiary company, defendant International Navigation Company, Limited, also operating from New York and Philadelphia to Liverpool and Southampton, . . . are referred to as the 'American Line.' Besides International Navigation Company, Limited, it also controls through stock ownership the defendants British & North Atlantic Steam Navigation Company, Limited, Société Anonyme de Navigation Belge Americaine, and Oceanic Steam Navigation Company, Limited.

4. "British & North Atlantic Steam Navigation Company, Limited, a British corporation, hereafter called the 'Dominion Line,' operating from Portland to Liverpool and return.

5. "Société Anonyme de Navigation Belge Americaine, a Belgian corporation, hereafter called the 'Red Star Line,' operating from New York and Philadelphia to Antwerp and return.

6. "Oceanic Steam Navigation Company, Limited, a British corporation, hereafter called the 'White Star Line,' operating from New York and Boston to Liverpool and Southampton and return.

7. "The Anchor Line (Henderson Brothers), Limited, a British corporation, hereafter called the 'Anchor Line,' operating from New York to Glasgow and return.

8. "Canadian Pacific Railway Company, a Canadian corporation, operating a regular line of steamships, hereafter called the 'Canadian Pacific Line,' from Montreal, Quebec, and St. John in the Dominion of Canada to Liverpool, England, and return. It also owns and operates a transcontinental railroad which, partly through branches running into the United States and partly through connections with the Wabash and other American railroads, [470] transports a substantial proportion (12 per cent) of its steamship passengers to and from points in this country.

9. "The Cunard Steamship Company, Limited, a British corporation, hereafter called the 'Cunard Line,' operating from New York and Boston to Liverpool in England, Fiume in Hungary, and Trieste in Austria, and return.

10. "Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, a German corporation, hereafter called the 'Hamburg-American Line,' operating from New York to Hamburg and return.

11. "Nord Deutscher Lloyd, a German corporation, hereafter called the 'North German Lloyd Line,' operating from New York, Baltimore, and Galveston to Bremen and return.

12. "Nederlandsh-Amerikaansche Stoomvaart Maatschapij (Holland-Amerika Lijn), a Netherlands corporation, hereafter called the 'Holland-American Line,' operating between New York and Rotterdam and return.

13. "Russian East Asiatic Steamship Company, a Russian corporation, hereafter called the 'Russian-American Line,' operating between New York and Libau, Russia, and return."

The individuals named as defendants were the principal officers and agents in this country of the corporate defendants. We extract from the argument on behalf of the government the following statement of the main provisions of the principal agreement.

"(1) The parties guarantee to each other certain definite percentages of the entire steerage traffic carried by them both eastbound and westbound between European ports and the United States and Canada, except Mediterranean passengers.

"(2) Any line exceeding its allotment must pay into the pool a compensation price of £4 for each excess passenger, which sum is to be paid proportionately to the line or lines [471] which have not carried their full quota. It is expressly stated that this provision 'forms one of the main features of the entire contract.'

"(3) Each line must make a weekly report of the number of steerage passengers carried, and from these the secretary of the pool compiles weekly statements showing the pool position of each line. He also prepares each month provisional accounts of the compensation due from lines which have exceeded their quota. This must be paid immediately on pain of heavy penalties. Final settlements are made at the end of each year.

"(4) Each line undertakes to arrange its rates and service in such manner that the number of steerage passengers it actually carries shall correspond as nearly as possible with the number allotted to it by the contract. If any line exceeds its proportion it is in duty bound to adopt measures calculated to bring about a correct adjustment. The other lines may either await the action of the individual line, or a majority of the lines representing 75 per cent of the pool shares can immediately order rates on a plus line to be raised or rates on a minus line to be lowered, and from this order there is no appeal. It is expressly stated, however, that 'all parties were unanimously of the opinion that the adjustment is, whenever practicable, to be effected not by reducing the rates of one line, but, on the contrary, by *raising* the rates of one or several of the lines.

"(5) No line has the right to alter its steerage rates without having previously informed the secretary; i. e., all lines are bound to maintain existing rates until the other pool members are notified.

"(6) No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any other conference line unfavorable to the latter, and no party shall support (advertise in) any newspaper which shall systematically attack any conference line.

"(7) To insure the faithful performance of the agreement, [472] each line deposits with the secretary a promissory note in the amount of £1,000 for each per cent of traffic allotted to it in the pool. From this amount penalties may be collected ranging from £250 for smaller infractions to the forfeiture of the entire deposit if the line withdraws from the agreement before its expiration, refuses to pay compensation money, or assists directly or indirectly any opposition line.

"(8) New lines may be admitted or the

terms of the agreement altered only by unanimous vote, unless otherwise provided in the contract.

"(9) To assist in the carrying out of the agreement a secretary was appointed.

"(10) Regular meetings are to be held alternately at London and Cologne for the purpose of carrying out this agreement and agreements collateral thereto. These meetings constitute what is called the Atlantic Conference.

"Representatives of the Atlantic Conference Lines likewise meet in New York in what is called the American Atlantic Conference or New York Conference."

It is to be observed in addition that the agreement expressly provided that the withdrawal of any one of the lines from the contract should release all others from all future obligation unless the others agreed among themselves to continue.

To the elucidation of the view we take of the case it suffices to say that, as the result of the answers of the defendants, the issues which arose for decision were twofold in character: Did the anti-trust act relate to the business of ocean transportation with which the assailed agreement and those subsidiary to it were concerned; and if so, did the agreements and the conduct of the defendants under them constitute a violation of the provisions of the anti-trust act?

The court below, although deciding that the ocean [473] transportation covered by the main agreement was under the control of the anti-trust act, yet held that the assailed contract and the action of the parties under it were not within the terms of the act, and therefore that the complaint of the government on that subject was without foundation. The court, however, concluded that a certain subsidiary agreement which had been entered into in the process of the execution of the original agreement had given rise to a practice which was reprobated by the anti-trust act, and the further execution of such agreement and the carrying out of the practice under it were by the decree forbidden. The court reached these conclusions upon opinions formed concerning the nature and character of ocean transportation with which the agreement was concerned, the evils which had existed in the traffic and which it was the purpose of the agreement to remedy, the practice of the commercial world in dealing with such transportation in the past, the benefit which had resulted to commerce from the execution of the agreement, the reflex light thrown upon its intent and object by the reasonable rates which had been applied in its execution, and many other conditions which had come to pass as a result of the agreement, tending to the amelioration of the conditions of steerage travel and the resulting benefaction to the safety, comfort, and health of the millions of human beings traveling by steerage, to which class of traffic alone the contract related. 216 Fed. 971.

The contentions which presumably were urged in the court below and which it is deemed by the parties here arise for decision will at once appear by giving a brief statement concerning those made on this appeal by the United States and by the defendants as appellees or on a cross appeal. On behalf of the United States it is insisted that the provisions of the anti-trust act govern the subject, that the terms of the agreement constitute a plain violation of that act, that the conduct of the parties under [474] it adds additional force to the considerations arising from the text of the contract, since it demonstrates that the purpose of the agreement was to destroy competition, to acquire dominion over rates and to fix them as the result of monopoly, and that it is wholly irrelevant to inquire whether, in executing the wrongful powers which were acquired by the contract, the parties were beneficent in their action, since what the act forbids is the monopoly and the combination for the purpose of obtaining monopoly, and there is no distinction in the act between a good monopoly and a bad one. On the other hand, the contentions of the defendants are as follows: First, that, conceding the power, it is not to be assumed, in the absence of express declaration to that effect, that the purpose of Congress in the anti-trust act was to extend its authority into foreign countries to prevent the execution in such countries of contracts which were there legal and and which were intended, in view of the conditions there prevailing, to better enable the discharge by ocean carriers of their duty. Second, that it appears from subsequent legislation of Congress that it was not its intention to deal with ocean transportation from and to foreign countries by the anti-trust act, since such transportation was dealt with in subsequent legislation in a manner which persuasively leads to such conclusion. Chap. 349, §§ 73–77, 28 Stat. at L. 570, Comp. Stat. 1913, §§ 8831–8835; chap. 11, § 34, 30 Stat. at L. 213; Joint Resolution, 38 Stat. at L. 779. Third, that in fully investigating and considering the question whether ocean transportation to and from foreign countries was included in the anti-trust act, in an elaborate report a committee of the House of Representatives had expressed conclusions in conflict with the view that the act did apply, and had recommended the adoption of legislation to

guard against evils in such traffic, if any, and which legislation, if adopted, would be in a large sense incompatible [475] with the conclusion that the anti-trust act was applicable to such transportation.

While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality; that is, because of their now moot character as an inevitable legal consequence springing from the European War which is now flagrant,—a matter of which we take judicial notice. Montgomery v. United States, 15 Wall. 395, 21 L. ed. 97; United States v. Lapène, 17 Wall. 601, 21 L. ed. 693, 7 Moore, Int. Law Dig. 244, 250. The legal proposition is not in substance controverted, but it is urged, in view of the character of the questions and the possibility or probability that, on the cessation of war, the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in California v. San Pablo & T. R. Co. 149 U. S. 308, 314, 37 L. ed. 747, 748, 13 Sup. Ct. Rep. 876:

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue [476] in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

See also Lord Veazie, 8 How. 251, 12 L. ed. 1067; Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. Rep. 431; Little v. Bowers, 134 U. S. 547, 33 L. ed. 1016, 10 Sup. Ct. Rep. 620; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Security Mut. L. Ins. Co. v. Prewitt, 200 U. S. 446, 50 L. ed. 545, 26 Sup. Ct. Rep. 314; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Stearns v. Wood, 236 U. S. 75, 59 L. ed. 475, 35 Sup. Ct. Rep. 229.

Our attention has indeed been directed to a recent decision in United States v. Prince Line, 220 Fed. 230, where, although it was recognized that "the combination against which this proceeding is directed, composed of two British and two German steamship companies, has been practically dissolved as a result of the European War," and the questions presented "have become largely academic," the court nevertheless proceeded to consider and dispose of the case on the merits, observing in conclusion, however: "In view of the fact that the logic of events has turned this investigation into an autopsy, instead of a determination of live issues, it seems unnecessary to discuss the persuasiveness of the proofs," etc. But we cannot give our implied sanction to what was thus done or accept the persuasiveness of the reasoning upon which the action was based, in view of the settled decisions of this court to the contrary, and the fundamental principles of public policy upon which they are based. In fact, at this term, although we were pressed to take jurisdiction of a cause in a capital case after the death penalty had been inflicted on the accused, we declined to do so and dismissed for want of jurisdiction because the case had become a moot one. Director of Prisons v. Court of First Instance, 239 U. S. 633, post, 478, 36 Sup. Ct. Rep. 220.

Nor is there anything in United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279 [477] which conflicts with this fundamental doctrine. In the first, the Trans-Missouri Case, a combination between railroads, charged to be illegal, was by consent dissolved, and it was held that, in view of the continued operation of the railroads and the relations between them, their mere consent did not relieve of the duty to pass upon the pending charge of illegality under the statute of their previous conduct, since by the mere volition of the parties the combination could come into existence at any moment. Leaving aside some immaterial differences, in terms the ruling in the Southern Pacific

Case was based upon the decision in the Trans-Missouri Case. Here, on the contrary, the business in which the parties to the combination were engaged has, by force of events beyond their control, ceased, and by the same power and a continued relation concerning it between them has become unlawful and impossible. The difference between this and the Trans-Missouri Case was clearly laid down in Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, where, after announcing the general rule as to the absence of authority to consider a mere moot question, and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared: "But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

Although it thus follows that there are no issues on the merits before us which we have a right to decide, it yet remains to be determined what our order should be with reference to the decree below rendered, which, as we have seen, was against the government and in favor of the assailed combination because it was found not to be within the prohibitions of the anti-trust act. As established by the ruling in South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921, our conclusion on such subject must be reached without at all considering the merits of the cause, [478] and must be based solely upon determining what will be "most consonant to justice" in view of the conditions and circumstances of the particular case. Coming to consider the question in that light, and in view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when, without any fault of the government, there is no power to review it upon the merits, but that it should be reversed and the case be remanded to the court below with directions to dismiss the bill without prejudice to the right of the government in the future to assail any actual contract or combination deemed to offend against the anti-trust act.

And it is so ordered.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

MYLES SALT COMPANY, Limited, Plff. in Err.,
v.
BOARD OF COMMISSIONERS OF THE IBERIA & ST. MARY DRAINAGE DISTRICT and George Henderson, Sheriff and Ex-officio Tax Collector of the Parish of Iberia.

(See S. C. Reporter's ed. 478–485.)

Error to state court — Federal question — validity of state law as administered.

1. The contention that a state law as administered and justified by the highest court of the state violates the Federal Constitution presents a Federal question which will support a writ of error from the Federal Supreme Court to the state court, although the state law as written is not attacked.

[For other cases, see Appeal and Error, 1645–1672, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — drainage district — including land not benefited.

2. An island which, being high land, is not, and cannot be, benefited directly or indirectly by a drainage improvement, may not, consistently with the due process of law clause of U. S. Const., 14th Amend., be included within the drainage district solely for the purpose of deriving a revenue from the levy and collection of drainage taxes thereon for the benefit of other lands subject to be improved by drainage.

[For other cases, see Constitutional Law, 561–581, in Digest Sup. Ct. 1908.]

[No. 141.]

Argued December 16, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of Louisiana to review a decree which affirmed a decree of the District

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois 42 L. ed. U. S. 998.

As to what adjudications can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On necessity of special benefit to sustain assessments for local improvements—see note to Re Madeira Irrig. Dist. 14 L.R.A. 755.

Court of the Parish of Iberia, in that state, dismissing a suit to restrain the sale of land for drainage taxes. Reversed and remanded for further proceedings.

See same case below, 134 La. 903, 64 So. 825.

The facts are stated in the opinion.

Mr. Edgar H. Farrar argued the cause and filed a brief for plaintiff in error:

The drainage tax was in the nature of a local assessment, based on some benefit to the property taxed. This is the law of Louisiana.

Levee Comrs. v. Lorio Bros. 33 La. Ann. 276; Charnock v. Fordoche & G. T. Special Levee Dist. 38 La. Ann. 323; Williams v. Bayou Sale Drainage Dist. 130 La. 969, 58 So. 847.

The above is the rule to be applied in the enforcement of the 14th Amendment to the Constitution of the United States, where the action of a state in assessing such a tax is arbitrary and confiscatory.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Tonawanda v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; Detroit v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

And the supreme court of Louisiana itself applied this doctrine in a drainage case where the property in one part of a district was being taxed for the sole benefit of property in another part of the district.

Williams v. Bayou Sale Drainage Dist. 130 La. 969, 58 So. 847.

The proposition that legislative discretion in delimiting a district within which local assessments are to be levied can be exercised in an arbitrary and confiscatory way, and that courts have no authority to right the wrong, is distinctly repudiated by this court in Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, and Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The peculiar facts of this case, as averred in the plaintiff's petition, constitute a taking of property without due process of law, as flagrant and as manifest as that in the Norwood Case.

Mr. L. T. Dulany argued the cause and filed a brief for defendants in error:

The judgment of the supreme court of the state rests entirely upon an independent question of pleadings under the laws of Louisiana, and decides no Federal question.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

The question propounded is not Federal, but one to be determined by the laws of Louisiana. Under the law of Louisiana the action of the legislative body in the exercise of its discretion as to what property shall be included in a drainage district will not be inquired into by the court, except upon special averment of fraud, which was not pleaded.

De Gravelle v. Iberia & St. M. Drainage Dist. 104 La. 703, 29 So. 302; Burguieres v. Sanders, 111 La. 110, 35 So. 478; Kelly v. Chadwick, 104 La. 719, 29 So. 295; Bernard v. Bayou Portage Drainage Dist. 130 La. 637, 58 So. 493.

The averment that benefit to the property is the sole basis upon which the tax could be justified, and, that there was, therefore, a taking of property without due process of law, does not, in the absence of averments that the tax is being levied in contravention of the laws of the state of Louisiana, or that the laws of Louisiana are repugnant to the Constitution of the United States, bring a Federal question into the case for decision.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

To give this court jurisdiction under U. S. Rev. Stat. § 709, several things should be apparent from the record; the first is that there was a Federal question involved for determination; that a decision of the Federal question was necessary to the decision of the case, and was actually decided by the state court.

Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Dibble v. Bellingham Bay Land Co. 163 U. S. 69, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; Meyer v. Richmond, 172 U. S. 100, 43 L. ed. 381, 19 Sup. Ct. Rep. 106.

If it appear from the record that a Federal question was directly involved, so that a state court could not have given judgment without deciding it, that would be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn into question and decision necessarily rendered

thereon in arriving at conclusions actually presented and considered.

Powell v. Brunswick County, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

The only issue raised by the pleadings and passed upon by the state court is one to be determined under the laws of Louisiana; and the issue and judgment are in no manner affected by the allegations that plaintiff's property is being taken without due process of law, in contravention of the Federal Constitution, when the averments of the petition are insufficient to maintain an attack upon the tax, which is not complained of as being in violation of the Constitution and laws of the state, and where no averment is made that the Constitution and laws of Louisiana are repugnant to, or in contravention of, the protective provisions of the Federal Constitution.

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120.

The decision of the supreme court of Louisiana, affirming the decision of the trial court, and maintaining the exception of no cause of action, is based entirely upon the settled jurisprudence of the state as announced by the supreme court in a number of cases, all consistent with the jurisprudence of the Supreme Court of the United States, as announced in French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; DeGravelle v. Iberia & St. M. Drainage Dist. 104 La. 703, 29 So. 302; Burguieres v. Sanders, 111 La. 110, 35 So. 478; Bernard v. Bayou Portage Drainage Dist. 130 La. 637, 58 So. 493; Moody & Co. v. Chadwick, 108 La. 66, 32 So. 181; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Kirtland v. Hotchkiss, 100 U. S. 491, 498, 499, 25 L. ed. 558, 562; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Kelly v. Chadwick, 104 La. 719, 29 So. 295.

Mr. Justice McKenna delivered the opinion of the court:

Suit to restrain the sale of plaintiff in error's land about to be made, it is alleged, by defendants in error, to collect a tax of 5 mills for four years, aggregating the sum of $2,000 and penalties. (We shall refer to the parties as plaintiff and defendants, respectively, that being their relation in the state courts.)

There is no dispute about the state laws. It is stated in plaintiff's brief that it is a matter of ordinary geographic knowledge that large portions of the flat lands in Louisiana adjacent to the Gulf coast are subject to fluvial or tidal overflow and must be leveed and drained by systems of general and special public levees and drains. To this end [480] legislation has been enacted, beginning in 1888 and receiving constitutional sanction in 1898 (art. 281). By an act passed in 1900 (Acts of 1900, p. 12) previous statutes were consolidated and it was provided that when the drainage of any locality was such that, in the opinion of the police juries of the respective parishes, it should become necessary to organize or create a drainage district composed partly of land situated in adjoining parishes, then such drainage district should be created by joint action of the police juries of the respective parishes.

The districts were authorized to issue bonds for drainage purposes and levy a 5-mill tax on all property subject to taxation situated in them. The statute was amended in details and re-enacted in 1902 and 1910 (Acts of 1902, p. 293; Acts of 1910, p. 542).

Acting under these statutes the police juries of the adjoining parishes of Iberia and St. Mary organized the drainage district with which the case at bar is concerned, and the organization of which is attacked.

The ground of the attack is that the district for the construction and maintenance of which the tax was levied was of no benefit to plaintiff's land and was formed only for the benefit of the other lands, was an unconstitutional usurpation of authority, and was and is an effort to take plaintiff's property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

The case was heard upon the petition in the case and an exception by defendants of no cause of action. The court dissolved the injunction that had been theretofore granted and dismissed the suit with an award of costs and attorneys' fees. Judgment was entered accordingly and sustained by the supreme court of the state.

The trial court held that the gist of plaintiff's demand was to the effect that no benefit was or would be derived by its property by the general drainage system and the levy [481] and collection of the tax on its property. The court said the question presented by the demand was no longer an open one. The principle laid down by the courts, it was declared, is that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into motives "where no fraud is pleaded." The supreme court affirmed the action of the district court and the principle upon which it was based, say-

ing that that court accepted the view as correct "that the decisions heretofore rendered settle the question forever that the local authorities as to drainage have the absolute right to organize drainage districts and give them shape and boundary lines as they choose." And it was further said: "It is upon that theory that the case is before us for decision; . . . without an element of fraud alleged, the court properly dismissed the suit. . . . Here no fraud has been alleged, nor its equivalent." [134 La. 905, 906, 64 So. 825.] Prior cases were cited.

Is this a correct view of the petition? The principle of law involved in the answer to the question is well known. There is no doubt that the legislature of a state may constitute drainage districts and define their boundaries, or may delegate such authority to local administrative bodies, as, in the present case, to the police juries of the parishes of the state, and that their action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. Houck v. Little River Drainage Dist. decided November 29, 1915 [239 U. S. 254, ante 266, 36 Sup. Ct. Rep. 58]. Does the district under review come within the principle or its limitation? Was it formed in an arbitrary manner and in plain abuse of power? The answer depends upon the allegations of the petition, which, being excepted to for insufficiency in law, must be taken as true.

We condense them narratively as follows: Weeks island, [482] the property which is the subject of the controversy, is one of several islands, being the highest uniform elevation above sea level in southwest Louisiana. It rises abruptly 175 feet or more, is surrounded on two sides by bayous, on the rear by a salt-water marsh, and on the front by a bay (Vermilion bay), with a small strip of salt-water marsh intervening.

Its topography is high and rolling, the drainage excessive, and washing and erosion are serious problems. The country around it outside of the sea marsh is thickly settled and presents the character of low lands as distinguished from high lands or uplands, reaching a maximum elevation of about 15 feet as against a maximum elevation of Weeks island of 175 feet.

In lieu of needing drainage the problem the island is confronted with "is to guard against washing and erosion, and that the drainage of all of the territory between it and Bayou Teche on all sides and to all extents leads to the marshes subject to tidal overflow between it and the mainland."

Some years ago a drainage district, known as the Iberia & S. Mary Drainage District, was organized at the instigation of interested individuals for the purpose of drainage into the bayous and marshes surrounding Weeks island of certain lands lying between Bayou Teche and the marshes.

Solely with the view of deriving revenues from the assessment of Weeks island and the salt deposit therein, and only for the benefit of the other properties, and not upon the theory that a general scheme of drainage would inure to the benefit of all of the property therein, even indirectly, and not through an exercise of sound and legal legislative discretion, the island was included within the confines of the district. In pursuance of such scheme and plan an election was held for the imposition of an ad valorem tax of 5 mills for a period of forty years [483] upon which to predicate an issue of bonds. The election resulted in the imposition of the tax.

It was not intended nor has it ever been intended, nor was it possible nor is it possible, to give any of the benefits of the drainage scheme to Weeks island or to the salt deposit therein, directly or indirectly, its inclusion in the district being solely and only for the purpose of deriving revenue therefrom for the special benefit of the other lands subject to be improved by drainage, without any benefit to plaintiff or its property whatever. The island is the highest assessed piece of property in the district, and has never received one single cent of benefit from the drainage system constructed and maintained in such district, and never can or will in the future receive any benefit whatever from the system.

Plaintiff has uniformly, for the reasons detailed, refused to pay the tax, and at no time prior to this year has an effort been made to collect the same, plaintiff having based its refusal to pay on its constitutional rights. But at the instance of the commissioners of the district the sheriff and ex-officio tax collector of Iberia parish has demanded the tax on the island and its salt mine, and is about to advertise the property as delinquent for the period of four years, aggregating $2,000 with the addition of the penalties provided by law.

The inclusion of the island within the district is charged to be an unconstitutional usurpation of authority and an effort to take plaintiff's property without due process of law. A like charge is made as to the assessment of the tax and its collection.

There is no doubt that a Federal right was asserted. Indeed, plaintiff was at pains, it says, "not to invoke for its protection any provision of the Constitution and laws of the state of Louisiana; not to make any attack upon any law of the state of Louisi-

ana or of any of its subdivisions." And, further, the pleadings "were deliberately [484] cast in this form so as to exclude every question of local or state law and to compel the consideration and decision of the Federal question only."

But, notwithstanding the studied effort so made and declared, defendants contend that plaintiff missed its purpose and that a Federal question was neither presented to the courts below nor decided by them, and a motion is made to dismiss. It is said that "under the law of Louisiana the action of the legislative body (the police jury), in the exercise of its discretion as to what property shall be included in a drainage district, will not be inquired into by the court, except upon a special averment of fraud, which is not pleaded." And such decision, it is further contended, was a decision upon the state law, and presents no Federal question, the statute of the state not being attacked.

We cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as administered and justified by the supreme court of the state is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.

The charge is that plaintiff's property was included in the district not in the exercise of "legal legislative discretion," not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined "purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit" to plaintiff "or its property whatever," present or prospective.

Nothing could be more arbitrary if drainage alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be indirect, such as might [485] accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks island could be a receptacle for stagnant water, or would be otherwise a menace to health if not included within the district, or would defeat the purpose of the law, which seems to have been the ground of decision in George v. Young, 45 La. Ann. 1232, 14 So. 137.

The case, therefore, is within the limitation of the power of the state as laid down in Houck v. Little River Drainage Dist. supra, which cites Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, and retains its principle. It has not the features which determined French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, and the cases which have followed that case, and Phillip Wagner v. Leser [239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66], decided coincidently with Houck v. Little River Drainage Dist. and cited in the latter.

It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. Phillip Wagner v. Leser, supra. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind.

Therefore, the judgment of the Supreme Court of Louisiana is reversed and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

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[486] NORTHWESTERN LAUNDRY and T. R. Hazard, Appts.,
v.
CITY OF DES MOINES et al.

(See S. C. Reporter's ed. 486–495.)

Appeal — from district court — extending review beyond Federal question.

1. The jurisdiction of the Federal Supreme Court of an appeal from a final decree of a Federal district court dismissing on the merits the bill in a suit involving a Federal question extends to a determination not only of such question, but of every other question properly arising on the record.

[For other cases, see Appeal and Error, 4297–4300, in Digest Sup. Ct. 1908.]

Note.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

For a discussion of police power, generally—see notes to State v. Marshall, 1

Constitutional law — police power — regulating smoke nuisance — due process of law — equal protection of the laws.

2. So far as the Federal Constitution is concerned, a state may, by itself or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods to be a nuisance and subject to restraint as such, and the harshness of such legislation or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections, nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expenses in complying with the terms of the law or ordinance.

[For other cases, see Constitutional Law, IV. a, 5; IV. b, 5; IV. c, 3, in Digest Sup. Ct. 1908.]

Statutes — repeal and re-enactment — effect.

3. The express repeal by Iowa act of March 20, 1913, of the earlier act of April 15, 1911, which granted identically the same authority to municipalities to abate the smoke nuisance as is conferred by the repealing statute, did not have the effect of annulling a municipal ordinance adopted under the sanction of the earlier law.

[For other cases, see Statutes, III. c; IV., in Digest Sup. Ct. 1908.]

Municipal corporations — powers — abating smoke nuisance.

4. Authority to abate the smoke nuisance conferred upon municipalities by the Iowa act of April 15, 1911, extends to the adoption of an ordinance declaring the emission of dense smoke in certain parts of the city to be a nuisance, and prohibiting the same, and delegating first to an inspector and then to a smoke abatement commission the power, subject to judicial review, to prescribe the requirements in each case.

[For other cases, see Municipal Corporations, II. c, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — abating smoke nuisance.

5. The equal protection of the laws is not denied by a municipal ordinance for the prevention of the emission of dense smoke in portions of the city, where it applies to all coming within its terms, although other businesses might have been, but were not, included.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 121.]

Argued and submitted December 9, 1915. Decided January 10, 1916.

APPEAL from the District Court of the United States for the Southern District of Iowa to review a decree dismissing the bill in a suit to enjoin the enforcement of a municipal ordinance prohibiting the emission of dense smoke in portions of the city. Affirmed.

The facts are stated in the opinion.

Mr. O. M. Brocket submitted the cause for appellants:

Injunction lies to restrain enforcement of invalid municipal ordinances, the execution of which injuriously affects private rights.

Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; Mobile v. Louisville & N. R. Co. 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106; Stevens v. St. Mary's Training School, 144 Ill. 336, 18 L.R.A. 832, 36 Am. St. Rep. 438, 33 N. E. 962; Austin v. Austin City Cemetery Asso. 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528; Bear v. Cedar Rapids, 147 Iowa, 341, 27 L.R.A.(N.S.) 1150, 126 N. W. 324.

It is a violation of the 14th Amendment to the Constitution of the United States to vest in any officer or body of officers wholly arbitrary and unregulated discretion to grant or withhold licenses to hold and enjoy the natural and lawful rights of property and occupation, as is attempted by the provisions of the ordinance complained of.

Yick Wo v. Hopkins, 118 U. S. 359, 30 L. ed. 221, 6 Sup. Ct. Rep. 1064; Richmond v. Dudley, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Grainger v. Douglass Park Jockey Club, 78 C. C. A. 199, 148 Fed. 513, 9 Ann. Cas. 997.

Prior to the enactment of Iowa Laws 1911, chap. 37, it was well-settled law in this state that cities had no power to declare what should constitute nuisances, or prescribe punishment for their maintenance, nor to bring actions in court for their abatement.

Everett v. Council Bluffs, 46 Iowa, 66; Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843; Nevada v. Hutchins, 59 Iowa, 506, 13 N. W. 634; Knoxville v. Chicago, B. & Q. R. Co. 83 Iowa, 636, 32 Am. St. Rep. 321, 50 N. W. 61; Chariton v. Barber, 54 Iowa, 360,

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L.R.A. 51; Re Gannon, 5 L.R.A. 359; State v. Schlemmer, 10 L.R.A. 135; Ulman v. Baltimore, 11 L.R.A. 224; Electric Improv. Co. v. San Francisco, 13 L.R.A. 131; and Barbier v. Connolly, 28 L. ed. U. S. 923.

As to municipal control over smoke as a public nuisance—see notes to St. Louis v. Edward Heitzeberg Packing & Provision Co. 39 L.R.A. 551; Atlantic City v. France, 18 L.R.A.(N.S.) 156; and Rochester v. Macauley-Fien Mill. Co. 32 L.R.A.(N.S.) 554.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

37 Am. Rep. 209, 6 N. W. 528; Ottumwa v. Chinn, 75 Iowa, 407, 39 N. W. 670.

If the repealing clause found in Iowa act March 20, 1913, in fact repealed the act of the 34th general assembly, the only authority claimed for the offensive ordinance was thereby withdrawn and the ordinance was therefore nullified.

Martin v. Oskaloosa, — Iowa, —, 99 N. W. 557; Pritchard v. Savannah Street & R. Resort R. Co. 87 Ga. 294, 14 L.R.A. 721, 13 S. E. 493; St. Louis v. Kellman, 235 Mo. 687, 139 S. W. 433.

Was Iowa Laws 1911, chap. 37 repealed by the act of March 20, 1913?

United States v. Musgrave, 160 Fed. 700; United States v. 99 Diamonds, 2 L.R.A. (N.S.) 185, 72 C. C. A. 9, 139 Fed. 961; Kunkalman v. Gibson, 171 Ind. 503, 84 N. E. 985, 86 N. E. 850; Elmer v. United States, 45 Ct. Cl. 90; People ex rel. Higgins v. Freeman, 242 Ill. 152, 89 N. E. 667; People ex rel. Easterday v. McCullough, 143 Ill. App. 112; Rockingham County v. Chase, 75 N. H. 127, 71 Atl. 634; Hampton v. Hickey, 88 Ark. 324, 114 S. W. 707; Thornton v. State, 5 Ga. App. 397, 63 S. E. 301; Buffalo v. Lewis, 192 N. Y. 193, 84 N. E. 809; Milligan v. Arnold, 50 Ind. App. 559, 98 N. E. 822; Petitti v. State, 7 Okla. Crim. Rep. 12, 121 Pac. 278; Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; 36 Cyc. 1077, 1078; Childs v. Shower, 18 Iowa, 272; Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532; Ogden v. Witherspoon, 3 N. C. (2 Hayw.) 227, Fed. Cas. No. 10,461.

The provisions of the ordinance which are the basis for the prosecutions complained of are in excess of the authority delegated by the acts in question.

Clarke, D. & Co. v. Davenport, 14 Iowa, 500; Tuttle v. Church, 53 Fed. 425.

The features of the ordinance here involved are void for unreasonableness.

Davis v. Anita, 73 Iowa, 325, 35 N. W. 244; State Center v. Barenstein, 66 Iowa, 249, 23 N. W. 652; Meyers v. Chicago, R. I. & P. R. Co. 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; Munsell v. Carthage, 105 Ill. App. 119; Everett v. Council Bluffs, 46 Iowa, 66; Bush v. Dubuque, 69 Iowa, 233, 28 N. W. 542; Centerville v. Miller, 57 Iowa, 56, 10 N. W. 293; St. Louis v. Edward Heitzeberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954.

The Iowa statute, if construed to delegate authority to enact ordinances containing the provisions in question, is void because repugnant to both the state and Federal Constitutions.

Neola v. Reichart, 131 Iowa, 492, 109 N. W. 5; Iowa City v. McInnerny, 114 Iowa, 586, 87 N. W. 498; Bloomfield v. Trimble, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586; Bear v. Cedar Rapids, 147 Iowa, 341, 27 L.R.A.(N.S.) 1150, 126 N. W. 324; State v. Beneke, 9 Iowa, 203; Geebrick v. State, 5 Iowa, 491; State v. Weir, 33 Iowa, 134, 11 Am. Rep. 115; Weir v. Cram, 37 Iowa, 649; Ford v. North Des Moines, 80 Iowa, 626, 45 N. W. 1031; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; State v. King, 37 Iowa, 462; Des Moines v. Hillis, 55 Iowa, 643, 8 N. W. 638; Robert J. Boyd Paving & Contracting Co. v. Ward, 28 C. C. A. 667, 55 U. S. App. 730, 85 Fed. 27; State ex rel. Childs v. Copeland, 66 Minn. 315, 34 L.R.A. 777, 61 Am. St. Rep. 410, 69 N. W. 27; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; State, Dexheimer, Prosecutor, v. Orange, 60 N. J. L. 111, 36 Atl. 706.

Mr. **Eskil C. Carlson** argued the cause, and, with Messrs. H. W. Byers and Earl M. Steer, filed a brief for appellees:

A Federal court cannot issue an injunction to restrain judicial proceedings in a state court, except in bankruptcy matters.

Haines v. Carpenter, 91 U. S. 254, 23 L. ed. 345; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482.

A court of equity cannot issue an injunction to restrain the enforcement of a criminal ordinance, at least, without a showing of irreparable injury, there being a plain, speedy, and adequate remedy at law.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; Harkrader v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Ewing v. Webster City, 103 Iowa, 226, 72 N. W. 511; 22 Cyc. 903.

In construing and interpreting the statute and ordinance, and in determining their validity under the state Constitution and statutes, this court must follow the decisions of the highest court of the state.

W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; Robinson v. Belt, 187 U. S. 41, 47 L. ed. 65, 23 Sup. Ct. Rep. 16; Manley v. Park, 187 U. S. 547, 47 L. ed. 296, 23 Sup. Ct.

Rep. 208; Whitmier & F. Co. v. Buffalo, 118 Fed. 773; 12 Cyc. 898.

The emission of dense smoke in populous cities is a proper subject of police regulation as a public nuisance.

Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; People v. Lewis, 86 Mich. 273, 49 N. W. 140; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 Ann. Cas. 580; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Rochester v. Macauley-Fien Mill. Co. 199 N. Y. 207, 32 L.R.A.(N.S.) 554, 92 N. E. 641; McGill v. Pintsch Compressing Co. 140 Iowa, 429, 20 L.R.A.(N.S.) 466, 118 N. W. 786; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198.

The repeal and simultaneous re-enactment of substantially the same provisions is to be construed and considered as a continuation of the prior statute, subject to the modifications, and the binding force and effect thereof is not destroyed or interrupted thereby.

Hancock v. Perry, 78 Iowa, 550, 43 N. W. 527; State v. Prouty, 115 Iowa, 657, 84 N. W. 670; Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532; Robinson v. Ferguson, 119 Iowa, 325, 93 N. W. 350.

The delegation to cities of the power to regulate the emission of dense smoke within their limits is proper, valid, and constitutional.

State v. King, 37 Iowa, 462; Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; Des Moines v. Hillis, 55 Iowa, 643, 8 N. W. 638; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; Fairfield v. Shallenberger, 135 Iowa, 615, 113 N. W. 459; 11 Cyc. 693.

The classification of cities affected according to population is reasonable, valid, and constitutional.

Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Haskel v. Burlington, 30 Iowa, 232; Owen v. Sioux City, 91 Iowa, 190, 59 N. W. 3; Ulbrecht v. Keokuk, 124 Iowa, 1, 97 N. W. 1082; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10.

The statute is uniform in its operation, within the meaning of the Constitution of Iowa, art. 1, § 6.

Haskel v. Burlington, 30 Iowa, 232; Owen v. Sioux City, 91 Iowa, 190, 59 N. W. 3; Fairfield v. Shallenberger, 135 Iowa, 615, 113 N. W. 459; Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177.

The legislature did not authorize double punishment for the same offense, but it could have authorized municipalities to punish an offense also punishable under the state law.

Bloomfield v. Trimble, 54 Iowa, 399, 37 Am. Rep. 212, 6 N. W. 586; Avoca v. Heller, 129 Iowa, 227, 105 N. W. 444; Blodgett v. McVey, 131 Iowa, 552, 108 N. W. 239; Neola v. Reichart, 131 Iowa, 492, 109 N. W. 5; 2 Dill. Mun. Corp. §§ 630–633; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; United States v. Marigold, 9 How. 560, 13 L. ed. 257; Moore v. Illinois, 14 How. 13, 14 L. ed. 306.

The ordinance is fairly within the authority conferred upon the city by the statute, under the rule that the city may exercise such powers as are inherent in it, and such as are expressly or impliedly conferred upon it, including those necessary or incidental to the carrying into effect of its express powers, regard always being had to the intention of the legislature.

Davenport v. Kelly, 7 Iowa, 102; Mullarky v. Cedar Falls, 19 Iowa, 21; Dubuque v. Stout, 32 Iowa, 47, 80, 7 Am. Rep. 171; State ex rel. Cedar Rapids v. Holcomb, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; Wood v. Farmer, 69 Iowa, 533, 29 N. W. 440; Walnut v. Rankin, 70 Iowa, 65, 29 N. W. 806; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070.

The classification of plants in the ordinance is reasonable and valid, and there is no unjust discrimination.

Moses v. United States, 16 App. D. C. 428, 50 L.R.A. 532; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; People v. Lewis, 86 Mich. 273, 49 N. W. 140; State v. Chicago, M. & St. P. R. Co. 114 Minn. 122, 33 L.R.A. (N.S.) 494, 130 N. W. 545, Ann. Cas. 1912B, 1030; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The ordinance is not unreasonable and void as vesting arbitrary and unregulated discretion in the smoke inspector and smoke abatement commission.

Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449; Davis v. Massachusetts, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673.

The provision for the use of Reigelman's smoke chart is reasonable and valid.

Rochester v. Macauley-Fien Mill. Co. 199

N. Y. 207, 32 L.R.A.(N.S.) 554, 92 N. E. 641; Cincinnati v. Burkhardt, 30 Ohio C. C. 350.

There is no violation of the constitutional provisions respecting excessive fines and unusual punishments.

Pervear v. Massachusetts, 5 Wall. 475, 18 L. ed. 608; 2 Dill. Mun. Corp. 5th ed. § 646; State v. Botkin, 71 Iowa, 87, 60 Am. Rep. 780, 32 N. W. 185; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The ordinance is presumed to be reasonable and valid; the party attacking it has the burden of showing invalidity, and any doubt should be resolved in favor of its validity.

State ex rel. Cedar Rapids v. Holcomb, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; Snouffer v. Cedar Rapids & M. C. R. Co. 118 Iowa, 287, 92 N. W. 79; McGuire v. Chicago, B. & Q. R. Co. 131 Iowa, 340, 33 L.R.A.(N.S.) 706, 108 N. W. 902; Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; 2 Dill. Mun. Corp. 5th ed. § 649; 2 McQuillin, Mun. Corp. § 974; 21 Am. & Eng. Enc. Law, 2d ed. 978.

An ordinance should not be held unreasonable or invalid as a violation of the Constitution or otherwise, unless such invalidity is clearly and unmistakably made to appear.

Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Livingston County v. Darlington, 101 U. S. 407, 25 L. ed. 1015; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

Mr. Justice Day delivered the opinion of the court:

The Northwestern Laundry and T. R. Hazard, its president, filed a bill in the district court of the United States for the southern district of Iowa, against the city of Des Moines, Iowa; James R. Hanna, mayor; W. A. Needham, commissioner; Zell G. Roe, commissioner; F. T. Van Liew, commissioner; J. I. Myerly, commissioner; W. H. Byers, commerce counsel; R. O. Brennan, city solicitor; Eskil C. Carlson, assistant city solicitor; Harry McNutt, smoke inspector; and Paul Beer, W. H. Harwood, L. Harbach, B. S. Walker, and Geo. France, members smoke abatement commission. The purpose of the bill was to enjoin the enforcement of an ordinance of the city of Des Moines, effective September 6th, 1911, which provided that the emission of dense smoke in portions [490] of that city should be a public nuisance and prohibited the same. To that end the ordinance authorized the appointment of a smoke inspector, and otherwise dealt with the subject with a view to effecting the prohibited purpose declared. The case was heard upon the bill and a motion practically amounting to a demurrer.

The bill and amended bill are very lengthy. For our purposes, their allegations and the requirements of the ordinance sufficiently appear in what is said in the discussion and disposition of the case.

The protection of the due process and equal protection clauses of the 14th Amendment is invoked. It is insisted that the ordinance is void because its standard of efficiency requires the remodeling of practically all furnaces which were in existence at the time of its adoption; it forbids remodeling or substituted equipment without a prescribed license; it forbids new construction without such license; it fails to specify approved equipment, and instead delegates, first to the inspector, and second, to the smoke abatement commission, the unregulated discretion to arbitrarily prescribe the requirements in each case, without reference to any other as to the required character of smoke prevention device, thus making the right of complainants and their class to own and operate such furnaces subject to the pleasure of the inspector and commission. It is averred that the ordinance exceeds the authority delegated to the city by the legislature; that it attempts to substitute its own definition of the crime and nuisance committed by the emission of dense smoke for that enacted by the legislature in the act under the pretended authority of which the ordinance is adopted; that it is unreasonable and tyrannical and exceeds the authority delegated for want of uniformity as to the whole city and because the exceptions specified are not natural and just. It is alleged that the ordinance prescribes arbitrary tests of degrees of density, and enables the inspector to present irrebuttable [491] proof of violation; that it provides for unlimited prosecutions and successive fines, constituting excessive punishment in the aggregate, without adequate remedy or relief, and undertakes to deprive the courts of power to determine whether the nuisances have in fact been committed or maintained.

A motion to dismiss the bill covered three grounds: First, that the bill did not state any matter of equity entitling complainants to the relief prayed, nor were the facts, as stated in the bill, sufficient to entitle complainants to any relief against defendants; second, that the bill showed upon its face that the complainants have a plain, speedy, and adequate remedy at law; and third, as it appeared on the face of the bill that the complainants were all residents of the state of Iowa, and the relief demanded was against an ordinance of the defend-

ant city, the court was without jurisdiction. The court sustained the motion, and entered a final decree dismissing the bill with prejudice. There was no attempt to make a separate issue on the question of jurisdiction, or to take an appeal upon that question alone to this court. Judicial Code, § 238, 36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215.

The decree was a general one on the merits, and, as the bill charged a violation of the 14th Amendment not so frivolous as to fail to give original jurisdiction, the appeal to this court from the final decree brings the whole case here. Holder v. Aultman, M. & Co. 169 U. S. 81, 88, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 620, 48 L. ed. 1142, 1152, 24 Sup. Ct. Rep. 784; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 91, 57 L. ed. 1400, 1406, 33 Sup. Ct. Rep. 997.

We are not furnished with any reference to an Iowa statute giving an adequate remedy at law, and we find none such. We have therefore to deal with the questions, Federal and state, made upon the face of the bill.

So far as the Federal Constitution is concerned, we have no doubt the state may by itself, or through authorized municipalities, declare the emission of dense smoke in [492] cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are Reinman v. Little Rock, 237 U. S. 171, 59 L. ed. 900, 35 Sup. Ct. Rep. 511; Chicago & A. R. Co. v. Tranberger, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678; Hadacheck v. Sebastian, decided December 20th, 1915 [239 U. S. 394, ante, 348, 36 Sup. Ct. Rep. 143].

That such emission of smoke is within the regulatory power of the state has been often affirmed by state courts. Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; Bowers v. Indianapolis, 169 Ind. 105, 81 N. E. 1097, 13 Ann. Cas. 1198; People v. Lewis, 86 Mich. 273, 49 N. W. 140; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 Ann. Cas. 580; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Rochester v. Macauley-Fien Mill Co. 199 N. Y. 207, 32 L.R.A.(N.S.) 554, 92 N. E. 641. And such appears to be the law in Iowa. McGill v. Pintsch Compressing Co. 140 Iowa, 429, 20 L.R.A.(N.S.) 466, 118 N. W. 786.

It is contended that the ordinance is in excess of the legislative authority conferred by the state of Iowa upon the city of Des Moines. This question does not seem to have been directly passed upon by the supreme court of Iowa.

The statute of Iowa enacted April 15th, 1911, before the passage of this ordinance, is as follows:

An Act Declaring the Emission of Smoke within the Corporate Limits of Certain Cities to be a Public Nuisance, and Conferring upon Such Cities Additional Powers for the Abatement of Such Nuisances. . . .

Be it enacted by the General Assembly of the State of Iowa:

Section 1. Declared a nuisance.—The emission of dense smoke within the corporate limits of any of the [493] cities of this state now or hereafter having a population of sixty-five thousand (65,000) inhabitants or over, including cities acting under the commission plan of government is hereby declared to be a public nuisance.

Section 2. Abatement.—Every such city is hereby empowered to provide by ordinance for the abatement of such nuisance either by fine or imprisonment or by action in the district court of the county in which such city is located, or by both, such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance. 34 Laws of Iowa, chap. 37, p. 27.

The ordinance in question was passed on the 6th day of September, 1911, and became effective, as we have said, on that date. The city of Des Moines is within the terms of this act. On March 20th, 1913, the legislature passed another law, as follows:

An Act Declaring the Emission of Smoke within the Corporate Limits of Certain Cities, Including Cities Acting under Special Charter, to be a Public Nuisance and Conferring upon Such Cities Additional Powers for the Abatement of Such Nuisances and Repealing Chapter Thirty-seven (37) of the Laws of the Thirty-fourth General Assembly. . . .

Be it enacted by the General Assembly of the State of Iowa:

Section 1. Declared a nuisance.—The emission of dense smoke within the corpo-

rate limits of the cities of the state, including cities acting under commission form of government, now or hereafter having a population of thirty thousand or over and in cities acting under special charter or hereafter having a population of sixteen thousand or over, is hereby declared a nuisance.

Section 2. Abatement.—Every such city is hereby empowered to provide by ordinance for the abatement of [494] such nuisance either by fine or imprisonment, or by action in the district court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city. They may also by ordinance provide all necessary rules and regulations for smoke inspection and the abatement and prevention of the smoke nuisance.

Section 3. Repeal.—That chapter thirty-seven (37) of the laws of the thirty-fourth general assembly be and the same is hereby repealed. 35 Laws of Iowa, p. 43.

This statute likewise includes the city of Des Moines.

The former statute was repealed by the new one. The effect of this repeal upon the validity of the ordinance is a state question, and as we understand the Iowa decisions, the authority of the ordinance here in question remained unimpaired. The statutory change did not have the effect to annul the ordinance passed under the former identical grant of authority. Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532; State v. Prouty, 115 Iowa, 657, 84 N. W. 670.

It is further contended that, conceding the statutory authority, the ordinance is in excess of the legislative grant. This question does not seem to have been passed upon specifically in any Iowa case called to our attention. The statute, after declaring the emission of dense smoke within the corporate limits of such cities as Des Moines to be a nuisance, authorizes the city to provide by ordinance for the abatement of such nuisance by fine or imprisonment or by action in the district court of the county, or both, such action to be prosecuted in the name of the city; and, furthermore, municipalities are authorized to provide by ordinance all necessary rules and regulations for smoke inspection and the abatement or prevention of the smoke nuisance. The smoke inspector must be qualified by training and experience to understand the theory and practice of smoke inspection. He has the benefit of counsel of the smoke abatement commission, [495] consisting of five members to be appointed by the city council, at least one of whom must have had experience in the installation and conduct of power and heating plants. From the smoke inspector there is an appeal to the smoke abatement commission in case of disagreement over plans for newly constructed plants or reconstruction of old ones. This grant of authority would seem to be sufficient to authorize the passage of an ordinance of a reasonable nature, such as we believe the one now under consideration to be. It delegates authority to carry out details to boards of local commissioners. That such rules and regulations are valid, subject as they are to final consideration in the courts, to determine whether they are reasonably adapted to accomplish the purpose of a statute, has been frequently held. 2 Dill. Mun. Corp. 5th ed. § 574. We find nothing in the Iowa cases to indicate that the supreme court of that state has laid down any different rule upon this question. That the courts of Iowa may be resorted to in case of an abuse of the powers vested in the inspector and commission seems to follow from the decision of the supreme court of that state in Hubbell v. Higgins, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822.

As to the attack upon the ordinance because of arbitrary classification, this question has been so often discussed that nothing further need be said. The ordinance applies equally to all coming within its terms, and the fact that other businesses might have been included does not make such arbitrary classification as annuls the legislation. Nor does it make classification illegal because certain cities are included and others omitted in the statute. Eckerson v. Des Moines, 137 Iowa, 452, 115 N. W. 177.

We think the District Court was right in dismissing the bill upon its merits.

Affirmed.

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[496] SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

W. L. LLOYD.

(See S. C. Reporter's ed. 496–502.)

Removal of causes — separable controversy — sufficiency of petition.

1. Allegations in the petition for the removal of an alleged separable controversy to a Federal court for diverse citizenship are not sufficient where they amount sim-

Note.—As to removal of causes in cases of separable controversy—see notes to Miller v. Clifford, 5 L.R.A.(N.S.) 50; Sloane v. Anderson, 29 L. ed. U. S. 899; Butler v. National Home, 36 L. ed. U. S. 346; Tor-

ply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertake to try the merits of a cause of action good upon its face.

[For other cases, see Removal of Causes, IV. b; IV. c; VI. d, in Digest Sup. Ct. 1908.]

Removal of causes — separable controversy — nonsuit as to resident defendant.

2. An order of nonsuit as to the resident corporation which was joined as codefendant with a nonresident corporation did not convert the action into a separable controversy for the purpose of removal to a Federal court, where plaintiff excepted to such order, with the right of review in the highest state court.

[For other cases, see Removal of Causes, IV. c, in Digest Sup. Ct. 1908.]

Removal of causes — diverse citizenship — separable controversy — suit brought under Federal employers' liability act.

3. The prohibition of the Judicial Code, § 28, against the removal to a Federal court of any case arising under the Federal employers' liability act or any amendment thereto, prevents the removal for diverse citizenship as a separable controversy of a suit brought under that statute in which a resident and nonresident corporation were made defendants upon a removal petition which alleges fraudulent joinder, and avers that the injury did not happen in interstate commerce.

[For other cases, see Removal of Causes, IV. b; IV. c; VI. d, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — question of local practice.

4. A ruling of the highest state court in an action brought under the Federal employers' liability act that no issue as to assumption of risk was made or submitted to the trial court, and that therefore under the state practice no question concerning that subject was presented on appeal, denies no right of a Federal character which may be reviewed in the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2209-2226, in Digest Sup. Ct. 1908.]

[No. 296.]

Argued November 29, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, on a second appeal, affirmed a judgment of the Superior Court of Guilford County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below on first appeal, 162 N. C. 485, 78 S. E. 489; second appeal, 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520.

The facts are stated in the opinion.

Mr. **John M. Wilson** argued the cause, and, with Messrs. L. E. Jeffries and H. O'B. Cooper, filed a brief for plaintiff in error:

The North Carolina Railroad Company was fraudulently joined as defendant.

Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Rea v. Standard Mirror Co. 158 N. C. 28, 73 S. E. 116; Lloyd v. North Carolina R. Co. 162 N. C. 485, 78 S. E. 489.

The state court had no authority to examine questions of fact on a petition to remove.

Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278; Rea v. Standard Mirror Co. 158 N. C. 28, 73 S. E. 116.

Making a defense in the state court was no waiver of the right to remove.

Powers v. Chesapeake & O. R. Co. 169 U. S. 94, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. v. Dunn, 19 Wall. 214, 22 L. ed. 68; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

Was the Federal employers' liability act applicable?

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Ruck v. Chicago, M.

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rence v. Shedd, 36 L. ed. U. S. 528; and Merchants' Cotton Press & S. Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195.

On removal of causes in cases of diverse citizenship—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65: Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskins v. Cincinnati, N. O. & T. P. R. Co. 5 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Meyer v. Delaware R. Constr. Co. 25 L. ed. U. S. 593; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

On the constitutionality, application, and effect of the Federal employers' liability act —see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A. (N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

& St. P. R. Co. 153 Wis. 158, 140 N. W. 1074; Gray v. Chicago & N. W. R. Co. 153 Wis. 637, 142 N. W. 505; La Casse v. New Orleans, T. & M. R. Co. 135 La. 129, 64 So. 1012; Wright v. Chicago, R. I. & P. R. Co. 94 Neb. 317, 143 N. W. 220; Parsons v. Delaware & H. Co. 167 App. Div. 536, 153 N. Y. Supp. 179; Rosney v. Erie R. Co. 68 C. C. A. 155, 135 Fed. 311; Chicago & N. W. R. Co. v. United States, 21 L.R.A. (N.S.) 690, 93 C. C. A. 450, 168 Fed. 236; Siegel v. New York C. & H. R. R. Co. 178 Fed. 873; United States v. Rio Grande Western R. Co. 98 C. C. A. 293, 174 Fed. 399.

There was not sufficient evidence of negligence to support a verdict under the Federal employers' liability act.

Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

Ordinary risks are presumed to have been undertaken by a servant.

Labatt, Mast. & S. 1167, 1171, 1173.

Assumption of risk incident to service is not really assumption of risk, but is merely the absence of negligence, and consequently is not necessary to be pleaded as a defense.

Labatt, Mast. & S. 1186a; New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 126 C. C. A. 632, 210 Fed. 118.

The rule of ordinary care obtains in the Federal courts, and the plaintiff assumes the risk incident to the service.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; See also White v. Thomasville Light & P. Co. 151 N. C. 358, 66 S. E. 210; Dartmouth Spinning Co. v. Achord, 84 Ga. 14, 6 L.R.A. 190, 10 S. E. 449; Lane v. North Carolina R. Co. 154 N. C. 96, 69 S. E. 780.

The issue of contributory negligence should have been submitted.

Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 782.

If the plaintiff was not engaged in interstate commerce, the suit should have been dismissed.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

Mr. **Aubrey L. Brooks** argued the cause and filed a brief for defendant in error:

The North Carolina Railroad Company, as lessor to the Southern Railway Company, is engaged in interstate commerce.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 593, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109.

An action may be maintained against it for such negligence as is shown in this record.

Ibid.; Logan v. North Carolina R. Co. 116 N. C. 941, 21 S. E. 959.

Suit was maintainable against the Southern Railway Company and the North Carolina Railroad Company as joint tort feasors.

Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726.

The case was not removable, the joinder of the resident defendant being the exercise of a lawful right.

Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278.

The act under which the suit was brought expressly conferred jurisdiction upon the state court to try and determine the issue involved, whether the suit had been brought against the North Carolina Railroad Company or the Southern Railway Company, or both jointly.

Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

The defendant in error at the time of the injury was engaged in interstate commerce.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648; Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Sears v. Atlantic Coast Line R. Co. 169 N. C. 446, 86 S. E. 176.

The defendant did not plead assumption of risk, nor was any issue relating thereto tendered by it, or submitted by the court. This is necessary, under our practice and procedure, in order to raise that question, as we regard it as a distinct defense, which must be pleaded and an issue thereon tendered by the defendant or submitted by the court, of its motion.

Dorsett v. Clement-Ross Mfg. Co. 131 N. C. 254, 42 S. E. 612; Eplee v. Southern R. Co. 155 N. C. 293, 71 S. E. 325; Bolden v. Southern R. Co. 123 N. C. 614, 31 S. E. 851; West v. Brevard Tanning Co. 154 N. C. 44, 69 S. E. 687.

[497] Mr. Justice Day delivered the opinion of the court:

W. L. Lloyd, herein called the plaintiff, brought his action in the superior court of Guilford county, North Carolina, against the defendant, the Southern Railway Company, joined with its lessor, the North Carolina Railroad Company. The action was brought under the Federal employers' liability act of 1908, 35 Stat. at L. 65, chap. 149, as amended April 5th, 1910, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662.

The North Carolina Railroad Company is a corporation of the state of North Carolina, owning a railroad line extending from Goldsboro, North Carolina, to Charlotte, in the same state. The Southern Railway Company is organized under the laws of the state of Virginia, and is a common carrier engaged in interstate commerce, transporting freight and passengers from the city of Washington, District of Columbia, through Greensboro, and over the tracks of the North Carolina Railroad Company through Spencer, Salisbury, and Charlotte.

The petition charges that the Southern Railway Company was, at the time of the injuries complained of, operating as lessee of the North Carolina Railroad Company the roads and side tracks at Spencer; that on January 12th, 1911, plaintiff was employed as an engineer by the defendant, Southern Railway Company, upon its freight trains running over said line of road from Spencer, North Carolina, to Monroe, Virginia, and was engaged in interstate traffic; that upon said date he was directed as engineer to take charge of a certain engine at Spencer, to ascertain whether the same was in serviceable condition, as it had just come from the repair shops; that while he was operating the engine on one of the side tracks of the North Carolina Railroad Company's main line at Spencer, and was oiling and inspecting the same, in stooping over the engine to ascertain if the ash pan and other equipments were in proper condition, a lever about 2 [498] feet long, located at the rear of the driving wheel and the lower side of the engine, used for the purpose of operating the damper to the ash pan, tripped and violently struck the plaintiff in the forehead, causing serious harm and injury; that the defective condition was known to the Southern Railway Company, and unknown to the plaintiff; that the plaintiff, at the time of the injury, was employed by the Southern Railway Company for the purpose of transporting interstate commerce running to and from Spencer, North Carolina, along the main line of the Southern Railway Company, part of which said line included the portion of said North Carolina Railroad Company's line leased by the Southern Railway Company from Greensboro, North Carolina, to Spencer, North Carolina; that the engine upon which the plaintiff was hurt was, and had been, exclusively used by the Southern Railway Company in the transportation of interstate commerce over the line of said road between Spencer and Monroe, Virginia, and that the plaintiff, at the time of his injury, was in charge of said engine. Negligence of the Southern Railway Company is charged in furnishing the plaintiff with an unsafe and dangerous engine, knowing the same to be such, and thereby rendering the plaintiff's employment hazardous and dangerous, and unnecessarily exposing him to peril.

The Southern Railway Company in due season filed its petition for removal of the case to the district court of the United States for the western district of North Carolina, because of its diversity of citizenship with the plaintiff, and alleging that the joinder of the North Carolina Railroad Company, the local defendant, was fraudulently made to avoid Federal jurisdiction; that the plaintiff was not engaged in interstate commerce at the time of the accident; that the engine upon which he was injured was not engaged in any kind of commerce at the time of the accident; and that these allegations in the petition were [499] fraudulent and false, which the plaintiff know, or could have ascertained by the exercise of the slightest diligence upon his part. The court refused to remove the case, to which refusal the Southern Railway Company excepted.

Upon issue joined, the case came on for trial at the February term, 1913, of the superior court of Guilford county. At the close of plaintiff's testimony, the court intimated that there was no cause of action against the North Carolina Railroad Company; upon this intimation a nonsuit was taken as to that company. Thereupon the Southern Railway Company filed a second petition for removal which the court, after argument, granted, and an order was made, removing the case to the district court of the United States for the western district of North Carolina. The plaintiff excepted to this order of removal, and to the nonsuit as to the North Carolina Railroad Company, and, upon appeal to the supreme court of North Carolina, that court held that the case should not have been removed, and remanded it to the superior court of Guilford county for trial. 162 N. C. 485, 78 S. E. 489.

The case coming on again for trial in the superior court, the Southern Railway Company renewed its objections to the juris-

diction by a plea, and set up that the case had been docketed in the district court of the United States for the western district of North Carolina, that no motion had been made to remand the same, that the order removing it had not been revoked, and that the case was then pending for trial in the district court as aforesaid. The North Carolina Railroad Company also filed a plea to the jurisdiction. These pleas were overruled, and upon trial a verdict and judgment was rendered in favor of the plaintiff. Upon appeal to the supreme court of North Carolina, that judgment was affirmed. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520.

From the statement of the case already made, it is apparent that the plaintiff sought to recover under the [500] Federal employers' liability act, joining both railroad companies upon the theory that the lessor company remained liable under the law of North Carolina upon the cause of action asserted by the plaintiff. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159. On the face of the petition a case was made invoking the jurisdiction of the state court to recover under the Federal act, because of the negligence charged. That the state court had jurisdiction of such an action is expressly provided by the Federal statute. Act of April 5, 1910, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662.

In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face. Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 58 L. ed. 544, 34 Sup. Ct. Rep. 278. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issue of fraud that the state court is required to surrender its jurisdiction. The order of nonsuit in the trial court as to the North Carolina Railroad Company, appealed from by plaintiff, with the right of review in the supreme court of the state, did not make the case removable as to the Southern Railway Company. American Car & Foundry Co. v. Kettelhake, 236 U. S. 311, 59 L. ed. 594, 35 Sup. Ct. Rep. 357. Moreover, as we shall see later, under the employers' liability act, no case is removable merely because of diversity of citizenship.

The act of 1910, supra, expressly gives jurisdiction to the state court, and provides that no case arising under its provisions, brought in a state court of competent jurisdiction, shall be removed to any court of the United States. Section 28 of the Judicial Code, 36 Stat. at L. 1087, chap. 231, Comp. Stat. 1913, § 1010, contains a like provision, and expressly provides that no case arising under the employers' liability act or any amendment thereto, brought in a state court of competent jurisdiction, shall be removed to any court of the United States. The question of the effect of this provision upon the right [501] to remove a case because of diversity of citizenship, since the passage of the act referred to, was before this court and passed upon in Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844. It was therein held that there was no authority to remove such action from the state court to the Federal court because of diversity of citizenship. Nor did the alleged fraudulent joinder of the local defendant in the state court give such right. North Carolina R. Co. v. Zachary, supra. And see Chicago, R. I. & P. R. Co. v. Whiteaker, decided in this court, December 20, 1915 [239 U. S. 421, ante, 360, 36 Sup. Ct. Rep. 152]. Such right did not arise from the allegation of the removal petition that the injury did not happen in interstate commerce. Chesapeake & O. R. Co. v. Cockrell, supra. It follows that the state court did not err in its judgment as to the right of removal upon the facts presented in this case.

As to other questions of a Federal character, they may be briefly disposed of. It is insisted that the trial court should have given the instruction requested by the railroad company to the effect that, upon the facts shown, the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that, in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the supreme court of the state rightly affirmed the judgment in that respect. North Carolina R. Co. v. Zachary, supra; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780; Pennsylvania Co. v. Donat, decided by this court November 1st, 1915 [239 U. S. 50, ante, 139, 36 Sup. Ct. Rep. 4.]

The court properly refused the request as to contributory negligence and gave the rule

laid down in the employers' [502] liability act. As to assumption of risk, the supreme court held that no such issue was made or submitted to the trial court (a conclusion fully supported by the record), and therefore under the state practice no question concerning that subject was presented on appeal. This conclusion denied no right of a Federal character.

Judgment affirmed.

HENRY C. HAPAI, G. W. A. Hapai, and Nelson K. Sniffen, Plffs. in Err.,
v.
MAY K. BROWN, Arthur M. Brown, Her Husband, Blanche Walker, John Walker, Her Husband, et al.

(See S. C. Reporter's ed. 502-506.)

Foreign judgments — collateral attack.

1. A decree of the highest court of the Kingdom of Hawaii, which has been given effect by the territorial supreme court as an adjudication of title, should not be declared invalid by the Federal courts on the ground that the bill, being one for partition, could not be made the means of trying a disputed title.

[For other cases, see Judgment, VI. a, in Digest Sup. Ct. 1908.]

Appeal — mode of review — error to Hawaiian supreme court.

2. A decree of the Hawaiian supreme court in a suit involving the requisite jurisdictional amount, tried without a jury, is reviewable in the Federal Supreme Court by writ of error, under the provision of the Judicial Code, § 246, by which writs of error and appeals from the final judgments and decrees of the Supreme Court of Hawaii may be taken in the same manner, under the same regulations, and in the same classes of cases in which they may be taken from the final judgments and decrees of the courts of a state, and also in all cases wherein the amount involved, exclusive of costs, exceeds the sum or value of $5,000.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

[No. 120.]

Argued December 17, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court of the First Judicial Circuit in favor of defendants in a suit to quiet title. Affirmed.

See same case below, 21 Haw. 756.

The facts are stated in the opinion.

Mr. Lorrin Andrews argued the cause and filed a brief for plaintiffs in error:

A bill for partition cannot be made a means of trying a disputed title.

Kaaimanu v. Kauwa, 3 Haw. 612; Kapuakela v. Iaea, 9 Haw. 555; Ahin v. Opele, 17 Haw. 525; Kaneohe Rice Mill Co. v. Holi, 20 Haw. 609; Brown v. Davis, 21 Haw. 327; 4 Kent, Com. 365; Freeman, Cotenancy & Partition, § 502; Bispham, Eq. 535; Nash v. Simpson, 78 Me. 142, 3 Atl. 53; Pierce v. Rallins, 83 Me. 172, 22 Atl. 110; Chapin v. Sears, 18 Fed. 814; Clark v. Roller, 109 U. S. 541, 50 L. ed. 300, 26 Sup. Ct. Rep. 141; Brown v. Cranberry Iron & Coal Co. 18 C. C. A. 444, 25 U. S. App. 679, 72 Fed. 96, 40 Fed. 850; Stuart v. Coalter, 4 Rand. (Va.) 74, 15 Am. Dec. 731; Hoffman v. Beard, 22 Mich. 62; Manners v. Manners, 2 N. J. Eq. 384, 35 Am. Dec. 512; Keil v. West, 21 Fla. 508; Hay v. Estell, 18 N. J. Eq. 252; Lucas v. King, 10 N. J. Eq. 280; Tobin v. Tobin, 45 Wis. 299; Slockbower v. Kanouse, 50 N. J. Eq. 481, 26 Atl. 333; Horton v. Sledge, 29 Ala. 478; Shearer v. Winston, 33 Miss. 149; Ellis v. Feist, 65 N. J. Eq. 548, 56 Atl. 369; Havens v. Seashore Land Co. 57 N. J. Eq. 143, 41 Atl. 755; Riverview Cemetery Co. v. Turner, 24 N. J. Eq. 18; Lewis v. Cocks, 23 Wall. 471, 23 L. ed. 71; Walker v. Laflin, 26 Ill. 473.

The jurisdiction to review judgments or decrees of the courts of the territory of Hawaii is to be determined, not by the law governing as respects territories generally, but by U. S. Rev. Stat. § 709, relating to the power to review judgments and decrees of state courts.

Equitable Life Assur. Soc. v. Brown, 187 U. S. 309, 47 L. ed. 191, 23 Sup. Ct. Rep. 123; Wilder's S. S. Co. v. Hind, 47 C. C. A. 243, 108 Fed. 113.

This court has considered writs of error in jury-waived cases and decided the same on their merits.

Damon v. Hawaii, 194 U. S. 154, 48 L. ed. 916, 24 Sup. Ct. Rep. 617.

Mr. A. A. Wilder argued the cause, and, with Messrs. Alexander Britton, Evans Browne, and F. W. Clements, filed a brief for defendants in error:

The trial and the determination of the issue of title was with the consent of the parties. Under such circumstances the objection must now be deemed to have been waived.

Kuala v. Kuapahi, 15 Haw. 300; Reynes

NOTE.—As to conclusiveness of judgment rendered in foreign country—see notes to Dunstan v. Higgins, 20 L.R.A. 668; and Fisher, B. & Co. v. Fielding, 32 L.R.A. 236.

On appellate jurisdiction of Federal Supreme Court over Hawaiian courts—see note to Toyota v. Hawaii, 57 L. ed. U. S. 180.

v. Dumont, 130 U. S. 354, 395, 32 L. ed. 934, 946, 9 Sup. Ct. Rep. 486; Kilbourn v. Sunderland, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604; Tyler v. Savage, 143 U. S. 79, 97, 36 L. ed. 82, 88, 12 Sup. Ct. Rep. 340; Re Tyler, 149 U. S. 164, 181, 37 L. ed. 689, 694, 13 Sup. Ct. Rep. 785; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 381, 37 L. ed. 1113, 1115, 14 Sup. Ct. Rep. 127; Insley v. United States, 150 U. S. 512, 515, 37 L. ed. 1163, 1165, 14 Sup. Ct. Rep. 158; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 554, 39 L. ed. 759, 809, 15 Sup. Ct. Rep. 673; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 381, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; Beyer v. Le Fevre, 186 U. S. 114, 118, 46 L. ed. 1080, 1082, 22 Sup. Ct. Rep. 765.

The appellate jurisdiction of this court over the judgment of a territorial court in a case where there was no trial by jury is by appeal, and by appeal only.

Stringfellow v. Cain, 99 U. S. 610, 25 L. ed. 421; Hecht v. Boughton, 105 U. S. 235, 26 L. ed. 1018; United States v. Union P. R. Co. 105 U. S. 263, 26 L. ed. 1021; Story v. Black, 110 U. S. 235, 30 L. ed. 341, 7 Sup. Ct. Rep. 176; Woolf v. Hamilton, 108 U. S. 15, 27 L. ed. 635, 1 Sup. Ct. Rep. 139; Bonnifield v. Price, 154 U. S. 672, and 26 L. ed. 1022, 14 Sup. Ct. Rep. 1194; Porto Rico v. Emmanuel, 235 U. S. 251, 59 L. ed. 215, 35 Sup. Ct. Rep. 33.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to quiet title to an undivided 29/36 of the ahupuaa of Kaonoulu, a large tract of land in the island of Maui, territory of Hawaii. The plaintiffs claim through the children of one Keaka other than one daughter, Paakuku, through whom the defendants claim the whole tract.

One of the defenses was res judicata. The proceeding relied upon as having decided the relative rights of the parties was a bill brought in November, 1871, by the plaintiffs' predecessors against Paakuku and others, alleging title in Keaka during her life; a devise by her to her heirs, followed by joint possession on the part of the plaintiffs and of Paakuku as quasi trustee; and waste, a wrongful sale and a wrongful lease by Paakuku. The bill prayed for an account from Paakuku, that the sale and lease be ordered to be canceled as against the plaintiffs, and that a partition be decreed. Paakuku's answer set up a conveyance of the premises by Keaka to her in fee, and continuous possession by her since the date of the same. It also alleged that Keaka's will, if not overridden by the subsequent deed, devised the land to Paakuku in fee, subject to some merely personal and revocable rights in some of the plaintiffs.

[504] The case was tried in the supreme court before the Chief Justice. On October 1, 1874, a minute was entered: "The opinion of the court is that the petitioners have no title to the lands of Kaonoulu and Kaluapulu and so adjudge. There is no controversy about the title of the land at Wailuku and the petition for partition of that land is hereby granted and decreed accordingly." An opinion filed two days later discusses the title, decides that the deed alleged by Paakuku is freed from every suspicion, and repeats the language of the minute. On October 12 it was decreed that the plaintiffs take nothing by their bill. The supreme court in the present case expressed the opinion which, apart from the deference due to it upon a local matter, does not require argument to support it, that the intention and meaning of the decree of October 12 was to dismiss the bill on the ground that the plaintiffs had not the title alleged. It therefore affirmed a judgment for the defendants, holding that the plaintiffs were concluded by the former decree. The only point, if any, that can be argued, is that in general a bill for partition cannot be made a means of trying a disputed title (Clark v. Roller, 199 U. S. 541, 545, 50 L. ed. 300, 302, 26 Sup. Ct. Rep. 141), and that therefore the decree should be taken to be a dismissal for want of jurisdiction, or at least allowed no greater effect than if it had gone on that ground.

But, as we cannot doubt the import of the decree when rendered, we are narrowed in our inquiry to the question of jurisdiction in an accurate sense. Unless we are prepared to pronounce the decree void for want of power to pass it, and open to collateral attack, the decision in this case must stand. But there was no inherent difficulty, no impossibility in the nature of things or for want of physical power, in the attempt to decide title in the suit of 1871. And, as was observed at the last term, it would seem surprising to suggest that the highest court in the Hawaiian Islands did not know its own powers, or decide in accordance [505] with the requirements of the law of which that court was the final mouthpiece. John Ii Estate v. Brown, 235 U. S. 342, 349, 59 L. ed. 259, 35 Sup. Ct. Rep. 106. The plaintiffs in the former case in no way protested against the trial of their title, but, on the contrary, sought relief distinct from partition, that made the trial necessary. Even if we were disposed to go behind the decisions of the

Chief Justice of the Kingdom and of the highest court of the territory upon a matter like this, it would seem to us as unreasonable to hold the adjudication of title void because partition was prayed as to hold it void because the decree was made upon a multifarious bill. The cases where objections to the jurisdiction, though taken in the cause, have been held to have been waived, go farther than we have to go here. We will not speculate as to how extreme a case must be to produce a different result; it is enough that this is far from the line.

The defendants in error filed a motion to dismiss, which, in view of our opinion upon the merits, they probably would not care to press, but which we are not at liberty to disregard. The case is brought here by writ of error, whereas, it is said, it should have been brought up by appeal. By § 246 of the Judicial Code of March 3, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. 1913, § 1223, writs of error and appeals from the final judgments and decrees of the supreme court of Hawaii may be taken "in the same manner, under the same regulations, and in the same classes of cases, in which" they may be taken from the final judgments and decrees of the court of a state, "and also in all cases wherein the amount involved, exclusive of costs, . . . exceeds the sum or value of five thousand dollars." The present suit comes here under the last clause; at the trial a jury was waived, and the proposition is that the earlier provisions of the section do not govern this clause, but that, except when there is a trial by jury, the cases there mentioned must be brought to this court by appeal under the act of April 7, 1874, chap. 80, § 2, 18 Stat. at L. 27, Comp. Stat. 1913, § 1652. It is said that [506] this has been the practice. See, *e. g.*, William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. Whether or not the incidental assumption in that decision that an appeal would lie was correct, we are of the opinion that the proceeding by writ of error was justified by the plain meaning of § 246. So far as the policy of Congress might permit (see act of March 3, 1915, chap. 90, § 274b, 38 Stat. at L. 956), we should be disposed to be a little astute to save a party's rights from being lost through mistakes upon a technical matter in the somewhat confused condition of the statutes. But we cannot doubt that the path adopted was right.

Judgment affirmed.

SIMEON HALLOWELL, Appt.,
v.
JOHN M. COMMONS, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah H. Walker.

(See S. C. Reporter's ed. 506–509.)

Federal courts — jurisdiction — suit by heir of Indian allottee.

1. Any jurisdiction which the Federal courts may have had of suits to establish the equitable title of alleged heirs of an Indian allottee dying intestate during the trust period must be deemed to have been taken away, even as to pending cases, by the provisions of the act of June 25, 1910 (36 Stat. at L. 855, chap. 431, Comp. Stat. 1913, § 4226), vesting in the Secretary of the Interior the final and conclusive ascertainment of such heirs, notwithstanding the provision of U. S. Rev. Stat. § 13, Comp. Stat. 1913, § 14, that the repeal of any statute shall not extinguish any liability incurred under it.

[For other cases, see Courts, V. c, 2, g, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — congressional control — suit by heir of Indian allottee.

2. Congress, in the exercise of its control over courts of its own creation and over the Indians, could validly take away, even as to pending cases, as it did by the act of June 25, 1910 (36 Stat. at L. 855, chap. 431, Comp. Stat. 1913, § 4226), any jurisdiction which the Federal district courts may have had of suits to establish the equitable title of alleged heirs of an Indian allottee dying intestate during the trust period, and vest in the Secretary of the Interior the final and conclusive ascertainment of such heirs.

[For other cases, see Courts, I. j; Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 135.]

Submitted December 15, 1915. Decided January 10, 1916.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the District Court for the District of Nebraska, dismissing the bill in a suit to establish the equitable title of an alleged heir of an Indian allottee dying intestate during the trust period. Affirmed.

See same case below, 127 C. C. A. 343, 210 Fed. 793.

The facts are stated in the opinion.

NOTE.—As to Federal control over Indians—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

Messrs. Hiram Chase and William Ross King submitted the cause for appellant:

The repeal or amendment of a statute conferring a right has been held not applicable to pending cases.

United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; United States Fidelity & G. Co. v. United States, 204 U. S. 349, 51 L. ed. 516, 27 Sup. Ct. Rep. 381; Burton v. Seifert & Co. 108 Va. 338, 61 S. E. 933.

At common law, all actions were terminated with the repeal of the statute under which they existed. The evil effect of this rule, both with respect to criminal and civil actions pending at the time of amendment, has been recognized by numerous statutes and by the trend of decisions, which in every way seek to avoid the consequences of the common-law rule.

Eastman v. Clackamas County, 32 Fed. 33; Hertz v. Woodman, 218 U. S. 216, 54 L. ed. 1006, 30 Sup. Ct. Rep. 621; Burton v. Seifert & Co. 108 Va. 338, 61 S. E. 933; Merlo v. Johnston City & B. M. Coal & Min. Co. 258 Ill. 328, 101 N. E. 525; Consolidated Barb Wire Co. v. Stevenson, 71 Kan. 64, 79 Pac. 1085; Wells v. Remington, 118 Wis. 573, 95 N. W. 1094; Murphy v. Uttter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776; Hochstettler v. Mosier Coal & Min. Co. 8 Ind. App. 442, 35 N. E. 927.

Assistant Attorney General Knaebel submitted the cause for appellees:

The plain result of the act of 1910 was to transfer back to the Secretary of the Interior the exclusive power to settle disputes like the one here involved, which had been taken away from him and vested in the Federal courts by the acts of 1894 and 1901; and so it has been held, even in cases which were pending before the act of 1910 became effective.

Bond v. United States, 181 Fed. 613; Pel-Ata-Yakot v. United States, 188 Fed. 387; Parr v. Colfax, 117 C. C. A. 48, 197 Fed. 302.

If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law.

Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 401, 25 L. ed. 231, 232.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to establish the equitable title of the plaintiff to an allotment made to Jacob Hallowell, deceased, a member of the Omaha Tribe, in accordance with §§ 5, 6, of the act of August 7, 1882, chap. 434, 22 Stat. at L. 341. The patent to Jacob Hallowell followed the language of § 6, and declared that the United States would hold his land for the period of twenty-five years in trust for the sole use of the allottee "or in case of his decease, of his heirs according to the laws of the state of Nebraska." The plaintiff says that he is the sole heir as against various other claims set forth in the bill. We do not go into further particulars, as we are of opinion that the circuit court of appeals was right in holding that the district court had no [508] jurisdiction of the case. 127 C. C. A. 343, 210 Fed. 793.

It is unnecessary to consider whether there was jurisdiction when the suit was begun. By the act of June 25, 1910, chap. 431, 36 Stat. at L. 855, Comp. Stat. 1913, § 4226, it was provided that in a case like this of the death of the allottee intestate during the trust period, the Secretary of the Interior should ascertain the legal heirs of the decedent, and his decision should be final and conclusive; with considerable discretion as to details. This act restored to the Secretary the power that had been taken from him by acts of 1894 [28 Stat. at L. 305, chap. 290] and February 6, 1901, chap. 217, 31 Stat. at L. 760, Comp. Stat. 1913, § 4214. McKay v. Kalyton, 204 U. S. 458, 468, 51 L. ed. 566, 570, 27 Sup. Ct. Rep. 346. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. The appellant contends for a different construction on the strength of Rev. Stat. § 13, Comp. Stat. 1913, § 14, that the repeal of any statute shall not extinguish any liability incurred under it (Hertz v. Woodman, 218 U. S. 205, 216, 54 L. ed. 1001, 1006, 30 Sup. Ct. Rep. 621), and refers to the decisions upon the statutes concerning suits upon certain bonds given to the United States (United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537). But, apart from a question that we have passed, whether the plaintiff even attempted to rely upon the statutes giving jurisdiction to the courts in allotment cases, the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi paternal supervision of the general head of Indian affairs. The consideration applies with the same force to all cases, and was embodied in a statute that no doubt was intended to apply to all, so far as construction is concerned.

[509] There is equally little doubt as to the power of Congress to pass the act, so construed. We presume that no one would question it if the suit had not been begun. It is a strong proposition that bringing this bill intensified, strengthened, or enlarged the plaintiff's rights, as suggested in De Lima v. Bidwell, 182 U. S. 1, 190, 200, 45 L. ed. 1041, 1057, 1058, 21 Sup. Ct. Rep. 743. See Simmons v. Hanover, 23 Pick. 188, 193, 194; Hepburn v. Curts, 7 Watts, 300, 32 Am. Dec. 760; Welch v. Wadsworth, 30 Conn. 149, 154, 79 Am. Dec. 236; Atwood v. Buckingham, 78 Conn. 423, 62 Atl. 616. The difficulty in applying such a proposition to the control of Congress over the jurisdiction of courts of its own creation is especially obvious. See Bird v. United States, 187 U. S. 118, 124, 47 L. ed. 100, 103, 23 Sup. Ct. Rep. 42. In any event, the rights of the Indians in this matter remained subject to such control on principles that have been illustrated in many ways. See Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587.

The decision of the Circuit Court of Appeals in this case is in accord with such earlier decisions, as we have seen. Bond v. United States, 181 Fed. 613; Pel-ata-yakot v. United States, 188 Fed. 387; Parr v. Colfax, 117 C. C. A. 48, 197 Fed. 302.

Decree dismissing the bill for want of jurisdiction affirmed.

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[510] SEVEN CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Eckman Manufacturing Company, Owner, Plff. in Err.,

v.

UNITED STATES OF AMERICA. (No. 50.)

SIX CASES (More or Less), Each Containing Twelve Bottles of Eckman's Alterative, Eckman Manufacturing Company, Owner, Plff. in Err.,

v.

UNITED STATES OF AMERICA. (No. 51.)

(See S. C. Reporter's ed. 510–519.)

Commerce — in misbranded drugs — power of Congress — prohibiting false statements as to curative effects.

1. Congress, in the exercise of its authority over interstate commerce, could lawfully amend the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), § 8, as it did by the act of August 23, 1912 (37 Stat. at L. 416, chap. 352, Comp. Stat. 1913, § 8724), so as to make contraband of interstate commerce, as misbranded, drugs which bear or contain in or upon packages or labels false and fraudulent statements as to curative or therapeutic effect.

[For other cases, see Commerce, IV. b, 1, in Digest Sup. Ct. 1908.]

Pure food and drugs law — misbranding — statements in circulars.

2. Circulars contained in the package are comprehended by the amendment of August 23, 1912 (37 Stat. at L. 416, chap. 352, Comp. Stat. 1913, § 8724), to the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), § 8, declaring that a drug shall be deemed to be misbranded if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of the drug or any of the ingredients or substances contained therein, which is false and fraudulent.

[For other cases, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Constitutional law — due process of law — indefiniteness of penal statute.

3. There is no such uncertainty in the amendment by the act of August 23, 1912 (37 Stat. at L. 416, chap. 352, Comp. Stat. 1913, § 8724), to the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), § 8, making contraband of interstate commerce, as misbranded, drugs which bear or contain in or upon packages or labels false and fraudulent statements as to curative or therapeutic effect, as to render the amendatory act repugnant to U. S. Const., 5th Amend., as operating as a deprivation of liberty and property without due process of law, or to the 6th Amendment, as not permitting of the laying of a definite charge.

[For other cases, see Constitutional Law, IV. b, 9; Criminal Law, I. a, in Digest Sup. Ct. 1908.]

Pure food and drugs law — sufficiency of libel — allegation of false and fraudulent statements of therapeutic effect.

4. The falsity and fraudulent character of the statements and circulars contained in each package of a drug, viz., "Effective as a preventative for pneumonia," and "We know it has cured," and that it

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NOTE.—On the power of Congress to regulate commerce—see notes to State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

As to validity of police regulations as to branding or labeling articles of commerce—see note to Alcorn Cotton Oil Co. v. State, 40 L.R.A.(N.S.) 875.

As to expression of opinion as fraud—see note to Hedin v. Minneapolis Medical & Surgical Institute, 35 L.R.A. 417.

"will cure tuberculosis," is sufficiently shown in libels for the condemnation of the drugs as misbranded, in violation of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915), § 8, as amended by the act of August 23, 1912 (37 Stat. at L. 416, chap. 352, Comp. Stat. 1913, § 8724), where it is alleged that such statements were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article "has cured," and "will cure," whereas, "in truth and in fact," it will "not cure," and there is no "medicinal substance nor mixture of substances known at present" which can be relied on to effect a cure.

[For other cases, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

[Nos. 50 and 51.]

Argued December 2, 1915. Decided January 10, 1916.

TWO WRITS OF ERROR to the District Court of the United States for the District of Nebraska to review judgments condemning drugs as misbranded. Affirmed.

The facts are stated in the opinion.

Mr. **Daniel W. Baker** argued the cause, and, with Mr. Francis D. Weaver, filed a brief for plaintiff in error:

This is a penal statute and must be construed as such.

Hipolite Egg Co. v. United States, 220 U. S. 45–60, 55 L. ed. 364–369, 31 Sup. Ct. Rep. 364; United States v. Johnson, 177 Fed. 313; Huntington v. Attrill, 146 U. S. 667–669, 36 L. ed. 1127, 1128, 13 Sup. Ct. Rep. 224; United States v. Chouteau, 102 U. S. 603, 26 L. ed. 246; Lagler v. Bye, 42 Ind. App. 592, 85 N. E. 36; Diversey v. Smith, 103 Ill. 390, 42 Am. Rep. 14; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Coffey v. United States, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Hepner v. United States, 213 U. S. 111, 53 L. ed. 723, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; United States v. Harris, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; United States v. Lacher, 134 U. S. 629, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; Northern Securities Co. v. United States, 193 U. S. 358, 48 L. ed. 709, 24 Sup. Ct. Rep. 436.

The power of Congress over interstate commerce is not an unlimited power. The power of Congress is prescribed by the Constitution. And the power to regulate commerce is like all the other powers given by the Constitution, and it cannot and must not be construed to extend to regulations of police, which have been left with the states and cannot be assumed by the national government.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; United States v. Delaware & H. Co. 164 Fed. 229; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

The act violates the 5th and 6th Amendments to the Federal Constitution.

United States v. Delaware & H. Co. 164 Fed. 229; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 919; Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; United States v. Lacher, 134 U. S. 628, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; United States v. Grimaud, 170 Fed. 210; State v. Mann, 2 Or. 241; Brown v. State, 137 Wis. 543, 119 N. W. 338; United States v. Capital Traction Co. 34 App. D. C. 597, 19 Ann. Cas. 68.

The libel is not specific, in that it does not directly point out to the defendant wherein he has violated the law.

United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Pettibone v. United States, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; Blitz v. United States, 153 U. S. 315, 38 L. ed. 727, 14 Sup. Ct. Rep. 924; Evans v. United States, 153 U. S. 587, 38 L. ed. 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Ledbetter v. United States, 170 U. S. 610, 42 L. ed. 1163, 18 Sup. Ct. Rep. 774.

Where there is used a written instrument as a ground for an offense or cause of action, such instrument must be set out either in its legal effect or in substance, and it cannot be referred to by disconnected parts or sentences.

McClure v. Review Pub. Co. 38 Wash. 160, 80 Pac. 303; Edgerley v. Swain, 32 N. H. 481; Com. v. Wright, 1 Cush. 62; Schubert v. Richter, 92 Wis. 199, 66 N. W. 107.

There can be no proceeding under the pure food and drugs act to condemn drugs, unless alleged fraudulent and false statements appear on the original packages, or on the bottles themselves. There can be no seizure where the statements are not contained on the label or on the package.

United States v. American Druggists' Syndicate, 186 Fed. 387; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

"Falsely," when used as a foundation for a criminal prosecution, or a quasi criminal proceeding like this, means something more than merely untrue.

Hatcher v. Dunn, 102 Iowa, 411, 36 L.R.A. 689, 71 N. W. 343; Ratterman v. Ingalls, 48 Ohio St. 468, 28 N. E. 168; State v. Brady, 100 Iowa, 191, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290.

By the use of the word "fraudulent," in the Sherley amendment, it was intended that the statement made must be a fraudulent act on the part of the person making it,—that the party making the statement must be guilty of some act of moral turpitude.

Miller v. Tobin, 18 Fed. 609; Ball v. Lively, 4 Dana, 370; Hagerman v. Buchanan, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946; Byard v. Holmes, 34 N. J. L. 296, 6 Mor. Min. Rep. 657; People v. Wiman, 85 Hun, 320, 32 N. Y. Supp. 1037; Re Reiffeld, 36 Misc. 472, 73 N. Y. Supp. 808; 4 Bouvier's, Inst. 167.

The words "fraud" and "fraudulent" are mere conclusions of law, and the mere use of them in a pleading is of no effect. The pleading must state facts showing the statements to be fraudulent.

Phœnix Ins. Co. v. Moog, 78 Ala. 284, 56 Am. Rep. 31; St. Louis & S. F. R. Co. v. Johnson, 133 U. S. 566–578, 33 L. ed. 683–687, 10 Sup. Ct. Rep. 390; Fogg v. Blair, 139 U. S. 118–127, 35 L. ed. 104–107, 11 Sup. Ct. Rep. 476; Fox v. Hale & N. Silver Min. Co. 5 Cal. Unrep. 980, 53 Pac. 32; Tolbert v. Caledonia Ins. Co. 101 Ga. 746, 28 S. E. 991; Anderson Transfer Co. v. Fuller, 73 Ill. App. 52; Ward v. Luneen, 25 Ill. App. 160; Kerr v. Steman, 72 Iowa, 241, 33 N. W. 654; Cohn v. Goldman, 76 N. Y. 284; 16 Cyc. 231; Cosgrove v. Fisk, 90 Cal. 75, 27 Pac. 56; New Bank v. Kleiner, 112 Wis. 287, 87 N. W. 1090; Cade v. Head Camp, P. J. W. W. 27 Wash. 218, 67 Pac. 603; Crowley v. Hicks, 98 Wis. 566, 74 N. W. 348; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; United States v. Post, 113 Fed. 852; Erbaugh v. United States, 97 C. C. A. 663, 173 Fed. 435; Etheredge v. United States, 108 C. C. A. 356, 186 Fed. 437; United States v. Louisville & N. R. Co. 165 Fed. 936; United States v. 68 Cases of Syrup, 172 Fed. 782; United States v. 650 Cases of Tomato Catsup, 166 Fed. 773; Nave-McCord Mercantile Co. v. United States, 104 C. C. A. 486, 182 Fed. 46.

Assistant Attorney General Underwood argued the cause and filed a brief for defendant in error:

The letter of the amendment, its spirit and that of the entire act, the evil to be remedied, and the legislative history of the amendment, all show indubitably that Congress intended to exclude from interstate commerce all articles accompanied by false and fraudulent representations of the kind in question, whether printed on the exterior label or upon circulars inclosed within the original package.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337; United States v. Antikamnia Chemical Co. 231 U. S. 654, 667, 58 L. ed. 419, 425, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; Potter's Dwarr. Stat. 146; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 663, 23 L. ed. 336, 339; Johnson v. Southern P. Co. 196 U. S. 1, 18, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Winn, 3 Sumn. 211, Fed. Cas. No. 16,740; Postmaster General v. Early, 12 Wheat. 136, 148, 6 L. ed. 577, 582; Murphy v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776; Platt v. Union P. R. Co. 99 U. S. 48, 58, 25 L. ed. 424, 427.

The Sherley amendment is a constitutional regulation of interstate commerce.

Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Lottery Case (Champion v. Ames) 188 U. S. 321, 353, 355, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; M'Culloch v. Maryland, 4 Wheat. 421, 4 L. ed. 605; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Flint v. Stone Tracy Co. 220 U. S. 107, 176, 55 L. ed. 389, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A. (N.S.) 325, 33 Sup. Ct. Rep. 141; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 47, 56 L. ed. 327, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; McDermott v. Wisconsin, 228 U. S. 115, 128, 130, 57 L. ed. 754, 764, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Hoke v. United States, 227 U. S. 308, 322, 323, 57 L. ed. 523, 527, 528, 43 L.R.A. (N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158,

166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 7th ed. 856.

The Sherley amendment is not a regulation of matters of opinion.

Chaffee v. United States, 18 Wall. 516, 542, 21 L. ed. 908, 912; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. 116; Stebbins v. Eddy, 4 Mason, 423, Fed. Cas. No. 13,342; Russell v. Clarke, 7 Cranch, 69, 94, 3 L. ed. 271, 280; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; Cooley, Torts, 3d ed. p. 925; Smith v. Land & House Property Corp. L. R. 28 Ch. Div. 15, 51 L. T. N. S. 718, 49 J. P. 182; Hedin v. Minneapolis Medical & S. Institute, 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; State v. Jules, 85 Md. 311, 36 Atl. 1027; Reg. v. Giles, 10 Cox, C. C. 44, Leigh. & C. C. C. 502, 32 L. J. Mag. Cas. N. S. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 Week. Rep. 327; Foster v. Swasey, 2 Woodb. & M. 217, Fed. Cas. No. 4,984; Reg. v. Bruce, 1 Frost. & F. 523; Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Scott v. Burnright, 131 Iowa, 507, 10 N. W. 422; Culley v. Jones, 164 Ind. 168, 73 N. E. 94; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Hickey v. Morrell, 102 N. Y. 454, 5 Am. Rep. 824, 7 N. E. 321; French v. Ryan, 104 Mich. 625, 62 N. W. 1016; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Montgomery Southern R. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60; Eibel v. Von Fell, 55 N. J. Eq. 670, 38 Atl. 201; Birdsey v. Butterfield, 34 Wis. 52; Darling v. Stuart, 63 Vt. 570, 22 Atl. 634; Cruess v. Fessler, 39 Cal. 336; Smith v. Griswold, 6 Or. 440; Kohler Mfg. Co. v. Beeshore, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572; Missouri Drug Co. v. Wyman, 129 Fed. 623; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Ayres v. French, 41 Conn. 142; Pom. Eq. Jur. § 878; State ex rel. Feller v. State Medical Examiners, 34 Minn. 391, 26 N. W. 125; Durland v. United States, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; Evans v. United States, 153 U. S. 584, 592, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Public Clearing House v. Coyne, 194 U. S. 497, 516, 48 L. ed. 1092, 1101, 24 Sup. Ct. Rep. 789; Bowen v. State, 9 Baxt. 45, 40 Am. Rep. 71; United States v. American Laboratories, 222 Fed. 104.

The act is not violative of the 5th or 6th Amendment.

Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Gibbons v. Ogden, 9 Wheat. 1, 197, 6 L. ed. 23, 70; Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644; Collins v. Texas, 223 U. S. 288, 296, 56 L. ed. 439, 444, 32 Sup. Ct. Rep. 286; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

This is a proceeding *in rem*,—a civil, and not a criminal, case.

Friedenstein v. United States, 125 U. S. 224, 231, 31 L. ed. 736, 740, 8 Sup. Ct. Rep. 838; Whelan v. United States, 7 Cranch, 112, 3 L. ed. 286; Hipolite Egg Co. v. United States, 220 U. S. 45, 55, 55 L. ed. 364, 367, 31 Sup. Ct. Rep. 364; The Three Friends, 166 U. S. 1, 49, 41 L. ed. 897, 913, 17 Sup. Ct. Rep. 495; Swearingen v. United States, 161 U. S. 446, 451, 40 L. ed. 765, 766, 16 Sup. Ct. Rep. 562; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; Keck v. United States, 172 U. S. 434, 440, 43 L. ed. 505, 510, 19 Sup. Ct. Rep. 254; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 450, 48 L. ed. 1062, 1066, 24 Sup. Ct. Rep. 703; United States v. Smith, 5 Wheat. 153, 159, 160, 5 L. ed. 57, 58, 59; United States v. Kelly, 11 Wheat. 417, 6 L. ed. 508; Baker v. State, 12 Ohio St. 214; Com. v. Exler, 243 Pa. 155, 89 Atl. 968; State v. Camley, 67 Vt. 322, 31 Atl. 840; Nash v. United States, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; International Harvester Co. v. Kentucky, 234 U. S. 216, 223, 58 L. ed. 1284, 1288, 34 Sup. Ct. Rep. 853.

The libel in this case meets even the requirements of the rules of pleading in criminal cases.

United States v. Simmons, 96 U. S. 360, 362, 24 L. ed. 819, 820; Fogg v. Blair, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476; Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 185, 51 L. ed. 430, 435, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Evans v. United States, 153 U. S. 584, 593, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Morrow v. Bonebrake, 84 Kan. 724, 34 L.R.A.(N.S.) 1147, 115 Pac. 585; Garvin v. Harrell, 27 Okla. 373, 35 L.R.A.(N.S.) 862, 113 Pac. 186, Ann. Cas. 1912B, 744.

Mr. Justice **Hughes** delivered the opinion of the court:

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as "Eckman's Alterative") as misbranded in violation of § 8 of the food and drugs act. The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained at the latter

place unsold and in the unbroken original packages. The two cases present the same questions, the libels being identical save with respect to quantities and the persons in possession. In each case demurrers were filed by the shipper, the Eckman Manufacturing Company, which challenged both the sufficiency of the libels under the applicable provision of the statute and the constitutionality of that provision. [513] The demurrers were overruled, and, the Eckman Company having elected to stand on the demurrers, judgments of condemnation were entered.

Section 8 of the food and drugs act, as amended by the act of August 23, 1912, chap. 352, 37 Stat. at L. 416, Comp. Stat. 1913, § 8724, provides, with respect to the misbranding of drugs, as follows:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded. In case of drugs:

. . . . . .

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

The amendment of 1912 consisted in the addition of paragraph "Third," which is the provision here involved.

It is alleged in each libel that every one of the cases of drugs sought to be condemned contained twelve bottles, each of which was labeled as follows:

"Eckman's Alterative,—contains twelve per cent of alcohol by weight, or fourteen per cent by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption) . . . Two dollars a bottle. Prepared only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A."

[514] And in every package, containing one of the bottles, there was contained a circular with this statement:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

The libel charges that the statement "effective as a preventative for pneumonia" is "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact, said article of drugs could not be so used;" and that the statement, "we know it has cured" and that it "will cure tuberculosis" is "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact, said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the white slave act, 36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812. Hoke v. United States, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. There, after stating that "if the facility of interstate transportation" can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from "the systematic enticement of and the enslavement in prostitution and debauchery of women," the court concluded with the reassertion of [515] the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. Id. pp. 322, 323. See Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Hipolite Egg Co. v. United States, 220 U. S. 45, 57, 55 L. ed. 364, 368, 31 Sup. Ct. Rep. 364; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is sa:

that the word "contain" in the amendment must have the same meaning in the case of both "package" and "label." Reference is made to the original provision in the first sentence of § 8 with respect to the statements, etc., which the package or label shall "bear." And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package, it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress.

But it appears from the legislative history of the act that the word "contain" was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. Cong. Rec. 62d Cong. 2d Sess. vol. 48, part 11, page 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package which is transported in interstate commerce. The further contention that Congress may not deal with the package thus transported in the sense of the immediate container of the article as it is intended for consumption is met by McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39. There the [516] court said: "That the word 'package' or its equivalent expression, as used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act [food and drugs act] clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. . . . Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed." And, after stating that the requirements of the act, thus construed, were clearly within the power of Congress over the facilities of interstate commerce, the court added that the doctrine of original packages set forth in repeated decisions, which protected the importer in the right to sell the imported goods, was not "intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end." Id. pp. 130, 131, 137.

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral, or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as "illicit," and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers, and make such preparations, accompanied by false and fraudulent statements, [517] illicit with respect to interstate commerce, as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (United States v. Johnson, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627), does not mark a constitutional distinction. The false and fraudulent statement which the amendment describes accompanies the article in the package, and thus gives to the article its character in interstate commerce.

Finally, the statute is attacked upon the ground that it enters the domain of speculation (American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), and by virtue of consequent uncertainty operates as a deprivation of liberty and property without due process of law, in violation of the 5th Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the 6th Amendment. We think that this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec. 62d Cong. 2d Sess. vol. 48, part 12, Appx. p. 675. It was, plainly, to leave no doubt upon this point that the words "false *and fraudulent*" were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. Id. 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations

may be made about it; and persons who make or deal in substances or compositions [518] alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements. Russell v. Clark, 7 Cranch, 69, 92, 3 L. ed. 271, 279; Durland v. United States, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; Stebbins v. Eddy, 4 Mason, 414, 423, Fed. Cas. No. 13,342; Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 574; Missouri Drug Co. v. Wyman, 129 Fed. 623, 628; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Hedin v. Minneapolis Medical & S. Institute, 62 Minn. 146, 149, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; Hickey v. Morrell, 102 N. Y. 454, 463, 55 Am. Rep. 824, 7 N. E. 321; Reg. v. Giles, 10 Cox, C. C. 44, Leigh & C. C. C. 502, 34 L. J. Mag. Cas. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 Week. Rep. 327; Smith v. Land & House Property Corp. L. R. 28 Ch. Div. 7, 15, 51 L. T. N. S. 718, 49 J. P. 182. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease, when he knows it is not, is beyond the reach of the lawmaking power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

With respect to the sufficiency of the averments of the libels, it is enough to say that these averments should receive a sensible construction. There must be a definite charge of the statutory offense, but we are not at liberty to indulge in hypercriticism in order to escape the plain import of the words used. There is no question as to the adequacy of the description of the article, or of the shipments, or of the packages. It is said that there was no proper statement of the contents of the circular. But the libels give the words of the circular, and we think that the allegations were sufficient to show the manner in which they were used. The objection that it was not alleged that the statements in question appeared on the original packages or on the bottles themselves, as already pointed [519] out, is based on a misconstruction of the statutory provision. The remaining and most important criticism is that the libels did not sufficiently show that the statements were false and fraudulent. But it was alleged that they were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article "has cured" and "will cure," whereas "in truth and in fact" it would "not cure," and that there was no "medicinal substance nor mixture of substances known at present" which could be relied upon to effect a cure. We think that this was enough to apprise those interested in the goods of the charge which they must meet. It was, in substance, a charge that, contrary to the statute, the article had been made the subject of interstate transportation with a statement contained in the package that the article had cured and would cure tuberculosis, and that this statement was contrary to the fact, and was made with actual intent to deceive.

Judgments affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

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[520] COMMERCIAL NATIONAL BANK OF NEW ORLEANS, Appt.,

v.

CANAL-LOUISIANA BANK & TRUST COMPANY and Jonas Hiller, Trustee of Estate of Dreuil & Company, et al., Bankrupts.

(See S. C. Reporter's ed. 520–530.)

Warehouse receipts — pledge — bona fide purchaser.

1. A pledgee of bills of lading for cotton, who permits the pledgeor to withdraw such bills of lading under an agreement to hold for the pledgee's account, and thus enables the pledgeors to obtain negotiable warehouse receipts which they pledge to a bank as security for their notes, cannot question the title of the latter, having clothed the pledgeor with the indicia of ownership, within the meaning of the doctrine established by the uniform warehouse receipts act (La. Acts 1908, No. 221, §§ 40, 41, 47), that if the owner of goods permits another to have possession or custody of negotiable warehouse receipts running to the order of the latter or to bearer, it is a representation of title upon which bona fide negotiators for value are entitled to rely, despite breaches of trust or violations of agreement on the part of the apparent owner.

[For other cases, see Warehousemen, in Digest Sup. Ct. 1908.]

NOTE.—As to the effect of putting paper or securities transferable by delivery, or indorsed or assigned in blank, into another's possession, to estop owner as against purchaser in good faith—see note to McCarthy v. Crawford, 29 L.R.A.(N.S.) 252.

On construction of statute according to purpose for which it was passed—see note to United States v. Saunders, 22 L. ed. U. S. 736.

Statutes — construction — uniform state laws.

2. The rule of construction established by the uniform warehouse receipts act (La. Acts 1908, No. 221, § 57), viz., "this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it," requires that the cardinal principle of the act, which is to give effect to the mercantile view of documents of title, shall have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it.

[For other cases, see Statutes, II., in Digest Sup. Ct. 1908.]

Warehouse receipts — pledge — bona fide purchaser.

3. The rights of a pledgee of warehouse receipts under the uniform warehouse receipts act (La. Acts 1908, No. 221, §§ 40, 41, 47), as a bona fide purchaser, where the pledgeors had been clothed with apparent ownership by the real owner, are not lost by permitting the pledgeors to withdraw such receipts under an agreement to hold for the pledgee's account, where this did not result in a subsequent negotiation of them to a purchaser in good faith for value.

[For other cases, see Warehousemen, In Digest Sup. Ct. 1908.]

[No. 117.]

Argued December 8, 1915. Decided January 10, 1916.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Louisiana, adverse to a petition for the recovery from a trustee in bankruptcy of cotton alleged to have been held by the bankrupts for the account of the petitioner. Reversed and remanded with direction to enter a decree in favor of the appellant.

See same case below, 128 C. C. A. 16, 211 Fed. 337.

The facts are stated in the opinion.

Mr. Edwin T. Merrick argued the cause and filed a brief for appellant:

When Dreuil & Company withdrew from the Canal-Louisiana Bank the bills of lading for the cotton in question, which had been pledged to the bank for money loaned, and, after sending it to a pickery, obtained two negotiable warehouse receipts for it, and pledged these warehouse receipts for the same cotton, this latter pledge was a valid and binding one, so long as the pledgee was acting in good faith.

Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025.

Trust receipts have been recognized throughout the nation as valid and useful agreements necessary for the carrying on of commercial business. By the trust receipt no title is given to the person receiving the goods.

Re E. Reboulin Fils & Co. 165 Fed. 248; Re Cattus, 106 C. C. A. 171, 183 Fed. 735; Re Dunlap Carpet Co. 206 Fed. 731; Bush v. Export Storage Co. 136 Fed. 935.

A pledge is not destroyed by the pledgee intrusting the pledgeor with the title to the goods pledged (when the goods pledged can still be identified in the pledgeor's hands), unless the pledgeor pledges the property to someone else acting in good faith.

New York Security & T. Co. v. Lipman, 157 N. Y. 551, 52 N. E. 595; Blydenstein v. New York Security & T. Co. 15 C. C. A. 14, 35 U. S. App. 175, 67 Fed. 470.

If the depositor of the goods, though he had no title, had ability or capacity to transfer a title to a purchaser for value, either by virtue of actual authority or because the owner had allowed a situation to arise which would estop him from asserting his title to the goods, the same reason should protect a purchaser of the document of title that would protect a purchaser of the goods.

Williston, Sales, pp. 722, 723; Pollard v. Reardon, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 852; Roland M. Baker Co. v. Brown, supra.

The Louisiana law, outside of the uniform laws, recognizes the absolute pledge of warehouse receipts by delivery only.

Mechanics' Bldg. Asso. v. Ferguson, 29 La. Ann. 548; Lafayette Bank v. Bruff, 33 La. Ann. 624; Chaffe v. DuBose, 36 La. Ann. 257; Fidelity & D. Co. v. Johnston, 117 La. 889, 42 So. 357; Kyle v. Sigur, 121 La. 889, 46 So. 910; Honold v. Meyer, 36 La. Ann. 585; Giovanovich v. Citizens' Bank, 26 La. Ann. 17; Saloy v. Hibernia Nat. Bank, 39 La. Ann. 90, 1 So. 657.

The claim of the Canal-Louisiana bank is not the prior equity.

1 Pom. Eq. Jur. 3d ed. pp. 690, 691, 694, 695, §§ 414, 417; 2 Pom. Eq. Jur. § 710, p. 1243; Neslin v. Wells, F. & Co. 104 U. S. 439, 26 L. ed. 806; Bacon v. Harris, 62 Fed. 104; Boone v. Chiles, 10 Pet. 210, 211, 9 L. ed. 400; Parshall v. Eggert, 54 N. Y. 24.

Where there is equal equity the law must prevail.

Phillips v. Phillips, 4 DeG. F. & J. 217, 31 L. J. Ch. N. S. 321, 8 Jur. N. S. 145, 5 L. T. N. S. 655, 10 Week. Rep. 236, 10 Eng. Rul. Cas. 533.

Mr. Henry Mooney argued the cause and filed a brief for appellees:

By the very terms of the trust receipt, the firm of Dreuil & Company was constituted

the special bailee of the Canal-Louisiana Bank & Trust Company, and was specifically required to surrender to such bank either the proceeds derived from the sale of the said cotton, or the warehouse receipts or bills of lading covering the same. Hence, Dreuil & Company were without any right or authority to execute the pledge to the Commercial National Bank, and such pledge was invalid and of no effect against the bailor, without fault and in good faith.

Re Dreuil, 205 Fed. 568.

By the law of Louisiana, title to the cotton passed by the delivery to the Canal-Louisiana Bank & Trust Company of the bill of lading, and was thereafter vested in said bank.

Fidelity & D. Co. v. Johnston, 117 La. 889, 42 So. 357.

Inasmuch as both banks had surrendered their respective muniments of title,—the Canal-Louisiana Bank & Trust Company its negotiable bill of lading, and the Commercial National Bank its negotiable warehouse receipt,—both banks stood upon their trust receipts as evidence of the pledge. Under such instruments their titles are equal, and the more ancient prevails.

Stern Bros. v. Germania Nat. Bank, 34 La. Ann. 1119; Lallande v. His Creditors, 42 La. Ann. 705, 7 So. 895; Denis, Contracts of Pledge, p. 190.

The Canal-Louisiana Bank & Trust Company was without negligence in constituting Dreuil & Company its special bailee for the purposes designated in the trust receipt, and the bank's action did not affect detrimentally its rights as pledgee.

Jacquet v. His Creditors, 38 La. Ann. 863; Story, Bailm. § 299; Weems v. Delta Moss Co. 33 La. Ann. 973; Troplong Nantissement, 311; Clark v. Iselin, 21 Wall. 360, 22 L. ed. 560; White v. Platt, 5 Denio, 269; Century Throwing Co. v. Muller, 116 C. C. A. 614, 197 Fed. 252.

[522] Mr. Justice Hughes delivered the opinion of the court:

This is a controversy arising in a bankruptcy proceeding. The Commercial National Bank of New Orleans petitioned the district court for the recovery from the trustee in bankruptcy of certain bales of cotton alleged to have been held by the bankrupts, Dreuil & Company, for the account of the petitioner under trust receipts. The Canal-Louisiana Bank & Trust Company defended, presenting its reconventional demand based upon a claim of superior title. The district court entered a decree in favor of the Canal-Louisiana Bank & Trust Company (205 Fed. 568), which was affirmed by the circuit court of appeals. 128 C. C. A. 16, 211 Fed. 337.

The controversy arises from the following transactions which were had prior to the bankruptcy. On December 9, 1912, Dreuil & Company, holding inland bills of lading for two lots of cotton (40 bales and 60 bales respectively), pledged the bills of lading with the Canal-Louisiana Bank to secure certain promissory notes for moneys advanced. On December 13, 1912, the bills of lading were withdrawn from the Canal-Louisiana Bank on trust receipts, as follows:

"Received of Canal Bank & Trust Company the bills of lading or other documents or securities as enumerated below, held by the said bank as collateral pledged to secure advances made to the undersigned, and in consideration thereof, the undersigned hereby agrees to pay over to the said bank or its assigns, and to specifically apply against the very same advances the proceeds of the sale of the property mentioned in the said documents; or to deliver to the said bank or its assignees the shipping documents or warehouse receipts representing the undermentioned goods within one day from the receipt thereof, this delivery being temporarily made the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title thereto, except as [523] trustee for the said bank, and except to receive the avails thereof or the documents therefor for account of the said bank."

Dreuil & Company, surrendering the bills of lading to the railroad company, obtained delivery of the cotton and sent it to a "pickery," where the lot of 40 bales was remade into 60, and the lot of 60 bales into 90. Dreuil & Company then stored the cotton with a warehouseman, the Planters' Press, receiving two negotiable warehouse receipts which, on December 17, 1912, they pledged to the Commercial Bank as security for their notes. On December 20, 1912, and December 28, 1912, these warehouse receipts, respectively, were withdrawn by Dreuil & Company from the Commercial Bank on trust receipts similar in tenor to those which had been given, as above stated, to the Canal-Louisiana Bank. Dreuil & Company then obtained a delivery of the cotton from the Planters' Press; on December 31, 1912, they were adjudicated bankrupts and temporary receivers were appointed. It appears that 60 of the bales had been disposed of, but the remainder of the cotton, which had been sent by Dreuil & Company to a steamer for shipment, was recovered by the receivers and placed by them in the Planters' Press, warehouse receipts being issued therefor which passed into the possession of the trustee. Despite the changes mentioned, and re-markings

(which we need not consider), the district court found the identity of the cotton to be established, and there is no further controversy upon that point. Nor is it controverted that the Commercial Bank was a purchaser in good faith for value of the warehouse receipts negotiated to it.

We assume that under the jurisprudence of Louisiana the transaction between Dreuil & Company and the Canal-Louisiana Bank (described by the bank as a pledge), created rights in the bank in the nature of ownership for the purpose of securing its advances (Rev. Stat. [La.] 2482; [524] Civil Code, arts. 3157, 3158, 3170, 3173; Fidelity & D. Co. v. Johnston, 117 La. 880, 889, 42 So. 357; act 94 of 1912 [uniform bills of lading act], § 32); and that when the Canal-Louisiana Bank intrusted the bills of lading to Dreuil & Company for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Company and their trustees in bankruptcy. See Clark v. Iselin, 21 Wall. 360, 368, 22 L. ed. 568, 571; Re E. Reboulin Fils & Co. 165 Fed. 245; Charavay v. York Silk Mfg. Co. 170 Fed. 819; Re Cattus, 106 C. C. A. 171, 183 Fed. 733; Century Throwing Co. v. Muller, 116 C. C. A. 614, 197 Fed. 252; Re Dunlap Carpet Co. 206 Fed. 726; Assets Realization Co. v. Sovereign Bank, 126 C. C. A. 662, 210 Fed. 156; Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; Drexel v. Pease, 133 N. Y. 129, 30 N. E. 732; Moors v. Wyman, 146 Mass. 60, 15 N. E. 104; Moors v. Drury, 186 Mass. 424, 71 N. E. 810; Hamilton v. Billington, 163 Pa. 76, 43 Am. St. Rep. 780, 29 Atl. 904; Williston, Sales, § 437. No question is presented as to the effect, in the light of the uniform bills of lading act passed in Louisiana in 1912 (act 94), of an attempted negotiation by Dreuil & Company of the bills of lading contrary to the terms of the trust receipts. See Roland M. Baker Co. v. Brown, 214 Mass. 196, 203, 100 N. E. 1025. The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Company. The transactions with the "pickery" are not material to the question to be decided. Dreuil & Company having obtained possession of the cotton, as was contemplated, placed it in store and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank.

It is a familiar rule that one who has no title to chattels cannot transfer title unless he has the owner's authority or the owner is estopped. See Civil Code (La.) arts. 2452, 3142, 3145, 3146. It follows that, in the absence of circumstances creating an estoppel, one without title cannot [525] transfer it by the simple device of warehousing the goods and indorsing the receipts. But if the owner of the goods has permitted another to be clothed with the apparent ownership through the possession of warehouse receipts, negotiable in form, there is abundant ground for protecting a bona fide purchaser for value to whom the receipts have been negotiated. Pollard v. Reardon, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 848, 852; Williston, Sales, § 421. The effect of the negotiation of warehouse receipts is defined in the uniform warehouse receipts act, enacted in Louisiana by act 221 of 1908. This act provides:

"Sec. 40. Who may negotiate a receipt.—A negotiable receipt may be negotiated—

"(a) By the owner thereof; or

"(b) By any person to whom the possession or custody of the receipt has been intrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been intrusted, or if at the time of such intrusting the receipt is in such form that it may be negotiated by delivery."

"Sec. 41. Rights of person to whom a receipt has been negotiated.—A person to whom a negotiable receipt has been duly negotiated acquires thereby—

"(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value; and

"(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him."

. . . . . .

[526] "Sec. 47. When negotiation not impaired by fraud, mistake, or duress.—The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress."

It will be observed that "one who takes by trespass or a finder is not included with-

in the description of those who may negotiate." (Report of Commissioners on Uniform State Laws, January 1, 1910, p. 204.) Aside from this, the intention is plain to facilitate the use of warehouse receipts as documents of title. Under § 40, the person who may negotiate the receipt is either the "owner thereof," or a "person to whom the possession or custody of the receipt has been intrusted by the owner" if the receipt is in the form described. The warehouse receipt represents the goods, but the intrusting of the receipt, as stated, is more than the mere delivery of the goods; it is a representation that the one to whom the possession of the receipt has been so intrusted has the title to the goods. By § 47, the negotiation of the receipt to a purchaser for value without notice is not impaired by the fact that it is a breach of duty, or that the owner of the receipt was induced "by fraud, mistake, or duress" to intrust the receipt to the person who negotiated it. And, under § 41, one to whom the negotiable receipt has been duly negotiated acquires such title to the goods as the person negotiating the receipt to him, or the depositor or person to whose order the goods were deliverable by the terms of the receipt, either had or "had ability to convey to a purchaser in good faith for value." The [527] clear import of these provisions is that if the owner of the goods permits another to have the possession or custody of negotiable warehouse receipts running to the order of the latter, or to bearer, it is a representation of title upon which bona fide purchasers for value are entitled to rely, despite breaches of trust or violations of agreement on the part of the apparent owner.

It cannot be doubted that if Dreuil & Company had pledged to the Commercial Bank the bills of lading which they withdrew from the Canal-Louisiana Bank under the trust receipts, the former, paying value in good faith, would have had the superior right. This would have been directly within the terms of the uniform bills of lading act (La. act 94, 1912, §§ 31, 32, 38, 39). Roland M. Baker Co. v. Brown, supra; see William T. Hardie & Co. v. Vicksburg, S. & P. R. Co. 118 La. 254, 42 So. 793. It seems to be contended that the case is different with the warehouse receipts. But it cannot be said that it was not within the contemplation of the parties that Dreuil & Company, on obtaining the goods from the railroad company, should put them in warehouse and take the usual receipts. As we have stated, we are not concerned with what happened at the "pickery," as the case is precisely the same, so far as the Commercial Bank is concerned, as if the original bales had been warehoused (without remaking) as soon as received. It was not the placing of the cotton in warehouse in the usual course of business, but the negotiation of the receipts, that constituted the violation of Dreuil & Company's agreement with the Canal-Louisiana Bank. By the very terms of that agreement Dreuil & Company were to take the position of "trustee" for the bank, with authority to receive "the avails" of the goods or "the documents" therefor for account of the bank, and being bound to apply the proceeds of sale to the bank's advances. And in taking documents of title, in ordinary course, pursuant to the agreement, which was intended to facilitate the [528] disposition of the cotton through Dreuil & Company, the latter were manifestly permitted to take such documents to their own order, as they took the bills of lading with which they were intrusted. To repeat, it was the *negotiation* of the receipts that constituted the breach of trust. But after the Canal-Louisiana Bank had allowed Dreuil & Company to be clothed with apparent ownership through possession of the receipts, it cannot be heard to question the title of a bona fide purchaser for value to whom they had been negotiated. Re Richheimer, 136 C. C. A. 542, 221 Fed. 16.

It is said that under the law of Louisiana, as it stood prior to the enactment of the uniform warehouse receipts act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank (Stern Bros. v. Germania Nat. Bank, 34 La. Ann. 1119; Lallande v. His Creditors, 42 La. Ann. 705, 7 So. 895; Holton v. Hubbard, 49 La. Ann. 715, 22 So. 338; Mechanics' & T. Ins. Co. v. Kiger, 103 U. S. 352, 26 L. ed. 433; but see William T. Hardie & Co. v. Vicksburg, S. & P. R. Co. supra); and it is urged that the new statute is but a step in the development of the law, and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the uniform warehouse receipts act expressly provides (§ 57): "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the com-

mercial law of the country, there should be taken into consideration the fundamental [529] purpose of the uniform act, and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it; and, in this view, we deem it to be clear that, in the circumstances disclosed, the Commercial Bank took title to the warehouse receipts and to the cotton in question.

Finally, it is insisted that whatever right the Commercial Bank might have had, if it had retained the warehouse receipts, it lost as against the Canal-Louisiana Bank by permitting Dreuil & Company to withdraw the documents under the trust receipts which they gave to the Commercial Bank; that is, that as the cotton came into the possession of Dreuil & Company, the equities of the two banks are equal, and the earlier equity should prevail. We think that this contention begs the question. The Commercial Bank did not lose its rights by permitting the withdrawal of its warehouse receipts under the agreement to hold for its account, any more than the Canal-Louisiana Bank lost its rights merely by the withdrawal of the bills of lading under its trust receipts. It was because the Canal-Louisiana Bank clothed Dreuil & Company with the indicia of ownership that a bona fide purchaser for value was enabled to take title; and a similar result would have followed if, after the withdrawal of the warehouse receipts from the Commercial Bank, there had been a like negotiation by Dreuil & Company. But there was no subsequent negotiation, and the Commercial [530] Bank, in the absence of the intervention of a purchaser in good faith for value, did not lose its rights by the agreement under which the cotton which it had duly acquired was to be held for its account. There is no equality of equities, for it was through the action of the Canal-Louisiana Bank and the apparent ownership it created in Dreuil & Company that the Commercial Bank was led to advance its money upon the faith of the documents of title.

The decree is reversed and the cause is remanded, with direction to enter a decree in favor of the appellant.

It is so ordered.

UNITED STATES, Appt.,
v.
CECIL D. ROSS.

(See S. C. Reporter's ed. 530–538.)

Army — pay of private — extra duty.

A private in the Hospital Corps of the United States Army, whose duties, as defined by the act of March 1, 1887 (24 Stat. at L. 435, chap. 311, Comp. Stat. 1913, § 1819), § 5, as amended by the act of July 13, 1892 (27 Stat. at L. 120, chap. 162, Comp. Stat. 1913, § 1824), include those of ward masters, cooks, nurses, and attendants in hospitals, and "such other duties as may by proper authority be required of them," cannot be said, contrary to the practical judgment of the War Department, to have been on extra duty calling for extra pay while he was, under verbal order of the surgeon commanding, in charge of the telegraph and telephone office in the general hospital at the Presidio of San Francisco, he not having been detailed on extra duty, and there being no clear abuse of the necessary official discretion shown.

[For other cases, see Army and Navy, X., in Digest Sup. Ct. 1908.]

[No. 131.]

Argued December 10, 1915. Decided January 10, 1916.

APPEAL from the Court of Claims to review an award of extra pay of a private in the Hospital Corps of the United States Army. Reversed and remanded with instructions to dismiss the petition.

See same case below, 49 Ct. Cl. 55.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause, and, with Mr. George M. Anderson, filed a brief for appellant.

Mr. Charles F. Consaul argued the cause, and, with Miss Ida M. Moyers, filed a brief for appellee.

Mr. Justice Hughes delivered the opinion of the court:

The United States brings this appeal from a judgment of the court of claims awarding to Cecil D. Ross the sum of $303.45, as extra pay while he was in charge of the telegraph and telephone office at the general hospital, Presidio of San Francisco. 49 Ct. Cl. 55.

The facts found by the court were in substance as follows: The claimant enlisted on April 25, 1900, as an infantry private in the United States Army; he was transferred to the Hospital Corps, and on November 8, 1900, to the general hospital at the Presidio, where he was placed in charge of the telegraph and telephone office by verbal order of the surgeon commanding;

and he performed duties accordingly, save for intervals of sickness, until he was discharged from the service on April 24, 1903, by reason of the expiration of his term of enlistment. He was not under the supervision of anyone connected with the Signal Corps, but remained under the orders of the medical [532] officer in command at the hospital. No pay was given to him on account of his services as telegrapher other than the usual pay and allowances of a private in the Hospital Corps. The muster rolls in the hospital show that during the entire period, except when sick, he was reported as "telegraph operator." These muster rolls, "returns from the Hospital Corps," passed under the review of the detailing and commanding officers at the hospital, and in due course reached the War Department. An effort was made by the hospital authorities to secure the detail of a man from the Signal Corps in the place of the claimant, but failed. During the time that the claimant was on duty at the hospital, he was excused from other duties, calls, details, and inspection. The fact that he was performing duty in the telegraph and telephone department throughout the entire period, as stated, was personally known to the major and surgeon commanding. The findings also set forth the following exhibit:

U. S. A. General Hospital,

Presidio, San Francisco, Cal., November 23, 1903.

Respectfully returned to Cecil D. Ross, late private, first class, Hospital Corps, U. S. A., Holly Springs, Miss., with the information that the following indorsement was written in this office on a communication from the Chief, Record and Pension Office, War Department, Washington, D. C., requesting information regarding your detail on extra duty in the telegraph office at this hospital:

"U. S. A. General Hospital,

"Presidio of S. F., Cal., November 12, 1903.

"Respectfully returned to the Chief, Record and Pension Office, War Department, Washington, D. C., with the information that Private Cecil D. Ross, Hospital Corps, U. S. Army, joined at this hospital for duty Nov. 8, 1900, and was discharged April 24, 1903, by reason of expiration of term of enlistment.

"He was on duty in the telephone and telegraph office [533] at this hospital from Nov. 9, 1900, until date of discharge, but no printed order was ever issued detailing him on extra duty, as at an institution of this kind there are many duties to be performed, the general character of which are similar.

"W. P. Kendall,

"Major and Surgeon, U. S. A., Commanding."

Although no order was issued detailing you on extra duty in the telephone and telegraph office at this hospital, you, nevertheless, performed this duty from November 9, 1900, until the date of your discharge.

W. P. Kendall,

Major and Surgeon, U. S. Army, Commanding Hospital.

The government insists that there is no statutory authority for extra-duty pay to enlisted men of the Medical Department of the Army, that the right of recovery is denied by the Army Regulations and by statute, and that the claimant did not perform extra duty.

From an early date, provision has been made for the payment of enlisted men on extra duty at "constant labor of not less than ten days." Acts of March 2, 1819, chap. 45, 3 Stat. at L. 488; May 19, 1846, chap. 22, 9 Stat. at L. 14; July 13, 1866, chap. 176, 14 Stat. at L. 93, Comp. Stat. 1913, § 2158; Feb. 1, 1873, chap. 88, 17 Stat. at L. 422, Comp. Stat. 1913, § 2158; Rev. Stat. § 1287, Comp. Stat. 1913, § 2158; acts of July 5, 1884, chap. 217, 23 Stat. at L. 110, Comp. Stat. 1913, § 6849; March 3, 1885, chap. 339, 23 Stat. at L. 359, Comp. Stat. 1913, § 2159. For the present purpose, we may assume that the court of claims correctly construed the provisos of the appropriation acts of July 5, 1884, and March 3, 1885, as amendatory of § 1287 of the Revised Statutes (Comp. Stat. 1913, § 2158), and as thus having the effect of providing a general rule. 49 Ct. Cl. pp. 63-65. See Army Regulations (1889) 163; (1895) 165; (1901) 183; (1904) 168; (1908) 168; (1910) 169; (1913) 170; 14 Comp. Dec. p. 153; 15 Comp. Dec. p. 375. The applicable clause, in this view, of the act of 1885, provides that "such extra-duty pay hereafter shall be at the rate of fifty cents per day for mechanics, artisans, school-teachers, and clerks at [534] Army, division, and department headquarters, and thirty-five cents per day for other clerks, teamsters, laborers, and other enlisted men on extra duty."

The regulation in force at the time in question—to which the government refers as denying the right of recovery—states that "enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War. They are not entitled to extra-duty pay for services rendered in their respective departments." Army Regula-

tions (1895) 167; (1901) 185. And the statute which the government cites (Rev. Stat. § 1235, Comp. Stat. 1913, § 2007) provides that detail for employment in "constant labor" shall be "only upon the written order of a commanding officer, when such detail is for ten or more days." We agree with the contention of the claimant that the regulation can have force only so far as it may be deemed to be in accord with the acts of Congress; and we may assume in deciding the present case, as was held by the court below, that § 1235 of the Revised Statutes was not intended to preclude a recovery of extra-duty pay where there had been a detail to extra duty by competent authority, although not in writing, and extra duty entitling the enlisted man to extra pay under the statute had actually been performed.

But the question remains whether the claimant did perform "extra duty." The term is obviously a relative one; and it cannot be determined that the enlisted man was performing extra duty without a complete understanding of the scope of the duties which he might properly be expected to perform in accordance with his enlistment without receiving extra pay. What might be extra duty in the case of men of the line might not be extra duty in the case of men in the staff departments. The claimant had been transferred to the Hospital Corps; by that transfer he became a member of that Corps and bound to perform, without extra pay, any of the duties which pertained to that [535] service. The act of March 1, 1887, chap. 311 (24 Stat. at L. 435, Comp. Stat. 1913, § 1819), organizing the Hospital Corps, defining its duty, and fixing the pay of its members (as amended by the act of July 13, 1892, chap. 162, 27 Stat. at L. 120, Comp. Stat. 1913, § 1824), provides:

"That the Hospital Corps of the United States Army shall consist of hospital stewards, acting hospital stewards, and privates; and all necessary hospital services in garrison, camp, or field (including ambulance service) shall be performed by the members thereof, who shall be regularly enlisted in the military service; said Corps shall be permanently attached to the Medical Department, and shall not be included in the effective strength of the Army nor counted as a part of the enlisted force provided by law.

"Sec. 2. That the Secretary of War is empowered to appoint as many hospital stewards as, in his judgment, the service may require; but not more than one hospital steward shall be stationed at any post or place without special authority of the Secretary of War.

. . . . . .

"Sec. 5. That the Secretary of War is empowered to enlist, or cause to be enlisted, as many privates of the Hospital Corps as the service may require, and to limit or fix the number, and make such regulations for their government as may be necessary; and any enlisted man in the Army shall be eligible for transfer to the Hospital Corps as a private. They shall perform duty as ward masters, cooks, nurses, and attendants in hospitals, and as stretcher bearers, litter bearers, and ambulance attendants in the field, and such other duties as may by proper authority be required of them.

"Sec. 6. That the pay of privates of the Hospital Corps shall be eighteen dollars per month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men. They shall be entitled to the same allowance as a corporal of the arm of service with which they may be on duty."

[536] The Army Regulations of 1895 contained the following:

"1433. General hospitals will be under the exclusive control of the Surgeon-General and will be governed by such regulations as the Secretary of War may prescribe. . . .

"1435. The senior surgeon is charged with the management and is responsible for the condition of the post hospital, which will be at all times subject to inspection by the commanding officer. . . .

"1436. The surgeon of the post will assign his assistants and the members of the Hospital Corps to duty, and report them on the muster rolls in the capacity in which they are serving. . . ."

See Army Regulations (1901) 1621, 1628, 1629; (1913) 1439, 1447, 1448.

It cannot be doubted that it was the intention that the members of the Hospital Corps should perform, for the stated pay, all the duties that are properly incident to the conduct of hospitals as efficient instrumentalities. The act provides that the privates "shall perform duty as ward masters, cooks, nurses, and attendants in hospitals . . . and such other duties as may by proper authority be required of them." We know of no way of defining these "other duties" except by reference to what may be reasonably demanded in the conduct of a fully equipped hospital, considered as an administrative unit, including all that is required in its varied work. Telephone service may well be regarded as essential to the convenient conduct of a properly managed institution of

this sort. With a correct understanding of its needs that facility may be deemed to be no less incidental to the hospital service than attendance at the door, or in the reception room, or in connection with the offices of administration. And if, in the practical judgment of the military authorities, the efficient management of a general hospital requires the maintenance of both a telephone [537] and telegraph office, we know of no ground for saying that members of the Corps who are assigned to this duty as a part of the current work of the establishment are any more entitled to extra pay than they would be in any other of the numerous activities which the successful administration of the hospital may demand.

Certainly, the question was one calling in the first instance for the practical judgment of the Department. Numerous regulations, for a very long period of years, have shown the desire to prevent abuses in the service by unwarranted details to "extra duty" as a basis for extra pay. The regulation, above quoted, that enlisted men of the several staff departments will not be detailed on extra duty without authority from the Secretary of War, is significant in this aspect. In the conduct of an institution like a general hospital, where Congress has provided that all necessary services shall be performed by the members of the Hospital Corps, there is every reason for caution, and for the exercise of careful official judgment, in determining whether a particular case justifies or requires a detail on "extra duty." It is said that the authorities in the present instance endeavored to secure the detail of a member of the Signal Corps for the duty in question, but clearly we may not infer from the failure to obtain such assistance from the outside that the service was not regarded as within the scope of the duties which members of the Hospital Corps might properly be required to perform. The inference is to the contrary.

The judgment of the Department was that the claimant was not on extra duty. He was not in fact assigned on extra duty; there was no such detail in accordance with the regulations or the statute as there should have been if he was considered to be on extra duty. And, in the only official report relative to the matter, it appears that "no printed order was ever issued detailing him on extra duty, as at an institution of this kind there are many [538] duties to be performed, the general character of which are similar."

We are asked to overrule this departmental judgment, and to take this service out of the broad description of the statute relating to the duties of members of the Hospital Corps. We find no basis for such action. On the contrary, we cannot escape the conclusion that, in view of the provisions of the act of Congress and of the authorized regulations with respect to the conduct of military hospitals, we are not at liberty to say that extra-duty pay has been earned in connection with service therein—where there was no detail on extra duty—unless there is a clear abuse of the necessary official discretion. No such abuse is shown here.

The judgment of the court below is reversed and the cause remanded, with direction to dismiss the claimant's petition.

It is so ordered.

ALBERT B. MOSS et al., Plffs. in Err.,
v.
ALFRED H. RAMEY.

(See S. C. Reporter's ed. 538–547.)

Evidence — presumption — omission of island from government survey.

1. There is no room for any inference that an island was not in existence at the time of a government survey because the field notes and plat make no mention of it, or that, if there, it was a mere sand bar, or of inconsiderable area and value, where such island contains about 120 acres, has banks rising abruptly above the water, is of stable formation, has a natural growth of grass and of trees suitable for firewood, and has evidently been in its present condition since long before the survey.

[For other cases, see Evidence, II. 1, 2, in Digest Sup. Ct. 1908.]

Public lands — survey — errors.

2. The errors of the government surveyor in failing to extend the survey over an island in a navigable stream did not make it any the less a part of the public domain.

[For other cases, see Public Lands, I. e, 4, in Digest Sup. Ct. 1908.]

Waters — relative rights of state and United States — islands.

3. A large island on the Idaho side of the Snake river,—a navigable stream,—being in existence when Idaho became a

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NOTE.—On error in surveys and descriptions in patents—see note to Watts v. Lindsey, 5 L. ed. U. S. 423.

On government grant bounded by water as carrying title to islands therein—see note to United States v. Chandler-Dunbar Water Power Co. 52 L. ed. U. S. 881.

On title to islands, generally—see notes to Holman v. Hodges, 58 L.R.A. 673, and Wilson v. Watson, 35 L.R.A.(N.S.) 227.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

state, did not pass to the state upon admission to statehood, or come within the disposing influence of its laws, but remained the property of the United States, subject to disposal by it.

[For other cases, see Waters, I. b, 2, in Digest Sup. Ct. 1908.]

Waters — title to island — Federal grant.

4. Patents for fractional lots on the east bank of the Snake river—a navigable stream forming the boundary between Idaho and Oregon—do not embrace an island lying between such lots and the thread of the stream.

[For other cases, see Waters, I. d, 4; Boundaries, IV. b, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — local law.

5. Whether or not a state appellate court may alter or correct its interlocutory decision upon the first appeal when the same case, with the same parties, comes before it again, is a question of local law upon which the decision of the highest court of the state controls the Federal Supreme Court.

[For other cases, see Appeal and Error, 2209–2226, in Digest Sup. Ct. 1908.]

[No. 61.]

Argued December 9, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of Idaho to review a decree which, on a second appeal, reversed a decree of the District Court of Canyon County, in that state, in favor of plaintiffs in a suit to quiet title, and remanded the cause with a direction to dismiss it. Affirmed.

See same case below on first appeal, 14 Idaho, 598, 95 Pac. 513; on second appeal, 25 Idaho, 1, 136 Pac. 608.

The facts are stated in the opinion.

Mr. **Oliver O. Haga** argued the cause, and, with Messrs. James H. Richards and McKeen F. Morrow, filed a brief for plaintiffs in error:

When land patented by the United States government under the public laws is shown by the official plat of the survey as bordering on a fresh water river, the body of water whose margin is meandered is the true boundary, and not the meander line.

Hardin v. Jordan, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808, 838; St. Clair County v. Lovingston, 23 Wall. 46, 23 L. ed. 59; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; Middleton v. Pritchard, 4 Ill. 514, 38 Am. Dec. 112; Houck v. Yates, 82 Ill. 179; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; Knudsen v. Omanson, 10 Utah, 124, 37 Pac. 250.

One of the important rights of a riparian owner is access to the navigable part of a river from the front of his land.

St. Louis v. Rutz, 138 U. S. 226, 247, 34 L. ed. 941, 949, 11 Sup. Ct. Rep. 337; Dutton v. Strong, 1 Black, 23, 17 L. ed. 29; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 19 L. ed. 74; Yates v. Milwaukee, 10 Wall. 497, 503, 19 L. ed. 984, 986.

When land is bounded by a river, the water is appurtenant to the land, and constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring it; and for the government to later survey and dispose of the strips of land that were left between the meander line and the body of water purporting to have been meandered is an injustice to the original entryman or patentee who acquired the meandered lots under the belief that they extended to the river or other body of water, and a resurvey and sale of such land should not be permitted except in case of fraud or palpable mistake in the original survey.

Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Knudsen v. Omanson, 10 Utah, 124, 37 Pac. 250; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Chandos v. Mack, 77 Wis. 573, 10 L.R.A. 207, 20 Am. St. Rep. 139, 46 N. W. 803.

Except in cases of omission by accident, fraud, or palpable mistake, the United States has no authority to make surveys, subsequent to patent to the upland, of any land between the meander line and the body of water purporting to have been meandered in the original survey.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 289, 19 L. ed. 74, 78; Hardin v. Jordan, 140 U. S. 371, 383, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 412, 413, 35 L. ed. 442, 444, 445, 11 Sup. Ct. Rep. 819, 840; Moore v. Robbins, 96 U. S. 530, 533, 24 L. ed. 848, 850; Franzini v. Layland, 120 Wis. 72, 97 N. W. 499; Davis v. Wiebold, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878, 11 Mor. Min. Rep. 673; Lindsey v. Hawes, 2 Black, 554, 560, 561, 17 L. ed.

265, 268; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Webber v. Pere Marquette Boom Co. 62 Mich. 635, 30 N. W. 469; Shufeldt v. Spaulding, 37 Wis. 662; State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 587, 87 N. W. 117.

Where the government has never complained of either fraud or mistake in the original survey, a squatter on land between the meander line and the water cannot be heard to complain that the government has parted with title to a larger acreage than it received pay for, and, as between such squatter and the riparian owner, the latter has the better title.

Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract.

St. Clair County v. Lovingston, 23 Wall. 46, 23 L. ed. 59; Churchill v. Grundy, 5 Dana, 100; Jefferis v. East Omaha Land Co. 134 U. S. 190, 33 L. ed. 876, 10 Sup. Ct. Rep. 518; St. Louis v. Rutz, 138 U. S. 243, 34 L. ed. 948, 11 Sup. Ct. Rep. 337; Ross v. Faust, 54 Ind. 475, 23 Am. Rep. 655; Turner v. Parker, 14 Or. 341, 12 Pac. 496.

Where surveys have been made and lands entered in reliance upon the decisions of this court that the riparian owner took to the water purporting to have been meandered, such decisions will be held to constitute rules of property, and the riparian owner will be protected accordingly.

The claim that the land in controversy was still part of the public domain was not raised in the trial court on the second trial, and the supreme court of Idaho had no power to reverse that court and determine that it was public land, and that title had not passed to plaintiffs in error.

Lamkin v. Sterling, 1 Idaho, 123; Miller v. Donovan, 11 Idaho, 545, 83 Pac. 608; Medbury v. Maloney, 12 Idaho, 634, 88 Pac. 81; Marysville Mercantile Co. v. Home F. Ins. Co. 21 Idaho, 377, 121 Pac. 1026; Pomeroy v. Gordan, 25 Idaho, 279, 137 Pac. 888.

The action of the supreme court in going entirely outside the record to determine that the land in controversy was public land, and that title had not passed to plaintiffs in error, was a denial of the equal protection of the laws and of due process of law.

5 Enc. U. S. Sup. Ct. Rep. 618.

Where a question necessary for the determination of a case has been presented to and decided by an appellate court, such decision becomes the law of the case in all subsequent proceedings in the same action, and is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves.

Westerfield v. New York L. Ins. Co. 157 Cal. 339, 107 Pac. 699; Lindsay v. People, 1 Idaho, 438; Hall v. Blackman, 9 Idaho, 555, 75 Pac. 608; Hunter v. Porter, 10 Idaho, 86, 77 Pac. 439; Steve v. Bonners Ferry Lumber Co. 13 Idaho, 394, 92 Pac. 363; Gerber v. Nampa & M. Irrig. Dist. 19 Idaho, 765, 116 Pac. 104; Nampa v. Nampa & M. Irrig. Dist. 23 Idaho, 422, 131 Pac. 8; Himely v. Rose, 5 Cranch, 313, 3 L. ed. 111; Skillern v. May, 6 Cranch, 267, 3 L. ed. 220; Martin v. Hunter, 1 Wheat. 304, 374, 4 L. ed. 97, 114; Browder v. M'Arthur, 7 Wheat. 58, 5 L. ed. 397; The Santa Maria, 10 Wheat. 431, 6 L. ed. 359; Sibbald v. United States, 12 Pet. 488, 9 L. ed. 1167; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Sizer v. Many, 16 How. 98, 14 L. ed. 861; Roberts v. Cooper, 20 How. 467, 15 L. ed. 969; Cook v. Burnley (Cook v. Porter) 11 Wall. 672, 20 L. ed. 84; Tyler v. Maguire, 17 Wall. 253, 294, 21 L. ed. 576, 587; Wayne County v. Kennicott, 94 U. S. 498, 24 L. ed. 260; The Lady Pike (Pearce v. Germania Ins. Co.) 96 U. S. 461, 24 L. ed. 672; Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116; Clark v. Keith, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; Chaffin v. Taylor, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; Barney v. Winona & St. P. R. Co. 117 U. S. 231, 29 L. ed. 859, 6 Sup. Ct. Rep. 654; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Re Sanford Fork & Tool Co. 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 456, 42 L. ed. 539, 541, 18 Sup. Ct. Rep. 121; Illinois v. Illinois C. R. Co. 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 300; United States v. Camou, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 505; Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 L. ed. 788, 24 Sup. Ct. Rep. 538; Richardson v. Ainsa, 218 U. S. 289, 54 L. ed. 1044, 31 Sup. Ct. Rep. 23; Balch v. Haas, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 974; Haley v. Kirkpatrick, 44 C. C. A. 102, 104 Fed. 647; Montana Min. Co. v. St. Louis Min. & Mill. Co. 78 C. C. A. 33, 147 Fed. 897; Taenzer v. Chicago, R. I. & P. R. Co. 112 C. C. A. 153, 191 Fed. 543.

This rule applies regardless of whether

the previous decision is right or wrong, and is a limitation on the court's power, and not a mere rule of practice.

Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. ed. 658; Chaffin v. Taylor, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; Sibbald v. United States, 12 Pet. 488, 493, 9 L. ed. 1167, 1169; Gaines v. Rugg (Gaines v. Caldwell) 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; Tyler v. Maguire, 17 Wall. 253, 21 L. ed. 576; Illinois v. Illinois C. R. Co. 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 300; United States v. Camou, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 505; Hunter v. Porter, 10 Idaho, 86, 77 Pac. 439; Leese v. Clark, 20 Cal. 416.

The cases from this court, relied upon by the supreme court of Idaho to justify its departure from the rule of law of the case, do not sustain its action.

United States v. Denver & R. G. R. Co. 191 U. S. 84, 48 L. ed. 106, 24 Sup. Ct. Rep. 33; Zeckendorf v. Steinfeld, 225 U. S. 445, 56 L. ed. 1156, 32 Sup. Ct. Rep. 728; Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Northern P. R. Co. v. Ellis, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724; Tyler v. Magwire, 17 Wall. 253, 294, 21 L. ed. 576, 587.

The rule of law of the case applies to intermediate appellate courts and to the highest courts of a state where Federal questions are involved, and if, pending a second appeal, the rule of law on which such a decision was based is changed by a higher court, the lower court has no power to reverse or modify its original decree.

Silva v. Pickard, 14 Utah, 245, 47 Pac. 144; District of Columbia v. Brewer, 32 App. D. C. 388; Ogle v. Turpin, 8 Ill. App. 453; Herr v. Graden, 22 Colo. App. 511, 127 Pac. 319; State v. Bank of Commerce, 96 Tenn. 591, 36 S. W. 719.

Under the laws of Idaho, the remittitur from the supreme court went down twenty days after the decision on the first appeal, and as such decision construed a Federal grant and determined the rights of plaintiffs in error to the land in controversy, the judgment of that court became final upon the expiration of the two years allowed for issuance of writ of error from this court, and the Idaho supreme court was without power on a subsequent appeal, five years later, to reverse such judgment, and its action in doing so impairs a vested right under such Federal grant.

Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513, 25 Idaho, 1, 136 Pac. 608.

The findings of the trial court on the issue of adverse possession were conclusive, both on this court and the state supreme court; and the Federal questions in this case being decisive of the whole controversy, this court, if it finds the decision of the state court on such questions erroneous, should order the affirmance of the decision of the trial court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; Robertson v. Moore, 10 Idaho, 115, 77 Pac. 218; Mellen v. Great Western Beet Sugar Co. 21 Idaho, 353, 122 Pac. 30, Ann. Cas. 1913D, 621; Weeter Lumber Co. v. Fales, 20 Idaho, 255, 118 Pac. 289, Ann. Cas. 1913A, 403; Miller v. Blunck, 24 Idaho, 234, 133 Pac. 383; Murdock v. Memphis, 20 Wall. 590, 642, 22 L. ed. 429, 446; Fairfax v. Hunter, 7 Cranch, 603, 628, 3 L. ed. 453, 461; Martin v. Hunter, 1 Wheat. 304, 323, 362, 4 L. ed. 97, 102, 111; Tyler v. Magwire, 17 Wall. 253, 293, 21 L. ed. 576, 586; Stanley v. Schwalby, 162 U. S. 255, 283, 40 L. ed. 960, 970, 16 Sup. Ct. Rep. 754.

As between a riparian owner and a squatter, the former has the better title to land between the meander line and the water's edge, where the government survey shows the riparian land as bordering on the water.

Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530.

Decisions on the binding effect of government surveys and rights of riparian owners are rules of property.

St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 289, 19 L. ed. 74, 78; St. Clair County v. Lovingston, 23 Wall. 46, 23 L. ed. 59; Cragin v. Powell, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; Jefferis v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Middleton v. Pritchard, 4 Ill. 510, 38 Am. Dec. 112; Houck v. Yates, 82 Ill. 179; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 917; Boorman v. Sunnuchs, 42 Wis. 235; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. 857; Ridgway v. Ludlow, 58

Ind. 249; Kraut v. Crawford, 18 Iowa, 549, 87 Am. Dec. 414; Morgan v. Reading, 3 Smedes & M. 366; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950.

Where decisions have been made in the construction of a statute or a constitutional provision, and contracts entered into or rights acquired subsequent to such construction, the construction of the statute is deemed in effect to be a part of the statute, and subsequent decisions changing such construction and overruling the prior cases have no greater effect than an amendment of the statute would have; that is to say, they operate prospectively, but not retrospectively, and only affect contracts entered into and rights acquired subsequent to the change in the decision.

11 Cyc. 758; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; 7 R. C. L. 1010; Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 997; Kenosha v. Lamson, 9 Wall. 477, 19 L. ed. 725; Weightman v. Clark, 103 U. S. 256, 26 L. ed. 392; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Anderson v. Santa Anna Twp. 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; German Sav. Bank v. Franklin County, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; Muhlker v. New York & H. R. Co. 197 U. S. 544, 577, 49 L. ed. 872, 880, 25 Sup. Ct. Rep. 522; Birrell v. New York & H. R. Co. 198 U. S. 390, 49 L. ed. 1096, 25 Sup. Ct. Rep. 667; Siegel v. New York & H. R. Co. 200 U. S. 615, 50 L. ed. 621, 26 Sup. Ct. Rep. 756; Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137; Jones v. Williams, 155 N. C. 179, 36 L.R.A.(N.S.) 426, 71 S. E. 222; Hill v. Brown, 144 N. C. 117, 56 S. E. 693; Hill v. Atlantic & N. C. R. Co. 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854; State v. O'Neil, 147 Iowa, 513, 33 L.R.A.(N.S.) 788, 126 N. W. 454, Ann. Cas. 1912B, 691; Kelley v. Rhoads, 7 Wyo. 237, 39 L.R.A. 594, 75 Am. St. Rep. 904, 51 Pac. 593; Haskett v. Maxey, 134 Ind. 182, 19 L.R.A. 379, 33 N. E. 358; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285.

Mr. Will R. King argued the cause and filed a brief for defendant in error:

The rule of *res judicata* cannot apply unless the decision in question completely disposes of the cause and puts an end to the litigation between the parties on that subject-matter. Unless a final judgment or decree is rendered in a suit, the proceedings in the same are never regarded as a bar to a subsequent action.

10 Enc. U. S. Sup. Ct. Rep. 774.

A judgment reversing the judgment of an inferior court, and remanding the cause for further proceedings, does not do this.

St. Clair County v. Lovingston, 18 Wall. 628, 21 L. ed. 813; Parcels v. Johnson, 20 Wall. 654, 22 L. ed. 410; McComb v. Knox County, 91 U. S. 2, 23 L. ed. 185; Bostwick v. Brinkerhoff, 106 U. S. 4, 27 L. ed. 74, 1 Sup. Ct. Rep. 16; Great Western Teleg. Co. v. Burnham, 162 U. S. 342, 40 L. ed. 992, 16 Sup. Ct. Rep. 850; United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392; Atlantic Coast Line R. Co. v. McElmurray Bros. 14 Ga. App. 196, 80 S. E. 680.

The case at bar was not finally decided by the Idaho supreme court in 1908, on its first hearing before that court. It was reversed and remanded for new trial because the trial court's findings were supposedly made on "a wrong theory of the law."

Moss v. Ramey, 14 Idaho, 598, 95 Pac. 513.

The Supreme Court of the United States will not review on writ of error a case in which a Federal question is involved unless the decision of the state court is final.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

The Supreme Court of the United States is not bound by a prior decision in a state court involving a Federal question.

United States v. Denver & R. G. R. Co. 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; Zeckendorf v. Steinfeld, 225 U. S. 445, 56 L. ed. 1156, 32 Sup. Ct. Rep. 728; Chesapeake & O. R. Co. v. McKell, 126 C. C. A. 336, 209 Fed. 514.

An appellate court may, on a second appeal, correct the entry of the former judgment so as to make it express the true decision of the case.

2 R. C. L. § 188.

Questions of practice, as interpreted by the state court, as in this instance, are not reviewable by this court on appeal.

Duncan v. United States, 7 Pet. 435, 451, 8 L. ed. 739, 745; Johnson v. Drew, 171 U. S. 93, 98, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800.

Since plaintiffs have brought this action to quiet their title, their right to recover depends upon the strength of their own title, and not upon the weakness of the defendant's title. Before the defendant is required to defend his claim to the island, the plaintiffs must establish their right thereto; and in so doing must establish their title on the ground that their predecessor in interest acquired title to said land by reason of the patent issued to him by the government for the lots bordering on Snake river, opposite said island.

McNitt v. Turner, 16 Wall. 362, 21 L. ed. 346; Watts v. Lindsey, 7 Wheat. 161, 5 L. ed. 424; Fussell v. Gregg, 113 U. S. 550, 28 L. ed. 993, 5 Sup. Ct. Rep. 631.

The finding of facts made in the highest court of a state is binding upon the Supreme Court of the United States, and will be the basis of decision there.

Adams v. Church, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 500; Jenkins v. Neff, 186 U. S. 230, 235, 46 L. ed. 1140, 1142, 22 Sup. Ct. Rep. 905; 1 Enc. U. S. Sup. Ct. Rep. 1005; Cliff v. United States, 195 U. S. 159, 49 L. ed. 139, 25 Sup. Ct. Rep. 1.

Not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a suit in equity, as in a case at law, when the facts are found by the court below, this court is concluded by such finding.

1 Enc. U. S. Sup. Ct. Rep. 781; Egan v. Hart, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300; E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 83, 46 L. ed. 1058, 1064, 22 Sup. Ct. Rep. 747; Dower v. Richards, 151 U. S. 658, 666, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This is a suit to quiet the title to an unsurveyed island in the Snake river, a navigable stream, the thread of which at that place is the dividing line between the states of Oregon and Idaho. The island lies between the main channel and the bank on the Idaho side, and is separated from the latter by a lesser channel from 100 to 300 feet in width, which carries a considerable part of the waters of the river, save when it is at its lower stages. The plaintiffs hold patents from the United States, issued in 1890 and 1892, for certain lots on the Idaho side, opposite the island, and claim it under these patents, while the defendant insists that it remains public land, and that he has a possessory right to it, acquired by settling thereon in 1894, and subsequently improving and cultivating it. [**545**] The island contains about 120 acres, has banks rising abruptly above the water, is of stable formation, has a natural growth of grass and of trees suitable for firewood, and evidently has been in its present condition since long before the adjacent lands on the Idaho side were surveyed, which was in 1868. The field notes and plat represented the survey as extending to the river, but made no mention of the island. They also represented the lots or fractional tracts immediately opposite the island as containing 110.40 acres. The patents under which the plaintiffs claim described the lots by giving the numbers assigned and the acreage accredited to them on the plat, and then saying, "according to the official plat of the survey of the said land returned to the General Land Office by the Surveyor General." The trial court concluded that the island remained unsurveyed public land, and that the plaintiffs' lands extended only to the river, and rendered judgment against the plaintiffs. They appealed, and the supreme court of the state held, one member dissenting, that the patents passed the title not only to the lots as shown on the plat, but also to all islands lying between them and the thread of the stream. The judgment was accordingly reversed and a new trial ordered to determine whether the plaintiffs had lost title to the island through adverse possession. 14 Idaho, 598, 95 Pac. 513. Upon the new trial judgment was given for the plaintiffs and the defendant appealed. The supreme court, in deference to our intermediate decision in Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 44 L.R.A.(N.S.) 107, 33 Sup. Ct. Rep. 242, then recalled its decision upon the first appeal, reversed the judgment rendered upon the second trial, and remanded the cause with a direction to dismiss it. 25 Idaho, 1, 136 Pac. 608. The plaintiffs bring the case here.

While the inference naturally arising from the silence of the field notes and plat is that the island was not there at the time of the survey, or, if there, was a mere sand bar or of inconsiderable area and value, what is shown and [**546**] conceded respecting its stable formation, elevation, size, and appearance, completely refutes this inference, and demonstrates that the island was in its present condition at the time of the survey and when Idaho became a state, which was twenty-two years later.

Thus the facts bearing on the status of the island and the operation of the patents are essentially the same as in Scott v. Lattig; and, in view of what was there held, it suffices to say: The error of the surveyor in failing to extend the survey over the island did not make it any the less a part of the public domain. It was fast, dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the state of Idaho on her admission into the Union, but remained public land as before. The descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this island lying between the lots and the thread of the stream. Chapman & D. Lumber Co. v. St. Francis Levee Dist. 232 U. S. 186, 58 L. ed. 564, 34 Sup. Ct.

Rep. 297; Gauthier v. Morrison, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384; Producers Oil Co. v. Hanzen, 238 U. S. 325, 59 L. ed. 1330, 35 Sup. Ct. Rep. 755. The claim that the island passed under the patents is therefore ill-founded. The case of Whitaker v. McBride, 197 U. S. 510, 49 L. ed. 857, 25 Sup. Ct. Rep. 530, upon which the plaintiffs rely, is distinguishable in that what was there claimed to be an island contained only 22 acres and was not shown to be of stable formation, and the Land Department had repeatedly refused to treat it as public land.

It is contended that the decision upon the first appeal became the law of the case, and that by recalling that decision when considering the second appeal the court infringed upon the due process of law clause of the 14th Amendment. The contention must fail. There is nothing in that or any other clause of the 14th Amendment which prevents a state from permitting an appellate court to alter or correct its interlocutory decision upon a first appeal when the same case, with the same [547] parties, comes before it again; and whether this is permitted is a question of local law, upon which the decision of the highest court of the state is controlling here. King v. West Virginia, 216 U. S. 92, 100, 54 L. ed. 396, 401, 30 Sup. Ct. Rep. 225; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178.

It also is contended that, under the due process of law clause of such Amendment, the court was not at liberty, upon the second appeal, to change its first decision, because, after the case was remanded for a new trial, the defendant acquiesced in that decision by an amendment to his answer completely eliminating from the case all controversy respecting the status of the island and the operation of the patents. This contention is without any real basis in the record. The original answer is not before us, but the amended one is, and it, in addition to otherwise traversing the plaintiffs' allegation of ownership, expressly denies that they or either of them "have any right, title, or interest whatever in any portion" of the island. And examining the evidence taken on the second trial we find that the defendant was then still insisting that the island was public, and not private, land. It is idle, therefore, to claim that the point involved in the first decision was completely eliminated from the case between the two appeals. Whether, if the record were otherwise, it could be said that there was an abuse of due process, need not be considered.

Judgment affirmed.

60 L. ed.

[548] CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

LIZZIE L. WRIGHT and Henry C. Berge, Administrators, etc.

(See S. C. Reporter's ed. 548–555.)

Master and servant — employers' liability — when employee is engaged in interstate commerce.

1. An employee of an interstate carrier, injured in a collision while taking a road engine from a point in one state to a repair shop in another state, was employed at the time in interstate commerce, within the meaning of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), although the train order under which he was then proceeding directed that his engine be run "extra" between two named points, both of which are in the same state.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Appeal — harmless error — submitting case under wrong statute.

2. Error in submitting a case to the jury, as if the state employers' liability act rather than the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), were controlling, does not require the reversal of a judgment in favor of plaintiff, where, on the only material point on which the two acts differ, the state act is more favorable to the employer than is the act of Congress.

[For other cases, see Appeal and Error, VIII. m, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — negligence — rules.

3. The running of a switching engine on the main track through a deep and curved cut within the yard limits at such a rate of speed as to endanger the safety of an "extra" which the switching crew knows may be coming through the cut on the same track is actionable negligence under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), whether permitted by the railway company's rules or not, and renders the railway company responsible for the killing of the engineer of the extra in the resulting collision.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 167.]

Argued November 30, 1915. Decided January 10, 1916.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court of Lancaster County, in that state, in favor of plaintiffs in a personal-injury action. Affirmed.

See same case below, 94 Neb. 317, 143 N. W. 220; on rehearing, 96 Neb. 87, 146 N. W. 1024.

The facts are stated in the opinion.

Mr. E. P. Holmes argued the cause, and, with Mr. Paul E. Walker, filed a brief for plaintiff in error:

The administrators of an engineer in the employ of a railroad company, operating a lone engine being taken from Fairbury, Nebraska, to Council Bluffs, Iowa, killed while on said trip, are entitled to maintain a suit against the railway company under the Federal employers' liability act.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159.

If the case is one where the employee is employed by the interstate carrier in such commerce, then the Federal employers' liability act is exclusive, and it is error to try the case under a state employers' liability act.

Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, supra; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 49, 56 L. ed. 327, 345, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

In construing and applying the Federal employers' liability act the decisions of the national courts control over those of the state courts, and in determining when a carrier is guilty of negligence under the Federal act the decisions of the Federal courts control, and if the state court, applying the Federal act or in trying a case which should have been tried under that act, erred in the trial of the case in holding the carrier liable, it is such an error as this court may review.

Roberts, Injuries to Interstate Employees, § 8, p. 15; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 56 L. ed. 1179, 33 Sup. Ct. Rep. 858; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

Rules that yard engines in yard limits might occupy tracks, protecting themselves against first-class and passenger trains, and that extra trains must run through yards under control, looking out for yard engines and other engines, are reasonable and sufficient.

Central R. Co. v. Young, L.R.A.—, —, 118 C. C. A. 465, 200 Fed. 359; 1 Bailey, Personal Injuries, 2d ed. p. 797; 3 Labatt, Mast. & S. p. 2948; Chicago, R. I. & P. R. Co. v. Ship, 98 C. C. A. 257, 174 Fed. 353; Rosney v. Erie R. Co. 68 C. C. A. 155, 135 Fed. 311; Great Northern R. Co. v. Hooker, 95 C. C. A. 410, 170 Fed. 154; Kansas & A. Valley R. Co. v. Dye, 16 C. C. A. 604, 36 U. S. App. 23, 70 Fed. 24; Little Rock & M. R. Co. v. Barry, 43 L.R.A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944; Scott v. Eastern R. Co. 90 Minn. 135, 95 N. W. 892, 14 Am. Neg. Rep. 373; Vedder v. Fellows, 20 N. Y. 126; Enright v. Toledo, A. A. & N. M. R. Co. 93 Mich. 409, 53 N. W. 536; Berrigan v. New York, L. E. & W. R. Co. 131 N. Y. 582, 30 N. E. 57; Whalen v. Michigan C. R. Co. 114 Mich. 512, 72 N. W. 323; Kenefick-Hammond Co. v. Rohr, 77 Ark. 290, 91 S. W. 179, 19 Am. Neg. Rep. 69; Ward v. Manhattan R. Co. 95 App. Div. 437, 88 N. Y. Supp. 758; Wolsey v. Lake Shore & M. S. R. Co. 33 Ohio St. 227; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Larow v. New York, L. E. & W. R. Co. 61 Hun, 11, 15 N. Y. Supp. 384; Shuster v. Philadelphia, B. & W. R. Co. 6 Penn. (Del.) 4, 4 L.R.A. (N.S.) 407, 62 Atl. 689; Shannon v. New York C. & H. R. R. Co. 88 App. Div. 349, 84 N. Y. Supp. 646; Smith v. New York C. & H. R. R. Co. 88 Hun, 468, 34 N. Y. Supp. 881; Niles v. New York C. & H. R. R. Co. 14 App. Div. 58, 43 N. Y. Supp. 751, 1 Am. Neg. Rep. 511; Corcoran v. New York, N. H. & H. R. Co. 77 App. Div. 505, 78 N. Y. Supp. 953.

When an empty car or a lone engine for whatever purpose is going from a point in one state to a point in another, within the meaning of the Federal employers' liability act, the crew moving it are engaged in interstate commerce.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159; Roberts, Injuries to Interstate Employees, p. 113.

Mr. George W. Berge argued the cause, and, with Mr. Halleck F. Rose, filed a brief for defendants in error:

A necessary movement of a defective empty car or engine alone, for the purpose of repair only, and not in connection with any cars commercially used, does not constitute interstate commerce; and in such a case it matters not whether the defective car or engine is being transported between two points in a state, or whether it crosses state lines.

Chicago & N. W. R. Co. v. United States, 21 L.R.A.(N.S.) 690, 93 C. C. A. 450, 168 Fed. 236; United States v. Rio Grande

Western R. Co. 98 C. C. A. 293, 174 Fed. 399; Siegel v. New York C. & H. R. R. Co. 178 Fed. 873; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Taylor v. Boston & M. R. Co. 188 Mass. 390, 74 N. E. 591; Southern R. Co. v. Snyder, 109 C. C. A. 344, 187 Fed. 492; St. Louis & S. F. R. Co v. Delk, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372; Illinois C. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138; Breske v. Minneapolis & St. L. R. Co. 115 Minn. 386, 132 N. W. 337; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163.

The Federal employer's liability act is in pari materia with the Federal safety appliance act, and what is interstate commerce under one act must be so under the other. At least, they must be construed together.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159.

The court's instructions assume, based upon the undisputed evidence, that the deceased, at the time he was killed, was engaged outside of interstate commerce; and the plaintiff in error, having requested such instructions, is bound by them; and it must be taken as settled that the state employers' liability act is applicable to this case, and not the Federal act.

Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

The right to proceed in an action for personal injuries under the Federal employers' liability act may be waived.

Graber v. Duluth, S. S. & A. R. Co. 159 Wis. 414, 150 N. W. 489; Leora v. Minneapolis, St. P. & S. Ste. M. R. Co. 156 Wis. 386, 146 N. W. 520, 8 N. C. C. A. 108; Hanson v. Chicago, M. & St. P. R. Co. 157 Wis. 455, 146 N. W. 524; Wabash R. Co. v. Hayes, supra; Chesapeake & O. R. Co. v. McDonald, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; Harding v. Illinois, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

In the case at bar the evidence is all one way, showing conclusively that the deceased was engaged outside of interstate commerce. Suppose, however, as a matter of fact, he had been engaged in interstate commerce, but the evidence showing this fact had been excluded by the trial court,—still this would be error without prejudice where the railway company's position was made no worse because the case was tried upon the hypothesis that the state law governed.

Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452.

Questions of fact which are merely preliminary to or the possible basis of a Federal question are not in themselves Federal.

Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245; Telluride Power Transmission Co. v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178; Crary v. Devlin, 154 U. S. 619, and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199; Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. ed. 245; Dower v. Richards, 151 U. S. 659, 38 L. ed. 306, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 97, 53 L. ed. 424, 29 Sup. Ct. Rep. 220; Quimby v. Boyd, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Thayer v. Spratt, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471.

[549] Mr. Justice Van Devanter delivered the opinion of the court:

This was an action against a railroad company by personal representatives to recover for the death of their intestate, an employee of the company, resulting from a collision of two locomotives on the company's railroad at Lincoln, Nebraska. One of the locomotives was a switch engine returning to the city from an adjacent transfer track, and the other a road engine on the way to a distant repair shop. The former was in charge of a switching crew, and the latter of an engine crew in which the intestate was the engineer. At the place of the collision the track is in a deep and curved cut which shortens the view along the track. The causal negligence set up in the petition included allegations that the defendant negligently failed to provide a suitable rule regulating the speed and movement of switch engines through the cut; that the switch engine was being run through the cut at a negligent, reckless, and dangerous rate of speed, and without its engineer having it under control, and that when the employees in charge of it came

within view of the other engine they negligently jumped to the ground without reversing their engine or attempting to stop it, notwithstanding it reasonably and safely could have been stopped in time to prevent the collision. The answer denied all that was alleged in the petition, and charged the intestate with gross contributory negligence and an assumption of the risk. The petition described the road engine as moving from one point to another in Nebraska, and said nothing about interstate commerce, but the answer alleged that this engine was being taken to a point in another state, and that the defendant was engaged and the intestate was employed in interstate commerce. At the trial the evidence disclosed that the defendant was operating a railroad extending through Kansas, Nebraska, Iowa, and other [550] states; that the road engine was on the way from Phillipsburg, Kansas, to Council Bluffs, Iowa; that the train order under which the intestate was proceeding at the time read, "Engine 1486 will run extra Fairbury to Albright," both points being in Nebraska, and that when Albright was reached another order was to be given, covering the remainder of the trip. Notwithstanding the allegation in the answer and this evidence, the court submitted the case to the jury as if it were controlled by the employers' liability act of Nebraska, and not by the act of Congress. The plaintiff had a verdict and judgment, and the latter was affirmed by the supreme court of the state. 94 Neb. 317, 143 N. W. 220, 96 Neb. 87, 146 N. W. 1024. The defendant prosecutes this writ of error.

It is entirely clear that taking the road engine from Phillipsburg, Kansas, to Council Bluffs, Iowa, was an act of interstate commerce, and that the intestate, while participating in that act, was employed in such commerce. That the engine was not in commercial use, but merely on the way to a repair shop, is immaterial. It was being taken from one state to another, and this was the true test of whether it was moving in interstate commerce. See North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159. The courts of the state rested their decision to the contrary upon the train order under which the intestate was proceeding, and upon the decisions in Chicago & N. W. R. Co. v. United States, 21 L.R.A.(N.S.) 690, 93 C. C. A. 450, 168 Fed. 236, and United States v. Rio Grande Western R. Co. 98 C. C. A. 293, 174 Fed. 399. In this they misconceived the meaning of the train order and the effect of the decisions cited. The order was given by a division train despatcher, and meant that between the points named therein the engine would have the status of an extra train, and not that it was going merely from one of those points to the other. The cases cited arose under the safety appliance acts of Congress, and what was decided was that those acts were not intended [551] to penalize a carrier for hauling to an adjacent and convenient place of repair a car with defective appliances, when the sole purpose of the movement was to have the defect corrected, and the car was hauled alone, and not in connection with other cars in commercial use. It was not held or suggested that such a hauling from one state to another was not a movement in interstate commerce, but only that it was not penalized by those acts.

As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the employers' liability act of Congress, chap. 149, 35 Stat. at L. 65, chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662; and as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state act were controlling. Wabash R. Co. v. Hayes, 234 U. S. 86, 89, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224, and cases cited.

But error affords no ground for reversal where it is not prejudicial, and here it is plain that the company was not prejudiced. While there are several differences between the state act and the act of Congress, the only difference having a present bearing is one relating to contributory negligence. The state act declares that in cases where the employee's negligence is slight and that of the employer is gross in comparison, the former's negligence shall not bar a recovery, but shall operate to diminish the damages proportionally. In other cases contributory negligence remains a bar as at common law. Comp. Stat. 1907, § 2803b; Cobbey's Anno. Stat. 1911, § 10,592. The act of Congress, on the other hand, declares that the employee's negligence shall not bar a recovery in any case, but shall operate to diminish the damages proportionally in all cases, save those of a designated class, of which this is not one. Thus, it will be seen that the state act is more favorable to the employer than is the act of Congress. The instructions to the jury followed the state [552] act, and consequently were more favorable to the company than they would have been had they followed the act of Congress. To illustrate: under the instructions given, a finding that the intestate's injuries were caused by concurring negligence of the company and himself, and that his negligence was more than slight and the company's less than gross, must have resulted in a ver-

dict for the company, while, under instructions following the act of Congress, such a finding must have resulted in a verdict for the plaintiffs, with the damages proportionally diminished. Of course, no prejudice could have resulted to the company from the instructions being more favorable to it than they should have been under the controlling law.

The company requested a directed verdict in its favor on the ground that there was no evidence of any negligence whereon it could be held responsible for the intestate's death, but the request was denied, and the supreme court of the state sustained the ruling. In this it is contended that the company was denied a Federal right; that is, the right to be shielded from responsibility under the act of Congress when an essential element of such responsibility is entirely wanting. See St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 277, 57 L. ed. 1179, 1185, 1186, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481. The collision was on the main track and within the outer portion of the yard limits at Lincoln. At that point the track was in a deep and curved cut which made the view along the track from an engine passing in either direction comparatively short. The intestate was proceeding to a distant point under an order which gave his engine the status of an extra train, and the switching crew were returning to the city with their engine after completing some switching work at an adjacent transfer track. The switching crew knew the extra was in the yard and that they might meet it while going through the cut, for the engineer in that crew testified:

Q. What did he [the fireman] [553] say?

A. He says: "Here they are," or "there they are," or something like that.

Q. You knew who "they" was, what "they" referred to, you knew it was this extra?

A. I thought it was.

Q. Yes, you was expecting it?

A. I was expecting it in a way. Yes, I was told to look out for it, which we were doing.

Q. You knew it was likely to come around that curve?

A. Yes, sir.

And yet the switching crew were proceeding through the cut at so high a speed that they were unable to stop their engine and avoid a collision notwithstanding the extra was 420 feet away when it came within view and was brought practically to a stop within 50 feet. Among the company's rules were the following: "All except first-class trains will approach, enter, and pass through the following named yards [among them being the yard at Lincoln] under full control, expecting to find the main track occupied or obstructed." "Yard limits will be indicated by yard-limit boards. Within these yard limits engines may occupy main tracks, protecting themselves against overdue trains. Extra trains must protect themselves within yard limits." The intestate's engine was neither a first-class nor an overdue train, but, as before stated, had the status of an extra train. The company took the position that the rules placed upon the intestate the entire burden of taking the requisite precautions to avoid a collision with the switch engine at any place within the yard limits, whether in the cut or elsewhere, and therefore that no negligence could be imputed to the company or the switching crew in respect of the speed or control of the switch engine. This position was pointedly illustrated by the foreman of the switching crew, who testified:

Q. But you went on the theory and assumed that everything had to get out of the way for you except this passenger [a first-class train soon to pass through the cut]?

A. Yes, sir.

Q. Although you knew the extra was in the yards?

A. Yes, sir.

Q. And you claim it under that rule?

[554] A. Yes, sir. . . .

Q. You ought to run under control, though, in the yard limits?

A. Why, I don't see why?

Q. How?

A. Other trains are supposed to look out for us. . . .

Q. What is the rule about switch engines running under control in the yard limits?

A. There is not any.

Q. How?

A. There is no rule.

And that position was also illustrated by the division train master, who stated that "switch engines had the right over all except first-class trains in the yards, and other trains would have to look out for them," and further testified:

Q. When you say you examine men for switch engines do you use these rules?

A. Yes, and the time-tables.

Q. You tell switch engine men that they have a right to run 25 miles an hour in the yards?

A. Yes, sir.

Q. You tell them that?

A. If they want to. I don't tell them anything about running.

Q. How is that?

A. I don't tell them anything about how fast they shall run or how slow.

Q. You understand, of course, that they can at any time run their engines negligently?

A. I understand that, yes.

Q. You don't tell them to be careful at all when you instruct your switch engine men?

A. I tell them to run their engines according to the rules.

Q. But you have no rules respecting switch engines?

A. No, we have instructions sometimes.

Q. Have you any rules respecting switch engines?

A. No, sir. . . .

Q. What do you tell your switch engine men about your rules, about running under control in yard limits?

A. Don't tell them anything, not in regard to running under control in the yards.

The plaintiffs took the position that the rules, if regarded as devolving upon one in the intestate's situation the measure of responsibility indicated, and permitting the switching crew to run their engine through the cut, not under control, but at high speed, when they knew that they might meet the other engine, were unreasonable in that respect. Whether the rules were thus unreasonable was submitted to the jury as a question of [555] fact over the company's objection that the question was one of law for the court. The jury found, as the record plainly shows, that the rules were unreasonable, and that the switch engine was negligently run at greater speed than was reasonable in the circumstances. Dealing with these subjects, the supreme court of the state said (96 Neb. 87, 146 N. W. 1024): "The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour; and, knowing, as the crew of the switch engine did, that No. 1486 [the extra] was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant."

While doubting that the rules, rightly understood, permitted the switching crew to proceed at a speed which obviously endangered the safety of the extra, which they knew might be coming through the cut on the same track, we agree that if this was permitted by the rules, they were in that respect unreasonable and void. And in either case, we think it is manifest that there was ample evidence of negligence whereon the company could be held responsible under the act of Congress.

Judgment affirmed.

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[556] BRUCE SHANKS, Plff. in Err.,

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY.

(See S. C. Reporter's ed. 556–560.)

Master and servant — employers' liability — when servant is engaged in interstate commerce.

An employee in a machine shop operated by a railway company for repairing parts of locomotives used by it both in interstate and intrastate transportation is not employed in interstate commerce within the meaning of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), while engaged in taking down and putting into a new location in such shop an overhead countershaft through which power is communicated to some of the machinery used in repair work.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 477.]

Argued November 30, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of New York in and for the County of Kings in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals, which affirmed a judgment of the Appellate Division of the

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Supreme Court, Second Department, reversing, with a direction to dismiss the complaint, a judgment of the trial term of the Supreme Court in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below in Appellate Division, 163 App. Div. 565, 148 N. Y. Supp. 1034; in Court of Appeals, 214 N. Y. 413, 108 N. E. 644.

The facts are stated in the opinion.

Mr. Joseph A. Shay argued the cause, and, with Messrs. Nash Rockwood and L. B. McKelvey, filed a brief for plaintiff in error:

As matter of fact and as matter of law this plaintiff was employed in interstate commerce at the time of his injury, within the meaning of the Federal statute, as it has been construed and applied in every authoritative decision.

Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146-151, 57 L. ed. 1125-1127, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779, Ann. Cas. 1914C, 153; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 159, 57 L. ed. 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 180 Fed. 832; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897; Law v. Illinois C. R. Co. L.R.A.1915C, 17, 126 C. C. A. 27, 208 Fed. 869; Eng v. Southern P. R. Co. 210 Fed. 92; Thomas v. Boston & M. R. Co. 134 C. C. A. 554, 219 Fed. 180; Illinois C. R. Co. v. Nelson, 122 C. C. A. 258, 203 Fed. 956; Montgomery v. Southern P. Co. 64 Or. 597, 47 L.R.A.(N.S.) 13, 131 Pac. 507; Louisville & N. R. Co. v. Melton, 218 U. S. 36-48, 54 L. ed. 921-926, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; Cousins v. Illinois C. R. Co. 126 Minn. 172, L.R.A.—, —, 148 N. W. 58; Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 60, note; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Thomson v. Columbia & P. S. R. Co. 205 Fed. 203, 4 N. C. C. A. 925; Johnson v. Great Northern R. Co. 102 C. C. A. 89, 178 Fed. 643; Zikos v. Oregon R. & Nav. Co. 179 Fed. 897; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Thornton v. Kansas City, M. & O. R. Co. 91 Kan. 684, 139 Pac. 410, Ann. Cas. 1915D, 314; Thompson v. Cincinnati, N. O. & T. P. R. Co. 165 Ky. 256, 176 S. W. 1006.

Mr. Alexander Pope Humphrey argued the cause, and, with Mr. William S. Jenney, filed a brief for defendant in error:

At the time plaintiff sustained the injuries complained of he was not employed by the defendant in interstate commerce.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.

Each case must be decided in the light of the particular facts, with a view of determining whether, at the time of the injury, the employee is engaged in interstate business or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof.

New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1.

Mr. Justice Van Devanter delivered the opinion of the court:

Shanks sued the railroad company for damages resulting from personal injuries suffered through its negligence while he was in its employ, and rested his right to [557]recover upon the employers' liability act of Congress. His injuries were received in New Jersey, and his action was brought in the supreme court of New York. He prevailed at the trial, but in the appellate division the judgment was reversed, with a direction that his complaint be dismissed without prejudice to any remedy he might have under the law of New Jersey, and this was affirmed by the court of appeals, the ground of the appellate rulings being that at the time of the injury he was not employed in interstate commerce. 163 App. Div. 565, 148 N. Y. Supp. 1034; 214 N. Y. 413, 108 N. E. 644. To obtain a review of the judgment of the court of appeals he sued out this writ of error, which was directed to the supreme court because the record was then in its possession. See Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265; Wurts v. Hoagland, 105 U. S. 701, 26 L. ed. 1109; Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57.

In so far as its words are material here, the employers' liability act declares that "every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce" [35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657], if the injury results in whole or in part from the negli-

gence of the carrier or of any of its officers, agents, or employees. Thus it is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in intrastate commerce, or in what is not commerce at all, that one who, while employed therein by the carrier, suffers injury through its negligence, or that of some of its officers, agents, or employees, must look for redress to the laws of the state wherein the injury occurs, save where it results from the violation of some Federal statute, such as the safety appliance acts.

[558] The facts in the present case are these: The railroad company was engaged in both interstate and intrastate transportation, and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop, Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead countershaft—a heavy shop fixture—through which power was communicated to some of the machinery used in the repair work.

The question for decision is, Was Shanks at the time of the injury employed in interstate commerce within the meaning of the employers' liability act? What his employment was on other occasions is immaterial, for, as before indicated, the act refers to the service being rendered when the injury was suffered.

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?

Applying this test, we have held that the requisite employment in interstate commerce exists where a car repairer is replacing a drawbar in a car then in use in such commerce (Second Employers' Liability Cases [Walsh v. New York, N. H. & H. R. Co.] 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875); where a fireman is walking ahead of and piloting through several switches a locomotive which is to be attached to an interstate train and to assist in moving the same up a grade (Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172), [559] where a workman about to repair a bridge regularly used in interstate transportation is carrying from a tool car to the bridge a sack of bolts needed in his work (Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779); where a clerk is on his way through a railroad yard to meet an inbound interstate freight train and to mark the cars so the switching crew will know what to do with them when breaking up the train (St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156); where a fireman, having prepared his engine for a trip in interstate commerce, and being about to start on his run, is walking across adjacent tracks on an errand consistent with his duties (North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159); and where a brakeman on a train carrying several cars of interstate and two of intrastate freight is assisting in securely placing the latter on a side track at an intermediate station to the end that they may not run back on the main track, and that the train may proceed on its journey with the interstate freight (New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780).

Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another (Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163), and where an employee in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce (Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902). In neither instance could the service indicated be said to be interstate transportation, or so closely related to it as to be practically a part of it.

Coming to apply the test to the case in hand, it is plain that Shanks was

not employed in interstate transportation, [560] or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case, was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the employers' liability act.

Judgment affirmed.

INTERSTATE AMUSEMENT COMPANY, Plff. in Err.,
v.
W. S. ALBERT, Fletch Catron, and Tennessee Realty & Leasing Company.

(See S. C. Reporter's ed. 560–568.)

Error to state court — scope of review — finding of fact.

1. The findings of fact are conclusive upon the Federal Supreme Court on writ of error to a state court in ordinary cases other than those arising under the contract clause of the Federal Constitution, unless there is ground for the insistence that a Federal right has been denied as the result of a finding that is without support in the evidence.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — finding of fact.

2. Evidence tending to show the transaction of business within the state by a foreign corporation, engaged in booking theatrical companies and vaudeville acts for theater owners, in consideration of a weekly "booking fee" and a commission upon the actors' salaries, under contracts which, while binding it to "use every precaution to see that artists fulfil their contracts," recite that it is acting solely in the capacity of agent of the theater owner, and is not responsible for failure of artists to fulfil their contracts, nor for any accident or delay preventing them from arriving when scheduled, is sufficient to support, on writ of error to a state court, a finding that such corporation was doing business within the state other than interstate commerce.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

Foreign corporations — state regulation — commerce — due process of law.

3. A foreign corporation doing local business within the state may, consistently with the commerce and due process of law clauses of the Federal Constitution, be required to file a copy of its charter with the secretary of state, conformably to Tenn. Laws 1895, chap. 81, as a condition precedent to its right to sue in the state courts upon a contract made in its conduct of such business.

[For other cases, see Corporations, XII. b, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — state regulation of foreign corporation.

4. A foreign corporation engaged in booking theatrical companies and vaudeville acts for theater owners in consideration of a weekly booking fee and a commission on the actors' salaries may, consistently with the equal protection of the laws clause of the Federal Constitution, be required to file a copy of its charter with the secretary of state, conformably to a local statute, as a condition precedent to its right to sue upon a contract made in its conduct of such business.

[For other cases, see Constitutional Law, IV. a, 3, in Digest Sup. Ct. 1908.]

[No. 69.]

Argued November 10, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which, reversing a judgment of the Chancery Court of Hamilton County, in that state, directed the dismissal of a suit by a foreign corporation which had not filed a copy of its charter with the secretary of state. Affirmed.

See same case below, 128 Tenn. 417, 161 S. W. 488.

The facts are stated in the opinion.

Mr. G. H. West argued the cause, and, with Messrs. W. E. Drummond and W. B. Miller, filed a brief for plaintiff in error:

There is no evidence to support the judgment, and no basis for the conclusion that the company did business in Tennessee as contemplated by the act. And to deny it

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NOTE.—As to review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 28 L. ed. U. S. 158.

As to constitutional equality of privileges, immunities, and protection, generally —see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On recognition or exclusion of foreign corporations—see note to Cone Export & Commission Co. v. Poole, 24 L.R.A. 289.

recovery without any basis or evidence to support the judgment of denial is to deprive it of property without due process of law.

Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; Wood v. Chesborough, 228 U. S. 678, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 277, 57 L. ed. 1186, 33 Sup. Ct. Rep. 858; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

On a writ of error to a state court in such a case this court will review the findings of fact by the state court and analyze the facts when necessary to determine whether or not a Federal right, seasonably claimed, has been infringed.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 432, Ann. Cas. 1916A, 1; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 438.

And while generally, if a decision of the state court can be upheld on an independent ground it will not be disturbed, yet, if such ground or conclusion can only be upheld by a denial of due process of law, the state court will be reversed.

Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

Where a state statute creates a new offense and prescribes the penalty, or gives a new right and declares a remedy, the punishment or remedy can be only that which the statute prescribes. D. R. Wilder Mfg. Co. v. Corn Products Ref. Co. 236 U. S. 165, 59 L. ed. 520, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 Sup. Ct. Rep. 711, Ann. Cas. 1914A, 699. The Tennessee statute places no ban on anything short of transacting the usual and customary business within the borders of the state.

Advance Lumber Co. v. Moore, 126 Tenn. 321, 148 S. W. 212.

The general right to contract relative to business, and to purchase or sell labor, is protected from prohibitive state legislation by the 14th Amendment.

Adair v. United States, 208 U. S. 173, 52 L. ed. 442, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

Thus, plaintiff in error had a right to make the contract involved in this case and to engage actors in Chicago pursuant thereto. A judgment based solely upon a statute against foreign corporations doing business in a state is void when applied to such business done beyond the state, being a deprivation of property without due process of law.

Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 22, 51 L. ed. 351, 27 Sup. Ct. Rep. 236; Simon v. Southern R. Co. 236 U. S. 115, 59 L. ed. 492, 35 Sup. Ct. Rep. 255.

The rudiments of fair play required by the 14th Amendment are wanting when a corporation is deprived of its earned compensation for services rendered in a foreign state to a resident of another state simply because the service rendered contemplates and results in individuals going into the domestic state for the transaction of their own business, and in furtherance of that of a resident of such domestic state.

Chicago, M. & St. P. R. Co. v. Polt, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301.

The highest court of a state is an instrumentality of the state through which the latter may deprive a citizen of his property without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Abbott v. National Bank, 175 U. S. 409, 44 L. ed. 217, 20 Sup. Ct. Rep. 153.

Any state statute, the effect of which is to declare interstate commerce unlawful, is itself invalid and unenforceable.

International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; International Textbook Co. v. Lynch, 218 U. S. 664, 54 L. ed. 1201, 31 Sup. Ct. Rep. 225; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 57 L. ed. 189, 33 Sup. Ct. Rep. 41; Heyman v. Hays, 236 U. S. 178, 59 L. ed. 527, 35 Sup. Ct. Rep. 403.

The contention that a statute as construed and applied by a state court is void, as an attempted state regulation of interstate commerce, will, in event of a decision against such contention, support a writ of error from this court.

Adams Exp. Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633.

Plaintiff in error did not solicit other contracts in Tennessee at the time the one in question was made, or during its existence. But, if it had done so, as such contracts were to be executed by it in Chicago in ordinary course, the solicitation thereof in Tennessee by traveling salesmen would have been protected as interstate commerce against the burdens imposed by the Tennessee statutes.

Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Crenshaw

v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294.

The transmission of a proposal for an interstate transaction is a part of the interstate transaction (Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Davis v. Virginia, 236 U. S. 697, 59 L. ed. 795, 35 Sup. Ct. Rep. 470), and a message of proposal, such as that sent by plaintiff in error from Chicago to Chattanooga,—and which the Tennessee court held to preclude recovery because a doing of business in Tennessee,—is but a species of interstate commerce not subject to state regulation.

Western U. Teleg. Co. v. Commercial Mill Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1004.

A state cannot tax a corporation for doing such character of business, yet this Tennessee statute lays a twofold annual tax on corporations subject thereto.

Pullman Co. v. Kansas, 216 U. S. 62, 54 L. ed. 384, 30 Sup. Ct. Rep. 232; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216.

Neither can a state tax the property of a foreign corporation located in another state, or its capital stock represented by such property,—but this is precisely what the Tennessee statute does.

Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Pullman Co. v. Kansas, 216 U. S. 62, 54 L. ed. 384, 30 Sup. Ct. Rep. 232.

Interstate commerce includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property. That is, a person may move or be moved in interstate commerce. Hence, if the Amusement Company had been obligated to present the artists in Tennessee instead of merely contracting with them to go there and then using every precaution to see that the artists fulfilled their contracts, the business by it done would have been interstate commerce.

Hoke v. United States, 227 U. S. 320, 57 L. ed. 526, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905.

The decision complained of denies to plaintiff in error the equal protection of the laws of Tennessee, contrary to the 14th Amendment.

Advance Lumber Co. v. Moore, 126 Tenn. 321, 148 S. W. 212.

Mr. Joe V. Williams argued the cause, and, with Messrs. F. M. Thompson and Neal L. Thompson, filed a brief for defendants in error:

Was the contract between the plaintiff and defendant one of the nature of commerce between the states, or was it of an intrastate nature?

Judson, Interstate Commerce, 2d ed. § 8, p. 15; Paul v. Virginia, 8 Wall. 168–183, 19 L. ed. 357–361; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The facts in the instant case show, in accordance with the authorities, that the plaintiff was engaged in carrying on its usual and ordinary business in Tennessee.

Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; Chattanooga Nat. Bldg. & L. Asso. v. Denson, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; Elliott v. Parlin & O. Co. 71 Kan. 665, 81 Pac. 500; Farrior v. New England Mortg. Secur. Co. 88 Ala. 275, 7 So. 200.

"Business" is said to be a word of large significance, and to denote the employment or occupation in which a person is engaged to procure a living. Goddard v. Chaffee, 2 Allen, 395, 79 Am. Dec. 796; Martin v. State, 59 Ala. 36, 3 Am. Crim. Rep. 287. Under a statute that any person who shall do any manner of labor, business, etc., shall be punished, etc., the loaning of money and taking a note therefor was held to be business within the meaning of such statute. Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26. In Towle v. Larrabee, 26 Me. 466, it was held that a promissory note made on Sunday for the price of a horse bought on that day was void as being in contravention of the statute prohibiting trade and business. In Lovejoy v. Whipple, 18 Vt. 379, 46 Am. Dec. 157, the taking of a promissory note executed upon Sunday in consummation of a contract previously made was considered business. "It thus seems," as said by Thurman, J., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts." Bloom v. Richards, 2, Ohio St. 388.

Counsel for plaintiff urges in his brief that the statutes of Tennessee are in conflict with the rights given by the Constitution, because of certain requirements in the statutes as to fees which must be paid by foreign corporations when they are domesticated in Tennessee. No claim is made, however, that foreign corporations are dis-

criminated against as compared with local corporations in Tennessee.

Baltic Min. Co. v. Massachusetts, 231 U. S. 68-88, 58 L. ed. 127-135, L.R.A.—, —, 34 Sup. Ct. Rep. 15.

A privilege tax on the business of a corporation done within the state is not a tax upon interstate commerce, although the company is also engaged in business between the states.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

The contention made and passed upon in the state court cannot be enlarged upon by assignments of error made to bring the case to this court.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21.

It must be conceded that a state may restrict the right of foreign corporations, not only to sue in its courts (Bank of Augusta v. Earle, 13 Pet. 519, 589, 591, 10 L. ed. 274, 308, 309; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92), but that, in addition, a state may restrict the right of such corporations to engage in business within its limits (Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207).

[564] Mr. Justice Pitney delivered the opinion of the court:

Plaintiff in error recovered a judgment in one of the courts of the state of Tennessee upon a cause of action that arose out of a written contract, dated May 24, 1909, whereby it agreed to "engage and book" for the firm of Catron & Albert, then operating a theater in Chattanooga, Tennessee, a certain number of "vaudeville acts" each week for certain weeks in each year, during the continuance of the contract, in consideration of the payment weekly of a "booking fee" of $10 and a commission of 5 per cent upon the salary of each performer. It appeared that plaintiff in error was a corporation of the state of Missouri, but had a situs in Chicago, Illinois. Upon the ground that it was guilty of noncompliance with the statute of Tennessee relating to foreign corporations doing business in the state, in that it had failed to file a copy of its charter in the office of the secretary of state, the supreme court of Tennessee reversed the judgment and dismissed the suit (128 Tenn. 417, 161 S. W. 488), and the case comes here upon questions raised under the "commerce clause" of the Constitution of the United States and the "due process of law" and "equal protection" clauses of the 14th Amendment.

Excerpts from the statute are set forth in the margin.[1]

[565] It is the insistence of plaintiff in error that it could not, consistently with the cited provisions of the Federal Constitution, be required to subject itself to the law of the state unless it was doing business within the state; and that in fact it did no such business, or, if it did any, it was interstate commerce, not subject to state regulation.

Respecting the effect of the written contract under which the cause of action arose, the court held that it created merely the relationship of principal and agent between the parties; that by it plaintiff in error became the agent of Catron & Albert, bound to render them the personal services called for by the contract in consideration of the specified sums to be paid by them to it, and that this consideration was to be forwarded weekly by Catron & Albert from Chattanooga, Tennessee, to Chicago, Illinois, where the office of plaintiff in error was located; that by the terms of the agreement plaintiff in error was not to be responsible for failure on the part of the actors to fulfil their contracts, nor for any accident or delay preventing their arrival in Chattanooga at the times appointed; that under the contract and the evidence showing the execution of it, it was not contemplated that plaintiff in error should engage, nor did it, so far as the record shows, engage in the interstate transportation of the troupes of vaudeville actors, and that while interstate transportation of such actors might or might not become an incident or factor in the execution of the contract, such interstate commerce was only incidental,

[1] Acts of 1877, chap. 31; Acts of 1891, chap. 122; amended by Acts of 1895, chap. 81, to read as follows:

"Section 1. . . . That each and every corporation created or organized under, or by virtue of, any government other than that of the state, for any purpose whatever, desiring to own property, or carry on business in this state of any kind or character, shall first file, in the office of the secretary of state, a copy of its charter. . . .

"Section 2. . . . That it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this state without first having complied with the provisions of this act, . . .

"Section 3. . . . That when a corporation complies with the provisions of this act, said corporation may then sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were created under the laws of the state of Tennessee; . . ."

and not a part of the agreement as made between the parties. It was held that this circumstance did not exempt the business done under the contract from state regulation or control. Williams v. Fears, 179 U. S. 270, 274, 45 L. ed. 186, 188, 21 Sup. Ct. Rep. 128, and Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, were cited.

[566] The court further found as matter of fact that it was the ordinary business of plaintiff in error to send troupes of actors from one theater to another in the state of Tennessee for the purpose of presenting plays to audiences assembled in each separate theater, and from the revenues derived by means of such performances it received an income, and its compensation arose from acts done in Tennessee in the several theaters where the troupes of actors appeared and performed; that the account sued on showed more than fifty different items, each representing plaintiff in error's share of the revenues received from as many separate and distinct performances by troupes of actors which it caused to appear in defendants' theater alone; and that for the purpose of enlarging and extending its business in Tennessee plaintiff in error had agents who entered that state and made contracts with other theater owners than Catron & Albert; that its articles of association stated its purpose to be to conduct and operate a general theatrical and amusement business, and this purpose it carried out by the establishment of "circuits" on which were located theaters convenient one to another, and its scheme contemplated the making of contracts with each of these theaters similar to that of Catron & Albert, and the collection of its revenues arising from booking fees and its percentages on actors' salaries; that, in short, it was a middleman, levying tribute from the owners of the houses where amusement was afforded and from the actors whose talents were employed; and that its claim in suit arose out of business thus conducted.

It is settled that such findings of fact, in ordinary cases other than those arising under the "contract clause" of the Constitution, are binding upon this court. Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 53 L. ed. 417, 424, 29 Sup. Ct. Rep. 220; Rankin v. Emigh, 218 U. S. 27, 32, 54 L. ed. 915, 920, 30 Sup. Ct. Rep. 672; Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal [567] right has been denied as the result of a finding that is without support in the evidence. Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717.

Plaintiff in error makes the point that the findings here are without support in the evidence; but this is not well taken. The evidence is meager,—none having been offered by plaintiff in error,—but there is evidence tending to show business transacted in the state, and it does not clearly appear to have been interstate business. Reference is made to the form of the contract, and especially its fifth paragraph, which states that plaintiff in error is acting solely in the capacity of agent of the theater owner, and is not responsible for failure of artists to fulfil their contracts, nor for any accident or delay preventing them from arriving in Chattanooga when scheduled; but the same paragraph binds plaintiff in error to "use every precaution to see that artists fulfil their contracts." Moreover, the prohibition of the statute, which, as construed and applied by the courts of Tennessee in a line of cases, renders illegal the contracts of foreign corporations carrying on business without complying with the laws applicable thereto, and debars such corporations from suing in the state courts thereon (Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 593, 22 S. W. 743; New Hampshire Ins. Co. v. Kennedy, 96 Tenn. 711, 714, 36 S. W. 709; Harris v. Water & Light Co. 108 Tenn. 245, 67 S. W. 811; Advance Lumber Co. v. Moore, 126 Tenn. 313, 148 S. W. 212), was evidently established as a matter of public policy, not so much for the benefit of parties sued as in the interest of the people at large; and the question is not so much—What was agreed to be done? as—What was done?

There being adequate support in the record for the finding of the supreme court of the state that plaintiff in error was doing business in the state, other than interstate [568] commerce, without complying with the statute quoted, the contentions based upon the commerce clause and the due process of law clause alike must fall. For the authority of the state to restrict the right of a foreign corporation to engage in business within its limits or to sue in its courts, so long as interstate commerce be not thereby burdened, is perfectly well settled. Paul v. Virginia, 8 Wall. 168, 181, 19 L. ed. 357, 360; Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Bank of Augusta

v. Earle, 13 Pet. 519, 589, 591, 10 L. ed. 274, 308, 309; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57.

The insistence based upon the "equal protection" clause is unsubstantial, and calls for no discussion.

Judgment affirmed.

HOME BOND COMPANY, Appt.,
v.
H. V. McCHESNEY, Trustee in Bankruptcy of the Estates of the American Fibre Reed Company, and the New England Chair Company, Bankrupts.

(See S. C. Reporter's ed. 568–576.)

Pledge — of accounts receivable — sale.

1. Accounts receivable were not sold, but were merely transferred as collateral security for loans by contracts under which the transferee was to make advances on acceptable accounts purporting to be sold to it, but which the transferrer was to and did collect, bearing all the expense in connection with such collection, the so-called purchase price, viz., the difference between the face of the accounts and the discount, not being known until payment of the account, and then depending upon the time that elapsed since the date of the advance, and what is deemed to have been the deferred payment of the purchase price being simply a return of the excess of the collection over and above the advance and the discount, the contracts also providing that in case of the nonpayment of any of the accounts at maturity, or of the debtor becoming insolvent, the transferrer should repurchase the account and pay therefor the advance made thereon, plus the discount.

[For other cases, see Pledge, II., in Digest Sup. Ct. 1908.]

Attorneys' fees — under pledge of accounts receivable.

2. Counsel fees in bankruptcy proceedings were not comprehended by a provision in a contract by which the bankrupts transferred their accounts receivable as collateral security for loans, that they should reimburse the transferee in case the latter should employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts or any part thereof, either in its own name or in the name of the bankrupts.

[For other cases, see Attorneys' Fees, in Digest Sup. Ct. 1908.]

[No. 90.]

Argued December 3, 1915. Decided January 10, 1916.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Kentucky, disallowing certain claims against bankrupt estates. Affirmed.

See same case below, 127 C. C. A. 552, 210 Fed. 893.

The facts are stated in the opinion.

Mr. Robert Kinkead argued the cause, and Messrs. S. M. Sapinsky, James R. Duffin, Owen D. Duffin, and S. M. Stockslager filed a brief for appellant:

It is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful, and by the other unlawful, the former must be adopted.

Hobbs v. McLean, 117 U. S. 576, 29 L. ed. 943, 6 Sup. Ct. Rep. 870; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; Lorillard v. Clyde, 86 N. Y. 384; Curtis v. Gokey, 68 N. Y. 300; Mandal v. Mandal, 28 La. Ann. 556; 39 Cyc. 917, 918; Jenkins' Succession, 5 La. Ann. 682; Archibald v. Thomas, 3 Cow. 284; Re Canfield, 113 C. C. A. 562, 193 Fed. 934; Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491.

Likewise, the courts will invariably construe an agreement so as to give it a legal effect rather than a usurious one.

39 Cyc. 917, 918.

To constitute the offense of usury, there must be an intent to do something which is in violation of the statute.

39 Cyc. 919; Bank of United States v. Waggener, 9 Pet. 378, 9 L. ed. 163.

Nothing in our contract contained, and nothing in the conduct of the parties in the transactions thereunder, is sufficient in any degree to impute to either the bankrupt companies or to our client "an intent" to violate the statute against usury.

Lloyd v. Scott, 4 Pet. 205, 7 L. ed. 833; McAleese v. Goodwin, 16 C. C. A. 387, 32 U. S. App. 650, 69 Fed. 759; Gunby v. Armstrong, 66 C. C. A. 627, 133 Fed. 417.

Notwithstanding the fact that the vendor indorses or guarantees the accounts sold, such a transaction is regarded as a valid sale of a chattel with a warranty of its soundness, and the purchaser is allowed to enforce the obligation to its full extent against his own indorser and all prior parties.

39 Cyc. 934; Oldham v. Turner, 3 B. Mon. 67; Durant v. Banta, 27 N. J. L. 624; Cantrell v. Ford, — Tenn. —, 46 S. W. 581; Leavitt v. Delauny, 4 N. Y. 364; Nichols v. Fearson, 7 Pet. 103, 8 L. ed. 623; 1 Page, Contr. p. 743, § 477.

Even in Alabama the doctrine that the mere guaranty by the seller of an account receivable transforms the transaction from a sale into a loan has been repudiated and overturned.

Capital City Ins. Co. v. Quinn, 73 Ala. 568; Wildsmith v. Tracy, 80 Ala. 261; Orr v. Sparkman, 120 Ala. 9, 23 So. 829.

An account receivable in the state of Kentucky may be sold just exactly like any other species of property.

Newby v. Hill, 2 Met. 530.

Where a promissory note has been fairly made, so that the payee has acquired a legal right to sue the maker thereon, he may then dispose of it at any rate of discount from its face.

Dickerman v. Day, 31 Iowa, 444, 7 Am. Rep. 156.

The burden of proof rests on the party pleading usury.

1 Remington, Bankr. p. 697, § 1199; Re Samuel Wilde's Sons, 133 Fed. 562.

Unless there was a loan there can be no usury.

1 Page, Contr. p. 741, § 465; Struthers v. Drexel, 122 U. S. 487, 30 L. ed. 1216, 7 Sup. Ct. Rep. 1293.

A person owning accounts can well afford to sell them at a discount in order to obtain ready money, and such a sale did not infect the transaction with the vice of usury.

Salt Fork Coal Co. v. Eldridge Coal Co. 170 Ill. App. 268.

Mr. Lewis A. Nuckols argued the cause, and, with Messrs. John Bryce Baskin and Eli H. Brown, Jr., filed a brief for appellee:

The contract shows on its face that it is one of lending, and not one of sale.

35 Cyc. 39, 40; Robinson v. Farrelly, 16 Ala. 472; Yankey v. Lockheart, 4 J. J. Marsh. 276; Re Grand Union Co. 135 C. C. A. 237, 219 Fed. 353; Re Fishel, 117 C. C. A. 224, 198 Fed. 464.

Where there is a dispute or uncertainty as to the facts, the courts will be slow to hold that usury has been exacted, or was in contemplation; but where there is no dispute of fact, and it appears, or a clear preponderance of the evidence or the contract itself shows, that the transaction is tainted with usury, then it will be closely scrutinized, and no shift or device or scheme to evade the statute will be tolerated.

Bright v. Wagle, 3 Dana, 254; Emig v. Mutual Ben. L. Ins. Co. 127 Ky. 588, 23 L.R.A.(N.S.) 828, 106 S. W. 230; Ringer v. Virgin Timber Co. 213 Fed. 1008; Edrington v. Harper, 3 J. J. Marsh. 354, 20 Am. Dec. 145.

Mr. Justice Pitney delivered the opinion of the court:

The New England Chair Company, and its successor, the American Fibre Reed Company, are Kentucky corporations which were engaged in business at Frankfort, in that state. On February 1, 1912, involuntary petitions in bankruptcy were filed against both companies, and they were duly adjudicated bankrupts. The two cases in bankruptcy were consolidated and directed to proceed as one cause, and the estates are under administration as one estate. The present appellant, the Home Bond Company, an Indiana corporation, filed intervening petitions, claiming certain funds in the hands of the trustee, obtained by him through the collection of accounts receivable of the bankrupt corporations, to which the petitioner claimed title under two contracts in writing made between it and the respective corporations; one with the New England Chair Company under date March 6, 1911, the other with the American Fibre Reed Company under date November 9, 1911, after the latter had taken over the assets and assumed the liabilities of the Chair Company. These agreements are identical in form, and a copy of one is set forth in the margin.[1]

[570] Petitioner also set up a claim against the trustee for the sum of $800, being $100 per month from March 16 to October 12, 1912, inclusive, paid by it to one Manning, [571] who, in the 6th clause of the contract of November 9, 1911, was by the Reed Company appointed attorney in fact to receive remittances in payment of the accounts [572] receivable and transmit

[1] This agreement, made this 6th day of March, 1911, at Indianapolis, Indiana, by and between New England Chair Company, hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for one dollar ($1) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

1 per cent on accounts that are paid within 15 days;

2 per cent on accounts that are paid within 30 days;

3 per cent on accounts that are paid within 60 days;

4 per cent on accounts that are paid within 90 days;

5 per cent on accounts that are paid within 120 days;

6 per cent on accounts that are paid within 150 days;

7 per cent on accounts that are paid within 180 days;

subject however, to the terms of this and

them to petitioner. It was averred that $100 per month was a reasonable charge, and that, under the provisions of the 6th clause, the Reed Company was to pay Manning, but failed to do so, and petitioner was compelled to make such payment.

The trustee filed answers contesting the principal claim on the ground that the transactions between petitioner and the bankrupt corporations did not amount to a purchase of the accounts receivable, but constituted mere loans of money (with the accounts assigned as collateral [573] security) at usurious rates of interest; and traversing the claim for moneys paid to Manning upon grounds that will appear below. The special master to whom the matter was referred overruled the claim, sustaining the trustee's contention, and holding, in view of the agreed statement of facts submitted to him by the parties in lieu of proof, that the contracts were not sales of the accounts by the respective bankrupt corporations to petitioner, but were transfers of the accounts as security for loans; and that these loans were made at usurious rates of interest, whether the contracts were made in Indiana or Kentucky, since the amounts retained as a "service charge" under the contracts amounted to at least 24 per centum per annum on the moneys paid by the petitioner from the time of payment to the time of reimbursement, while the statutes of both states fixed 6 per centum per annum as the legal rate of interest, providing that any excess might be relieved against, and, if paid, recouped, and while the Indiana statute permitted interest up to 8 per cent to be contracted for in writing, it provided that if over 8 per cent were contracted for or collected, all over 6 per cent should be forfeited. The special master therefore held that in the settlement the transactions between the petitioner and trustee should be purged of usury, and the petitioner be treated as a creditor of the bankrupt corporations with security for its debt. As to the claim for the $800 paid by petitioner to Manning, the special master overruled this upon the ground that there was nothing to show what services, if any, were rendered by Manning as attorney in fact during the time from March 16, 1912, to November 12, 1912. It appeared that during the continuance of the contracts between the petitioner and the Chair Company and the Reed Company respectively, Manning was an officer and employee of the respective companies; that for all services rendered by him while so employed by these companies, including such as he [574] rendered as attorney in fact, he was to receive

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any subsequent written agreements executed by the parties hereto.

Second. That the second party shall pay:

78 per cent on 30 day accounts;
77 per cent on 60 day accounts;
76 per cent on 90 day accounts;
75 per cent on 120 day accounts;
74 per cent on 150 day accounts;
73 per cent on 180 day accounts;

upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party, provided, however, no payment of the remainder shall be made while any of said accounts are in default.

Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of nonpayment at maturity to said second party, of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit so to do.

Sixth. Whereas it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the party of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, their attorney in fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

a regular salary, which was paid to him by the Chair Company until the business was taken over by the Reed Company, and then by it until April 9, 1912, when the custodian took charge of the bankrupts' estates, with the exception of salary for the two weeks ending April 9, which was owing to him from the Reed Company; that from April 9 to September 9, 1912, Manning was in the employ of the custodian as clerk, and thereafter in the employ of the trustee in the same capacity, and his salary for this employment had been paid him out of the bankrupts' estates. The special master also overruled a claim made by petitioner for allowance of its counsel fee in the same proceedings. The demand for such allowance was based upon the 8th clause of the agreement, which it was contended was broad enough to embrace not only counsel fees incurred in the collection of accounts receivable from delinquent debtors or customers of the Chair Company or the Reed Company, but also counsel fees incurred by petitioner in collecting directly from either of those companies any accounts receivable which had come into its hands and for which it or its trustee in bankruptcy failed to account.

Thereupon the special master stated an account between the petitioner and the bankrupts' estates, making the proper allowances for the usury, finding a balance of only $576.10 due from the trustee to the petitioner, and recommending that this be ordered paid over, but only upon condition that the petitioner turn over or account to the trustee for the contracts of March 6, 1911, and November 9, 1911, and any uncollected accounts, or papers connected with the uncollected accounts, delivered to it under those contracts.

Petitioners' exceptions to this report were overruled by the district court (206 Fed. 309), and a decree was entered in accordance with the recommendations of [575] the special master. The circuit court of appeals affirmed the decree. 127 C. C. A. 552, 210 Fed. 893.

Upon the present appeal it is insisted that there was error in holding that petitioner and appellant, by virtue of the contracts between it and the bankrupts and the transactions and conduct of the parties, did not become the purchaser or owner of the accounts receivable in question, and that the transactions were really loans, with the accounts receivable transferred as collateral security. But it seems to us so entirely clear that the conclusions reached by the special master and approved by both courts were correct that we deem it un-

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And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes and agrees to guarantee the faithful conduct of said attorney in fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney in fact compensation for all such services so rendered in that behalf; and that we will furnish and provide for said attorney in fact all necessary clerical or stenographic assistance for making reports to party of the first part, and all postage or express charges for transmitting reports and remittances; said attorney in fact shall also have the right and power, and it shall be his duty to indorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney in fact as to all such matters shall receive such moneys or other remittance solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney in fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in his stead.

Seventh. That said second party in making purchase of accounts hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract and should second party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name or of the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings.

In witness whereof, etc.

necessary to discuss the matter at any length. To quote from the opinion of the district court: "The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expenses in connection with their collection; what is claimed to have been the purchase price for the accounts, to wit, the difference between the face of the accounts and the discount, was not known until payment of the account and receipt thereof by the company, and then depended on the time that had elapsed since the date of the advance of the 75 per cent; what is claimed to have been deferred payment of the purchase price was simply a return to the bankrupt of the excess of the collection over and above the advance and discount; and the provision that, in the event of nonpayment of any of the accounts at maturity, or the debtor becoming insolvent, the bankrupt should repurchase the account and pay therefor the advance made thereupon, plus the discount. . . . In so far as the contracts in question here use words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest. That the company was not adverse to the use of shams is otherwise apparent from the use by it of the word 'service,' in its dealings with the bankrupts under the contracts, [576] to characterize the discounts. In any view of the contracts those discounts were not charges for services rendered the bankrupts. Loans are never regarded as services."

Houghton v. Burden, 228 U. S. 161, 57 L. ed. 780, 33 Sup. Ct. Rep. 491, affirming Re Canfield, 113 C. C. A. 562, 193 Fed. 934, is plainly distinguishable, for there the contract contemplated actual services by the lender, and this provision was found not to have been a mere cover for usury.

The rulings adverse to the claim for moneys paid to Manning and for counsel fees in the proceedings are so manifestly correct as to require no discussion.

Decree affirmed.

KANAWHA & MICHIGAN RAILWAY COMPANY, Plff. in Err.,
v.
T. L. KERSE, Administrator of the Estate of Thomas P. Barry, Deceased.

(See S. C. Reporter's ed. 576-582.)

Master and servant — employers' liability — negligence.

1. It is actionable negligence under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), for a railway company, through its employees, to conduct its switching operations upon a private switch obstructed in such a manner as to endanger the lives of brakemen upon its cars.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Trial — question for jury — assumption of risk.

2. The trial court cannot be charged with error in refusing to take the question of the assumption of risk from the jury in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), unless the evidence tending to show such assumption of risk was clear and from unimpeached witnesses and free from contradiction.

[For other cases, see Trial, VI. c, 21, in Digest Sup. Ct. 1908.]

Appeal — harmless error — refusing requested instruction.

3. Error in refusing a requested instruction does not require a reversal of the judgment where the jury, by its specific findings of fact, distinctly negatived the hypothesis upon which alone the instruction was based.

[For other cases, see Appeal and Error, 4737-4739, in Digest Sup. Ct. 1908.]

[No. 129.]

Argued December 10, 1915. Decided January 10, 1916.

IN ERROR to the Circuit Court of Kanawha County, in the State of West Virginia, to review a judgment in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

The facts are stated in the opinion.

Messrs. Leroy Allebach and W. N. King argued the cause and filed a brief for plaintiff in error:

The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal right.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159.

The burden of proving negligence on the part of the defendant rested upon the plaintiff.

Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

The railway company was not liable unless negligence was shown.

Ibid.; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475.

To hold that, under the statute, the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words "due to its negligence."

The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated.

Seaboard Air Line R. Co. v. Horton, supra.

Assumption of risk and the negligence of plaintiff were available as defenses.

Ibid.; Farley v. New York, N. H. & H. R. Co. 87 Conn. 328, 87 Atl. 990; Hogg, Pl. & Forms, § 228, pp. 184, 185; Ridgeley v. West Fairmont, 46 W. Va. 445, 33 S. E. 235; Woodell v. West Virginia Improv. Co. 38 W. Va. 47, 17 S. E. 386; Williamson v. Newport News & M. Valley Co. 34 W. Va. 657, 12 L.R.A. 297, 26 Am. St. Rep. 927, 12 S. E. 824; Oliver v. Ohio River R. Co. 42 W. Va. 703, 26 S. E. 444; Sanderson v. Panther Lumber Co. 50 W. Va. 42, 55 L.R.A. 908, 88 Am. St. Rep. 841, 40 S. E. 368; Pankey v. Atchison, T. & S. F. R. Co. 180 Mo. App. 185, 168 S. W. 274, 6 N. C. C. A. 74.

The refusal of the trial court to instruct the jury to find in favor of the railway company denied to the railway company its right to immunity from liability under the Federal employers' liability act, and is, therefore, error, calling for a reversal of the judgment.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 282, 57 L. ed. 1179, 1188, 33 Sup. Ct. Rep. 858; Hoylman v. Kanawha & M. R. Co. 65 W. Va. 270, 22 L.R.A.(N.S.) 741, 64 S. E. 536, 17 Ann. Cas. 1149.

The uncontradicted evidence clearly showed actual knowledge on the part of Barry of the presence of the obstruction over the track and of the dangers surrounding it.

Melton v. Chesapeake & O. R. Co. 64 W. Va. 168, 61 S. E. 39.

Mr. George A. Berry argued the cause, and, with Mr. R. F. Downing, filed a brief for defendant in error:

The facts, and the conclusions to be drawn from them, are for the jury, and cannot be reviewed by the Federal Supreme Court upon writ of error.

Standard Oil Co. v. Brown, 218 U. S. 78, 87, 54 L. ed. 939, 946, 30 Sup. Ct. Rep. 669; Herencia v. Guzman, 219 U. S. 44, 55 L. ed. 81, 31 Sup. Ct. Rep. 135; United States Exp. Co. v. Ware, 20 Wall. 543, 22 L. ed. 422; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Lincoln v. Power, 151 U. S. 436, 438, 38 L. ed. 224, 225, 14 Sup. Ct. Rep. 387; Humes v. United States, 170 U. S. 210, 42 L. ed. 1011, 18 Sup. Ct. Rep. 602.

The danger from injury from coming in contact with this piece of timber was not one of the risks incident to Barry's employment as a brakeman in the employ of the defendant.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 501, 505, 58 L. ed. 1068, 1070, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; Erslew v. New Orleans & N. E. R. Co. 49 La. Ann. 86, 21 So. 153; New York, N. H. & H. R. Co. v. O'Leary, 35 C. C. A. 562, 93 Fed. 737; Holden v. Fitchburg R. Co. 129 Mass. 268, 37 Am. Rep. 343; Gates v. Chicago, M. & St. P. R. Co. 2 S. D. 422, 50 N. W. 907; Chesapeake & O. R. Co. v. Cowley, 92 C. C. A. 201, 166 Fed. 283; Norfolk & W. R. Co. v. Beckett, 90 C. C. A. 25, 163 Fed. 479; Ohio, I. & W. R. Co. v. Johnson, 31 Ill. App. 183; Lindsay v. Norfolk & S. R. Co. 132 N. C. 59, 43 S. E. 511, 13 Am. Neg. Rep. 597; Greenleaf v. Dubuque & S. C. R. Co. 33 Iowa, 52, 14 Am. Neg. Cas. 607; McDuffee v. Boston & M. R. Co. 81 Vt. 62, 130 Am. St. Rep. 1019, 69 Atl. 124; Coles v. Union Terminal R. Co. 124 Iowa, 48, 99 N. W. 108; Nance v. Newport News & M. Valley R. Co. 13 Ky. L. Rep. 554, 17 S. W. 570; Pittsburgh, C. C. & St. L. R. Co. v. Parish, 28 Ind. App. 189, 91 Am. St. Rep. 120, 62 N. E. 514; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 94.

Mr. Justice Pitney delivered the opinion of the court:

This was an action under the Federal employers' liability act to recover damages because of the death of one Barry, a brakeman in the Railway Company's yard at Charleston, West Virginia, on April 23, 1911. It was pleaded and was proved without dispute that he received injuries resulting in his death while employed in interstate commerce by the Railway Company, admittedly a common carrier. There was a verdict in favor of the administrator, and the supreme court of appeals of West Virginia refused to allow a writ of error to review the resulting judgment; hence our writ was directed to the trial court.

The principal argument of plaintiff in error is addressed to the refusal of the court to direct a verdict in favor of de-

fendant upon the ground that there was no proof of negligence on the part of the Railway Company, and that there was clear and undisputed proof that Barry assumed the risk of such an injury as that which resulted in his death.

It appears that Barry was an experienced yard brakeman, and was employed in that capacity by the Railway Company in its Charleston yard. Among the industries served by the yard was that of the Kanawha Brewing [579] Company, which had a private switch running through its premises and connecting with defendant's main line. Some time prior to April 23, 1911, carpenters in the employ of the Brewing Company had placed one or two pieces of timber, about 2 inches thick and 3 to 6 inches wide, in a horizontal position across the switch track, and at a height between 3 feet and 4½ feet above the top of an ordinary box car. The timber was secured by nails to two buildings on opposite sides of the track. There was a conflict of testimony as to the length of time that the timber had been in position prior to the accident, witnesses fixing it at periods varying from two or three days to a month. It was necessary for members of defendant's yard crew to pass in and out of the switch and under the obstruction frequently. The timber was in plain view, but because of a sharp curve in the switch track could be seen by those upon the top of a car for only a short distance when approaching it. On the 23d of April a switching crew, of which Barry was that day a member, went upon the switch to haul out upon the main line a car destined for interstate commerce. The engine, in charge of one Leonard, was backed in upon the switch, and Barry coupled up the car, which was an ordinary box car, and then climbed to the top of it. Leonard started to pull out of the switch, and as the train proceeded Barry, who was standing near the rear end of the car, and not looking forward, but sidewise (presumably watching Wintz, the conductor, who was standing upon the ground, in charge of the train), came in contact with the timber and was thrown to the ground, sustaining a facture of the skull, from which he soon died.

The action of the Railway Company, through its employees, in conducting its switching operations upon a switch obstructed, as this one was, in such manner as to endanger the lives of brakemen upon its cars, speaks so clearly of negligence that no time need be spent upon it. [580] The evidence that the timber had been in the position described for a considerable period of time was presumptive evidence of notice to the company; besides which, the switch engineer and conductor both testified to actual knowledge on their part, prior to the time of the accident to Barry. Under the employers' liability act (35 Stat. at L. 65, chap. 149, § 1, Comp. Stat. 1913, § 8657) the action lies for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

Upon the question of assumption of risk, the case for the Railway Company was stronger. One Forbes, a fellow brakeman, testified that Barry had worked on the same crew with witness during all the time he was employed by the company, this being "something like a month;" that the obstruction across the Brewing Company's track had been there "pretty near the whole time Mr. Barry was working for the company,—must have been there something like a month;" that "I told Mr. Barry to be careful and watch this piece of timber, myself, and I and Mr. Barry had passed under it ourselves, and we had to get down this way (witness stoops quite low) to get under the piece of timber on the box car, and I told him several times about watching;" and that he and Barry probably went in on the switch together two or three times a day, and he had often seen Barry go under the obstruction. And Wintz, the conductor, testified that Barry commenced work for the company "about the first of the month, and worked up until the 23d;" also that "I notified him about the overhead pieces, to be careful and watch out for them." This testimony, as seen in print, certainly seems convincing, although Wintz, upon cross-examination, could not say but that he had told Mr. Kerse, the administrator, that he and Barry had "never had any conversation at all about this overhead obstruction."

But there was substantial contradiction of the testimony [581] of these witnesses. Leonard, the engineer of the yard locomotive, called as a witness for plaintiff, testified distinctly that the day on which Barry met his death was the first that the witness had seen him; that he did not know whether Barry was employed by the Railway Company or not. And one Greter, called by defendant, testified that it was to him Barry had applied for employment as yard brakeman, and he identified the written application signed by Barry; he also testified that Barry entered the service of the company "about three or four days" after the application was approved. The application itself was introduced in evidence by defendant; it is dated March 31, 1911, and is indorsed "Approved, A. N. Lyon, Supt., 4/14/1911." The latter date, coupled with Greter's testimony, would seem to fix April 17th or 18th (five or six days before the accident) as the earliest

date on which Barry was employed by the Railway Company. And this is so inconsistent with a material part of the testimony of Forbes and Wintz that the jury may reasonably have concluded that their testimony should be rejected in toto,—falsus in uno, falsus in omnibus,—and that in truth, as indicated by the testimony of Leonard, Barry had never worked upon the Brewing Company's switch previous to the time of the disaster. The burden of proof of the assumption of risk was upon defendant, and unless the evidence tending to show it was clear and from unimpeached witnesses, and free from contradiction, the trial court could not be charged with error in refusing to take the question from the jury.

Only one matter remains to be mentioned. The court refused to instruct the jury, as requested by defendant, "that if they find from the evidence that Thomas P. Barry knew of the presence of the piece of timber over the track of the Kanawha Brewing Company, and knew that it would not clear a man standing on the top of a box car, and with such knowledge continued in the service of [582] the Kanawha & Michigan Railway Company, where his duties required him to pass under said piece of timber, then said Thomas P. Barry must be held to have assumed the risk of being injured by being struck by said piece of timber and there can be no recovery by the plaintiff herein."

Since knowledge of a fixed obstruction over the track in such a position as not to clear a man standing upon the top of a box car would seem necessarily to import to an experienced brakeman that there was a risk of injury to him in that situation, and since there was no evidence of objection by Barry or promise of reparation by his employer to rebut the presumption that the risk was assumed, the refusal of this request appears plainly erroneous. But this does not result in a reversal of the judgment under review, because by specific findings of fact the jury negatived the hypothesis upon which alone the instruction was based. In response to particular interrogatories submitted by the court, they found that Barry did not know that the piece of timber was stretched over the track, and (of course) did not know that the timber was so low that it would not clear him standing upon the top of the box car.

A judgment is not to be reversed for an error by which the plaintiff in error cannot have been prejudiced. And the refusal of an instruction as to the legal result that would follow only upon the hypothesis that the deceased knew of the presence of the timber, and knew it would not clear a man standing upon the top of a box car, became legally insignificant when the jury had in its findings distinctly negatived the facts that made up the hypothesis. Thus the progress of the trial rendered the error wholly immaterial to the merits. Greenleaf v. Birth, 5 Pet. 132, 135, 8 L. ed. 72, 73; Fidelity & D. Co. v. Courtney, 186 U. S. 342, 351, 46 L. ed. 1193, 1198, 22 Sup. Ct. Rep. 833.

Judgment affirmed.

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[583] NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plff. in Err.,

v.

CHARLES P. GRAY.

(See S. C. Reporter's ed. 583-587.)

Carriers — Federal regulation — invalidating contract for free transportation — recovery of contract price.

There is nothing in the prohibition of the Hepburn act of June 29, 1906 (34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8569), § 2, against charging, collecting, or receiving a greater or less or different compensation for transportation than that specified in the carrier's published rates, which prevents or relieves a carrier from making just compensation in money for the unpaid balance of the purchase price of a map made for it, because the delivery of the particular consideration stipulated for in the contract, viz., free transportation, became unlawful upon the passage of that statute.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

[No. 147.]

Argued December 17, 1915. Decided January 10, 1916.

IN ERROR to the Supreme Court, Appellate Division, First Department of the State of New York, to review a judgment which affirmed a judgment of the Appellate Term of the Supreme Court, affirming a judgment of the City Court of the City of New York, in favor of plaintiff in an action on a contract. Affirmed.

See same case below, in Appellate Division, 161 App. Div. 924, 145 N. Y. Supp. 1125.

The facts are stated in the opinion.

Mr. William Mann argued the cause, and, with Mr. Charles C. Paulding, filed a brief for plaintiff in error:

The transportation which plaintiff in er-

NOTE.—As to rights and remedies where agreement by carriers to issue passes is impossible of performance because of subsequent legislation—see note to Louisville & N. R. Co. v. Crowe, 49 L.R.A.(N.S.) 848.

ror agreed to furnish defendant in error was to be used on interstate journeys, and was, therefore, subject to the provisions of the act of February 4, 1887, and the amendments thereof and supplements thereto, known as the interstate commerce act.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 219; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

On and after August 28, 1906, the date upon which the amendment to the interstate commerce act of June 29, 1906, became effective, it was unlawful for the plaintiff in error to furnish defendant in error transportation for use on an interstate journey, except upon receiving from him in money the regular fare provided in its tariffs in payment for such transportation.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272.

The refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, to apply in part payment of the map in question, did not constitute a breach of the agreement on its part, and no cause of action arose in favor of defendant in error because of such refusal.

People v. Globe Mut. L. Ins. Co. 91 N. Y. 174.

Mr. Arthur W. Clement argued the cause, and, with Mr. Wilson E. Tipple, filed a brief for defendant in error:

Admitting for argument (1) that the transportation which plaintiff in error agreed to furnish was to be used on interstate journeys, (2) that after August 28, 1906, it was unlawful for the plaintiff in error to furnish further transportation under its agreement, and (3) that the refusal of plaintiff in error to furnish defendant in error transportation in September, 1906, was, for that reason, right and proper, nevertheless the defendant in error is entitled to recover the value of the map furnished by him pursuant to the agreement, less the various amounts received by him in part payment. The action is not brought to recover damages for breach of contract, or to enforce specific performance of the contract.

Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 49 L.R.A.(N.S.) 848, 160 S. W. 759; Jones v. Judd, 4 N. Y. 411; Day v. New York C. R. Co. 51 N. Y. 583; Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132; Irwin v. Curie, 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161; Akers v. Mutual L. Ins. Co. 59 Misc. 273, 112 N. Y. 254.

The legal result of the failure of the plaintiff in error to furnish the transportation when demanded was to convert the claim from one for transportation into one for money.

New York News Pub. Co. v. National S. S. Co. 148 N. Y. 39, 42 N. E. 514.

Mr. Justice Pitney delivered the opinion of the court:

In the month of November, 1900, Charles P. Gray, the defendant in error, made an agreement with the representatives of the New York Central & Hudson River Railroad Company, plaintiff in error, to make for the company a large map of the Vanderbilt Lines for the World's Fair, which was to take place at Buffalo in the following year. The price agreed to be paid him was $750, of which $150 was to be paid in cash and the balance in transportation to be used by defendant in error in traveling between New York city and his farm in Girard, Pennsylvania, following the lines of plaintiff in error between New York and Buffalo, and the line of another and independent railroad between that point and Girard. The map was made, delivered, and accepted, and the cash payment [585] of $150 was made. At different times between the making of the contract and the month of September, 1906, defendant in error received from plaintiff in error transportation to the value of $55.77, applicable to this contract. In September, 1906, he called upon the company for transportation for himself and wife from New York city to Buffalo and return, intending to use it for a visit to the farm at Girard, Pennsylvania. The demand was refused, upon the ground that, because of the provisions of the interstate commerce law, the company could furnish no additional transportation on account of his services. A second demand of the same kind having been refused, defendant in error brought an action against plaintiff in error in the city court of the city of New York for the unpaid balance of the agreed price of the map, to which plaintiff in error set up the defense that by the terms of the Hepburn act of June 29, 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563], it was unlawful to furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The trial court, holding that this constituted no defense to the action, directed a verdict in favor of defendant in error for an amount made up by taking the agreed price of the map, deducting the cash payment and the

amount paid in transportation, and adding interest to the balance. No particular question was or is made as to the quantum of recovery. The resulting judgment was affirmed by the appellate term of the supreme court, and its determination was affirmed by the appellate division of the supreme court for the first judicial department. Leave to appeal to the court of appeals of the state was denied, and this writ of error was sued out.

Among the prohibitions contained in the act of June 29, 1906, is the following (34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8569): "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation [586] of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." The reference, of course, is to common carriers by railroad in interstate commerce; and it is not questioned that plaintiff in error is within this category. The act took effect August 28, 1906 (34 Stat. at L. 838, Res. 47).

In Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 476, et seq., 55 L. ed. 297, 301, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, it was held that the prohibition we have quoted prevented the exchange of transportation for services, advertising, releases, property, or anything else than money, and that this operated upon an agreement made long before the passage of the act, whereby the carrier, in consideration of a release of damages for injuries sustained by Mottley and his wife in consequence of a collision of trains upon the railroad, agreed to issue free passes to them, renewable annually during their several lives, the result being that after the taking effect of the Hepburn act specific performance of this agreement could no longer be required.

That the prohibition applies with respect to transportation within the bounds of a state as part of an interstate journey is quite clear. Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 110, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 340, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837.

In the present case, therefore, the railroad company acted strictly in accordance with the law when it refused any longer to furnish transportation to defendant in error in performance of the contract of November, 1900. [587] But from this it by no means follows that it could refuse to make just compensation in money for the unpaid balance of the purchase price of the map. The judgment of the state court proceeded upon the ground that since the contract had been fully performed by Gray, so that the railroad company had received the entire benefit of it, and since the delivery of the particular consideration stipulated for had been prohibited by the act of Congress, the company thereupon became bound upon general principles of justice to pay him an equivalent in money for the balance of the consideration. In so holding the court was simply administering the applicable principles of state law, and did not run counter to the act of Congress. If the court had accorded legal efficacy to an executory contract made after the taking effect of the Hepburn act, and contrary to its provisions, a different question would be presented. But there is nothing in the act to prevent or relieve a carrier from paying in money for something of value which it had long before received under a contract valid when made, even though the contract provided for payment in transportation, which the passage of the act rendered thereafter illegal. In the Mottley Case, while the right to further specific performance of the contract for free passage was denied, the court said (219 U. S. 486): "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it."

Judgment affirmed.

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[588] CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plff. in Err.,

v.

EDWARD DETTLEBACH.

(See S. C. Reporter's ed. 588-595.)

Carriers — limiting liability — agreed value — terminal carrier — liability as warehouseman.

The liability of a terminal carrier in an interstate shipment for a loss due to its negligence while the goods were in its pos-

Note.—On the validity of agreement to restrict carrier's liability, generally—see

session as warehouseman at the place of destination must be regarded as controlled by a limitation to an agreed valuation made to adjust the rate contained in the uniform bill of lading issued by the initial carrier, in view of the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), enlarging the definition of the term "transportation" so as to include all services rendered in connection therewith, and of a provision of the bill of lading that "every service to be performed hereunder" is subject to all the conditions therein contained.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 229.]

Argued November 29, 1915. Decided January 10, 1916.

IN ERROR to the Court of Appeals for the Eighth District of the State of Ohio to review a judgment which affirmed a judgment of the Court of Common Pleas of the City of Cleveland, in that state, in favor of a shipper for the market value of a shipment destroyed while in the possession of the terminal carrier, notwithstanding a limitation of liability in the bill of lading to an agreed value. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. Edward A. Foote argued the cause, and, with Mr. Frank L. Littleton, filed a brief for plaintiff in error:

If a stipulation limiting the time for filing claims for loss or damage is applicable to the warehouseman's service (Armstrong v. Chicago, M. & St. P. R. Co. 53 Minn. 183, 54 N. W. 1059; Hutchinson, Carr. 3d ed. § 446), certainly a stipulation as to the value of articles shipped under a bill of lading which provides that every service thereunder shall be performed subject to its conditions is applicable to the service of warehouseman when the contract specifically provides for that service.

Mr. C. C. Young argued the cause, and, with Messrs. Jesse A. Fenner and Charles L. Stocker, filed a brief for defendant in error:

After freight has reached the destination, and the consignee has had a reasonable opportunity to receive it, the railway company no longer stands in the relation of carrier to the goods. It becomes an ordinary bailee for hire, with the right to charge storage for whatever time the goods remain in its possession. This is a distinct service from the carriage of the goods. The basis of liability of the company is different, and the basis of compensation is also different from that controlling during the transit.

2 Hutchinson, Carr. § 714.

If provisions increasing the liability of carriers while goods are in transit are not to be applied after the transportation (Welch v. Concord R. Co. 68 N. H. 206, 44 Atl. 304), neither should provisions limiting liability during transit have such application.

The rule is that all such limitations are to be strictly construed against the carriers.

4 Elliott, Contr. § 3221.

And such exemption will not extend beyond the express language of the contract.

Amory Mfg. Co. v. Gulf, C. & S. F. R. Co. 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856; Nicholas v. New York C. & H. R. R. Co. 89 N. Y. 370.

Under the general law, the owner in this case was entitled to the value of his goods.

E. O. Standard Mill. Co. v. White Line Central Transit Co. 122 Mo. 258, 26 S. W. 704; Union P. R. Co. v. Moyer, 40 Kan. 184, 10 Am. St. Rep. 183, 19 Pac. 639; Rice v. Hart, 118 Mass. 201, 19 Am. Rep. 433; Gleadell v. Thomson, 56 N. Y. 194; Tarbell v. Royal Exch. Shipping Co. 110 N. Y. 170, 6 Am. St. Rep. 350, 17 N. E. 721; Wheeler v. Oceanic Steam Nav. Co. 125 N. Y. 161, 21 Am. St. Rep. 729, 26 N. E. 248; Wiegand v. Central R. Co. 75 Fed. 370, af-

notes to Deming v. Merchants' Cotton-Press & Storage Co. 13 L.R.A. 518; Missouri P. R. Co. v. Ivey, 1 L.R.A. 500; Hartwell v. Northern P. Exp. Co. 3 L.R.A. 342; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Duntley v. Boston & M. R. Co. 9 L.R.A. 452; Gulf, C. & S. F. R. Co. v. Gatewood, 10 L.R.A. 419; Pacific Exp. Co. v. Foley, 12 L.R.A. 799; Ballou v. Earle, 14 L.R.A. 433; Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527; Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985; New Jersey Steam Nav. Co. v. Merchants' Bank, 12 L. ed. U. S. 465; and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

As to validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On the construction of the Hepburn act, generally—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

As to carrier's power to limit amount of liability in case of negligence, generally—see note to Ballou v. Earle, 14 L.R.A. 433.

On the right of a carrier to terminate its responsibility as warehouseman—see note to Brunson v. Atlantic Coast Line R. Co. 9 L.R.A.(N.S.) 577.

On the Carmack amendment as affecting state regulations as to stipulations limiting liability of common carrier for loss or damage to goods—see notes to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257, and Louisville & N. R. Co. v. Miller, 50 L.R.A.(N.S.) 819.

firmed in 25 C. C. A. 681, 39 U. S. App. 763, 79 Fed. 991.

Congress has not yet legislated upon the subject of the liability of a warehouseman in such a case as this; and until it does, state laws will control.

Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 58 L. ed. 1377, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

Messrs. C. C. Young and Jesse A. Fenner also filed a separate brief for defendant in error:

Courts generally are reluctant to permit common carriers to relieve themselves by contract from the ordinary consequences of their own negligence.

Bermel v. New York, N. H. & H. R. Co. 62 App. Div. 389, 70 N. Y. Supp. 804, affirmed in 172 N. Y. 639, 65 N. E. 1113; 1 Moore, Carr. p. 498; Rosenthal v. Weir, 170 N. Y. 148, 57 L.R.A. 527, 63 N. E. 65.

Gross negligence of the plaintiff in error as warehouseman affords another reason why it should not avail itself of the stipulation as to the value in order to reduce its damages. It was not in the contemplation of the shipper when this clause was inserted that any representative of the carrier would be guilty of such conduct. Failure to deliver property without lawful excuse is the same as a conversion of it.

Vanderbilt v. Ocean S. S. Co. 132 C. C. A. 226, 215 Fed. 886.

And loss of goods by a wrong delivery, made negligently by the carrier, is a conversion for which the carrier is liable to account for the full value of the goods, this kind of loss not being within the terms of the special contract fixing a conventional value upon the goods at the time of shipment, in consideration of the rate of freight being reduced.

Savannah, F. & W. R. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219.

And it is well established that, in a suit for conversion, the wrongdoer cannot take advantage of an agreed valuation of the property in order to limit the amount of the liability.

Georgia S. & F. R. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807. See also Georgia, F. & A. R. Co. v. Blish Mill Co. 15 Ga. App. 142, 82 S. E. 784; St. Louis, I. M. & S. R. Co. v. Wallace, — Tex. Civ. App. —, 176 S. W. 764; Shelton v. Canadian Northern R. Co. 189 Fed. 153.

And where the bill of lading provided that the carrier should not be liable for loss by fire, and there was unreasonable delay on the part of the connecting carrier in forwarding the goods, and the same were destroyed by fire while in the transfer warehouse, the carrier was held liable for the loss.

Erie R. Co. v. Star & C. Mill. Co. 89 C. C. A. 569, 162 Fed. 879.

[589] Mr. Justice Pitney delivered the opinion of the court:

The court whose judgment we have here under review sustained a judgment rendered by an inferior state court in favor of Dettlebach and against the railway company for the market value of certain goods which, having been shipped in interstate commerce, were lost through the negligence of the railway company (the terminal carrier) while in its possession as warehouseman at the place of destination; overruling the contention that, because of a limitation of liability agreed upon by plaintiff's agent in consideration of a reduced rate of freight, and contained in the bill of lading that was issued by the initial carrier, and by force of the provisions of the interstate commerce act and its amendments, especially the Hepburn act of 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563], the recovery ought to be limited in accordance with the stipulation. This question, it may be observed, as affecting the warehouseman's responsibility, was not passed upon in Boston & M. R. Co. v. Hooker, 233 U. S. 97, 109, 58 L. ed. 868, 874, L.R.A.1915B, 450, Ann. Cas. 1915D, 593.

The facts are as follows: Dettlebach, the plaintiff, on September 18, 1911, shipped certain packages of merchandise, described as household goods, over the Chicago, Burlington, & Quincy Railway and connecting lines from Denver, Colorado, consigned to his wife at Cleveland, Ohio. They were received for transportation under the terms of a bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission in its report of June 27, 1908 (14 Inters. Com. Rep. 346, 352: 22 Ann. Rep. I. C. C. 1908, p. 57), which contained the following provision:

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, *that every service to be performed* [590] *hereunder* shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns."

Among the conditions printed upon the back were the following:

"Sec. 3. . . . The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value

of the property . . . at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence. . . ."

. . . . . .

"Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only. . . ."

Upon the face of the bill of lading was the following declaration signed by plaintiff's agent: "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10 per cwt."

The court found as a fact that the shipper, by consenting to the limitation, received a consideration in the shape of a substantial reduction in the freight rate, and that this supported the agreement to limit the company's liability. No question was made but that the agreement was in accordance with the filed tariff.

The goods thus shipped were transported by the initial carrier to the junction between its line and that of defendant, [591] and transported by the latter company to destination, where they arrived on September 27. They were not called for by the consignee, and remained in defendant's possession as warehouseman until November 1, 1911, when, through its negligence, certain of the goods, of the market value of $2,792, were lost.

This action having been brought to recover the value of the goods lost, and the claim of Federal right already mentioned having been made and overruled, a verdict and judgment went against defendant for the market value of the goods, and this was affirmed by the court of appeals, eighth district, state of Ohio. The supreme court of the state declined to review the judgment. The case comes here under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214].

It is no longer open to question that if the loss had occurred in the course of transportation upon defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing the lower of two rates of freight, would have been binding upon plaintiff, in view of the Carmack amendment. Adams Exp. Co. v. Croninger, 226 U. S. 491, 509, 57 L. ed. 314, 321, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 648, 654, 57 L. ed. 683, 686, 689, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 668, 57 L. ed. 690, 696, 33 Sup. Ct. Rep. 397. The question is whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman. The court of appeals, recognizing the question as one of difficulty, reasoned thus:

"To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to [592] charge for the storage of consigned goods, from the time when its relation to them as carrier ceases."

The court considered that the declaration of value stamped upon the bill of lading, and signed by plaintiff's agent, carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation, and for it additional compensation may be charged; proceeding as follows: "The additional compensation is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the part of the carrier should do double duty by serving also to uphold a like limitation of the liability of a warehouseman,—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in

the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more if the stipulation had not been made."

We recognize the cogency of the reasoning from the [593] standpoint of the common-law responsibility of a railway company as carrier and as warehouseman. But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the act of Congress regulating the matter. The question is Federal in its nature. Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. ed. 690, 698, 33 Sup. Ct. Rep. 397; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 180, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556.

The provision that we have quoted from the contract is to the effect that "every service to be performed thereunder" is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier, such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within forty-eight hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only." Thus, "any loss or damage for which any carrier is liable" includes not merely the responsibility of carrier, strictly so called, but "carrier's responsibility as warehouseman" also.

And this is quite in line with the letter and policy of the commerce act, and especially of the amendment of June 29, 1906, known as the Hepburn act (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), which enlarged the definition of the term "transportation" (this, under the original act, included merely "all instruments of shipment or carriage") so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, [594] elevation, and transfer in transit, ventilation, refrigeration or icing, *storage*, and handling *of property transported;* and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge *for such services or any part thereof* is prohibited and declared to be unlawful."

From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "transportation," and subjected to the provisions of the act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification [595] or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

We conclude that, under the provisions of the Hepburn act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman.

Judgment reversed, and the cause re-

manded for further proceedings not inconsistent with this opinion.

Mr. Justice Holmes took no part in the consideration or decision of this case.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
JAMES T. HORTON.

(See S. C. Reporter's ed. 595–602.)

Master and servant — assumption of risk — promise to repair — imminent danger.

1. The danger of the explosion of the tube in a water gauge on a locomotive boiler, which normally should withstand the pressure to which it is subjected, cannot be said, as a matter of law, to be so imminent as to import an assumption by an experienced engineer of the risk of injury arising from the absence of any guard glass after he had reported the defect and was given a promise to repair.

[For other cases, see Master and Servant, II. b, 4, in Digest Sup. Ct. 1908.]

Master and servant — contributory negligence — continuing in employment after promise to repair defect.

2. An experienced railway engineer injured through the explosion of a tube in a water gauge on a locomotive boiler cannot be said as a matter of law to be chargeable with contributory negligence because he continued to run his engine with knowledge that there was no guard glass for such tube after he had reported the defect and was given a promise to repair.

[For other cases, see Master and Servant, II. c, 2, in Digest Sup. Ct. 1908.]

Proximate cause — personal injury — explosion of water gauge.

3. A railway engineer's conduct in using a water gauge without a guard glass when he could have cut the gauge off and used the gauge cocks instead cannot be said to have been the proximate cause of an injury resulting from the bursting of the water tube, where there is evidence to show that the gauge cocks themselves are not a safe instrumentality because of their liability to become clogged.

[For other cases, see Proximate Cause, in Digest Sup. Ct. 1908.]

[No. 541.]

Argued November 30 and December 1, 1915.
Decided January 10, 1916.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which, on a third appeal, affirmed a judgment of the Superior Court of Wake County, in that state, in favor of plaintiff in an action brought under the Federal employers' liability act. Affirmed.

See same case below on first appeal, 157 N. C. 146, 72 S. E. 958; on second appeal, 162 N. C. 424, 78 S. E. 494; on third appeal, 169 N. C. 108, 85 S. E. 218.

The facts are stated in the opinion.

Mr. **Murray Allen** argued the cause and filed a brief for plaintiff in error:

The sufficiency of evidence to establish a cause of action or a defense under the Federal employers' liability act is to be determined according to the rule of the Federal courts, and not according to the practice of the state courts.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

It is the duty of the trial judge to withdraw a case from the jury where the evidence is undisputed, or is so conclusive that the court, in the exercise of its discretion, must set aside a verdict returned in opposition to it.

Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

This rule has been applied by this court in an action involving the defense of assumption of risk, where it appeared from all of the evidence that plaintiff assumed the risk.

Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136.

It would be an idle proceeding to submit the evidence to the jury when they could justly find only one way.

North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 31 L. ed. 287, 288, 8 Sup. Ct. Rep. 266.

NOTE.—On the rights of a servant who continues work upon the faith of his master's promise to remove a specific cause of danger—see note to Illinois Steel Co. v. Mann, 40 L.R.A. 781.

On the effect of promise to repair, where danger is great and imminent—see note to Comer v. Meyer, 29 L.R.A.(N.S.) 597.

On the constitutionality, application, and effect of the Federal employers' liability act —see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

As to master's duty to furnish suitable and safe machinery and appliances, and liability to servant for their being insufficient or out of repair—see note to Richmond & D. R. Co. v. Elliott, 37 L. ed. U. S. 728.

Upon all the evidence in this case, plaintiff assumed the risk of injury from the defective water glass as matter of law.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 567, 121 Fed. 451; Indianapolis & St. L. R. Co. v. Watson, 114 Ind. 20, 5 Am. St. Rep. 578, 14 N. E. 721, 15 N. E. 824; Attleton v. Bibb Mfg. Co. 5 Ga. App. 779, 63 S. E. 918; Alteriac v. West Pratt Coal Co. 161 Ala. 435, 49 So. 867; Erdman v. Illinois Steel Co. 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993; McAndrews v. Montana Union R. Co. 15 Mont. 290, 39 Pac. 85; Albrecht v. Chicago & N. W. R. Co. 108 Wis. 530, 53 L.R.A. 653, 84 N. W. 882; St. Louis, A. & T. R. Co. v. Kelton, 55 Ark. 483, 18 S. W. 933; Western Coal & Min. Co. v. Garner, 87 Ark. 190, 22 L.R.A.(N.S.) 1183, 112 S. W. 392; Levesque v. Janson, 165 Mass. 16, 42 N. E. 335; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; Holmes, Common Law, p. 124; Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248, 16 Am. Neg. Rep. 122; Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612.

When the undisputed evidence leads to but one conclusion, assumption of risk is a question of law.

26 Cyc. 1479; Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136; Kyner v. Portland Gold Min. Co. 106 C. C. A. 245, 184 Fed. 46; St. Louis & S. F. R. Co. v. Snowden, — Okla. —, 149 Pac. 1083.

Should it be conceded that the fireman submitted to the same risk as the engineer, Horton, this would neither show nor tend to show that the danger was of such character that a man of ordinary prudence would continue to work in its presence in reliance on the promise to repair.

Lindsay v. Hollerbach & M. Contract Co. 29 Ky. L. Rep. 68, 4 L.R.A.(N.S.) 830, 92 S. W. 294; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; Smith v. Beaudry, 175 Mass. 286, 56 N. E. 596.

The promise to repair must be the inducing motive for remaining in the employment.

Labatt, Mast. & S. p. 1184.

The burden of proof in actions under the Federal employers' liability act is a matter of substance in which the state courts cannot follow their own practice and fix their own rules.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

The existence of the defect and the appreciation of the danger incident thereto being established by plaintiff's evidence, the burden was on plaintiff to satisfy the jury by a preponderance of evidence that he reported the defect and was given a promise of repair.

Malm v. Thelin, 47 Neb. 686, 66 N. W. 650.

The court should have instructed the jury that plaintiff was guilty of contributory negligence as a matter of law.

Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; McCarthy v. Washburn, 42 App. Div. 252, 58 N. Y. Supp. 1125; Hannigan v. Smith, 28 App. Div. 176, 50 N. Y. Supp. 845; 3 Labatt, Mast. & S. p. 3275.

There has been no negligence on the part of the defendant.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044.

Horton's injury resulted from his own disobedience of the defendant's rules, and he has failed to establish any negligent omission of duty on the part of the defendant.

Holland v. Seaboard Air Line R. Co. 143 N. C. 435, 55 S. E. 835; Whitson v. Wrenn, 134 N. C. 86, 46 S. E. 17; Stewart v. Van Deventer Carpet Co. 138 N. C. 60, 50 S. E. 562.

In an action for personal injuries, while defendant has the burden of proof of contributory negligence, plaintiff must establish grounds of defendant's liability; and to hold the master responsible, the servant must show by substantial proof that appliances furnished were defective, and must show knowledge of the defect, or some omission in regard thereto.

Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627.

The master must be fixed with notice of a defect in his appliances to create liability in favor of an employee who, with knowledge of the defect, has been injured thereby.

Hudson v. Charleston, C. & C. R. Co. 104 N. C. 499, 10 S. E. 669; Blevins v. Erwin Cotton Mills, 150 N. C. 493, 64 S. E. 428; Labatt, Mast. & S. §§ 119 et seq.

Evidence which shows that the servant had knowledge of the defect and appreciated the risk, and that this appreciation was attended by circumstances which make a proper case for the application of the maxim, "Volenti non fit injuria," establishes that the master has been guilty of no breach of duty in exposing the servant to the risk. The application of the maxim, in a proper case, makes necessary a negative response to the issue of negligence.

Thomas v. Quartermaine, L. R. 18 Q. B. Div. 695, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516; Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660; Katalla Co. v. Rones, 108 C. C. A. 132, 186 Fed. 30; Worden v. Gore-Meenan Co. 83 Conn. 642, 78 Atl. 422; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; Thomp. Neg. § 412; Membery v. Great Western R. Co. L. R. 14 App. Cas. 187, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244.

Plaintiff's use of a defective glass, when there was available a safe way to operate the engine, was the proximate cause of his injury.

White, Personal Injuries on Railroads, § 585; Covington v. Smith Furniture Co. 138 N. C. 374, 50 S. E. 761; Dermid v. Southern R. Co. 148 N. C. 183, 61 S. E. 657; H. D. Williams Cooperage Co. v. Headrick, 86 C. C. A. 548, 159 Fed. 683.

The master discharges his duty by exercising due care in respect to providing a reasonably safe place to work.

Hough v. Texas & P. R. Co. 100 U. S. 218, 25 L. ed. 615; Washington & G. R. Co. v. McDade, 135 U. S. 570, 34 L. ed. 241, 10 Sup. Ct. Rep. 1044; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Gardner v. Michigan C. R. Co. 150 U. S. 359, 37 L. ed. 1110, 14 Sup. Ct. Rep. 140; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Powell v. American Sheet & Tin Plate Co. 216 Pa. 618, 65 Atl. 1113; Kyner v. Portland Gold Min. Co. 106 C. C. A. 245, 184 Fed. 43.

An erroneous instruction on the issue of damages, in an action based upon the Federal employers' liability act, is sufficient to sustain a reversal.

Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

A servant must either aver his want of knowledge of the defect which caused the injury, or that, having such knowledge, he informed the master and continued in the employment upon a promise, express or implied, to remedy the defect.

Chicago & O. Coal & Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857; Griffiths v. London & St. K. Docks Co. L. R. 13 Q. B. Div. 259, 53 L. J. Q. B. N. S. 504, 51 L. T. N. S. 533, 33 Week. Rep. 35, 49 J. P. 100.

Evidence tending to show that defective machinery was used under a promise by the master to remove the defect was inadmissible where such promise had not been pleaded.

Malm v. Thelin, 47 Neb. 686, 66 N. W. 650.

Mr. Clyde A. Douglass argued the cause, and, with Mr. William C. Douglass, filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This action, based upon the Federal employers' liability act (35 Stat. at L. 65, chap. 149, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), was under consideration on a former occasion, when a judgment in favor of defendant in error was reversed and the cause remanded for further proceedings. 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. There was a new trial, and the resulting judgment in favor [597] of Horton, the employee, having been affirmed by the supreme court of North Carolina (169 N. C. 108, 85 S. E. 218), the case is brought here again, with numerous assignments of error, of which, however, only a few need be noticed.

Plaintiff was injured while in the employ of defendant in interstate commerce. He was an experienced locomotive engineer, and was so employed when injured. His engine was equipped with a Buckner water gauge, a device attached to the boiler head for the purpose of showing the level of the water in the boiler, and consisting of a brass frame inclosing a glass tube 12 or 14 inches long, and ¾ inch in diameter, the glass being about ⅜ inch thick. The tube was placed vertically, and was connected with the boiler above and below, so that it received water and steam direct from the boiler and under a pressure of 200 pounds. In order to protect the engineer and fireman from injury in case of the bursting of the tube, a thick piece of plain glass, known as a guard glass, should have been in position in slots arranged for the purpose in front of the water tube. Plaintiff took charge of the engine in question on July 27 or 28, 1910, and noticed at that time that the guard glass was missing. He reported

this to a roundhouse foreman, to whom such report should properly be made, and asked for a new guard glass. The foreman replied that he had none in stock, but would send for one, and that plaintiff in the meantime should run the engine without one. He did so for about a week, and until August 4th, when the water tube exploded, and the flying glass struck him in the face, causing the injuries upon which the action was grounded.

The principal insistence of defendant (plaintiff in error) is that, upon all the evidence, plaintiff, as a matter of law, assumed the risk of injury arising from the absence of the guard glass. The rule applicable to the situation was expressed by this court upon the former review of the case, in the following terms (233 U. S. 504): "When the [598] employee does know of the defect [arising from the employer's negligence], and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, or until the particular time specified for its performance, the employee, relying upon the promise, does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

By motions for nonsuit and for dismissal of the action, and by various requests for instructions to the jury, all of which were refused, defendant raised the point that although plaintiff reported the absence of the guard glass to defendant's foreman and received a promise of repair, yet the danger was so imminent that no ordinarily prudent man under the circumstances would have relied upon the promise, and hence plaintiff, as matter of law, assumed the risk of injury.

But we do not think it can be said as matter of law that the danger was so imminent that no ordinarily prudent man under the circumstances would continue in the employment in reliance upon the promise. It was not the function of the guard glass to prevent the bursting of the water tube, but only to limit the effect of such an explosion in case it happened to occur. That there was a constant danger that the tube might explode was abundantly proved, and was admitted by plaintiff. But the tube was designed to withstand the pressure of 200 pounds, and ordinarily did so. It was its proper function to do so. One witness said: "They may last a day, a week, a month, or a year, or it may last an hour, or shorter." The jury [599] might reasonably believe that such a water glass would probably not explode in the ordinary use of it unless it was imperfect or defective in some respect other than the absence of the guard glass, and that, since there was no evidence of this, Horton was justified in assuming that the danger of an explosion was not immediately threatening.

There is a substantial difference in the attitude of the employee towards the known dangers arising out of defects attributable to the employer's negligence, depending upon whether there has or has not been a promise of repair. It was clearly expressed in a well-reasoned opinion by the supreme court of New Jersey (Dowd v. Erie R. Co. 70 N. J. L. 451, 455, 57 Atl. 248, 16 Am. Neg. Rep. 122) thus: "To the rule that the servant assumes the obvious risks of the employment, an exception is made where the master has promised to amend the defect or to make the place safe, and the servant continues the work in reliance upon the promise. . . . The master is exempted from liability in the case of obvious risks for the reason that the servant, by continuing in the employment with knowledge of the danger, evinces a willingness to incur the risk, and upon the principle 'volenti non fit injuria.' But when the servant shows that he relied upon a promise made to him to remedy the defect, he negatives the inference of willingness to incur the risk."

To relieve the employer from responsibility for injuries that may befall the employee while remaining at his work in reliance upon a promise of reparation, there must be something more than knowledge by the employee that danger confronts him, or that it is constant. The danger must be imminent,—immediately threatening,—so as to render it clearly imprudent for him to confront it, even in the line of duty, pending the promise. The danger of the explosion of the water glass, which normally should withstand the pressure to which it was subjected, [600] but which might probably explode at some time near or remote, cannot be said, as matter of law, to have been so imminent as to import an assumption of the risk by Horton notwithstanding the employer's promise to replace the guard glass. It would require a much plainer case than this to justify taking the question from the jury.

It is insisted that the trial court erred in refusing to instruct the jury that plaintiff was guilty of contributory negligence as a matter of law. This, also, is based

upon the ground of the obvious and imminent nature of the danger to plaintiff arising out of the absence of the guard glass. But the reasonable reliance of the employee upon the employer's promise to repair the defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed. The employer's direction or request that the employee remain at work pending performance of the promise has a material bearing upon the employee's duty in the meantime, and therefore upon the question of his negligence, which involves the notion of some fault or breach of duty on his part. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 58 L. ed. 1062, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. Hence, the question of Horton's contributory negligence was at best a matter for the jury to determine.

All the disputable questions of fact were submitted to the jury under instructions that were sufficiently favorable to defendant. The jury were told, in substance, that if they found the absence of the guard glass was known to plaintiff, and he reported the defect and was given a promise to repair, and if he knew and appreciated the danger incident thereto, and the danger was so obvious that a man of ordinary prudence would not have continued to use the water gauge without the guard glass, then the plaintiff assumed the risk. This was unduly favorable to defendant, in that it omitted to state that in order to qualify plaintiff's right to rely upon the [601] promise of reparation the danger must be imminent as well as obvious. But, besides this, we deem it proper to say, in view of the fact that the instruction referred to seems to have been intended to conform to our opinion delivered upon the former writ of error, that we did not then intend to decide whether an employee remaining at work in reliance upon the employer's promise to repair a defective appliance, but where the danger known is so imminent that no ordinarily prudent man under the circumstances would remain at work in reliance upon the promise, should be held to assume the risk, or, rather, to be guilty of contributory negligence. What we said was that the employee, in the situation described, "does *not* assume the risk *unless, at least*, the danger be so imminent," etc. While most courts agree that an employee cannot, without impairing his right to recover from the employer, remain at work in the presence of a known danger so imminent that no reasonably prudent man would confront it, even where the employer has promised reparation, they differ as to whether this is to be placed upon the ground of assumption of risk or of contributory negligence. See Hough v. Texas & P. R. Co. 100 U. S. 213, 224, 225, 25 L. ed. 612, 617, 618; Dowd v. Erie R. Co. 70 N. J. L. 451, 456, 57 Atl. 248, 16 Am. Neg. Rep. 122; Clarke v. Holmes, 7 Hurlst. & N. 937, 945, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405. The distinction, which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal employers' liability act, which in ordinary cases recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages, as was pointed out when the case was here before. Seaboard Air Line R. Co. v. Horton, supra. The disputable point above referred to was not then presented for decision. Nor is it now presented, for upon the last trial the court, in the instruction given to the jury, put the plaintiff (upon the hypothesis of his persisting [602] in the face of an imminent danger, where a man of ordinary prudence would not) in the position of assuming the risk—a position more favorable to defendant (plaintiff in error) than that of contributory negligence.

It is further argued that Horton's own conduct in using the Buckner gauge without the guard glass, when he could have cut this off and used the gauge cocks, said to be an entirely safe instrumentality, was unquestionably the proximate cause of his injury. But there was evidence to show that the gauge cocks themselves were not a safe instrumentality, because of their liability to become clogged. Hence, at the utmost, there was here no more than a question for the jury.

Other points are raised, but they are quite unsubstantial, and require no particular mention.

Judgment affirmed.

NARCISO BASSO, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 602-608.)

Claims — against the United States — jurisdiction — torts.

The court of claims has no jurisdiction under the Tucker act of March 3, 1887 (24 Stat. at L. 505, chap. 359), of a cause of action against the United States based wholly upon the tortious acts of its agents by which the claimant alleges he was de-

prived of rights under the Federal Constitution.

[For other cases, see Claims, 128-131, in Digest Sup. Ct. 1908.]

[No. 142.]

Argued January 6, 1916. Decided January 17, 1916.

APPEAL from the Court of Claims to review a judgment dismissing, for want of jurisdiction, a suit against the United States, based upon the tortious acts of its agents. Affirmed.

See same case below, 49 Ct. Cl. 700.

The facts are stated in the opinion.

Mr. Henry M. Ward argued the cause and filed a brief for appellant:

The jurisdiction of the court of claims over a claim ex delicto, founded upon the Constitution of the United States, is supported by the recent decisions of this court.

Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162; United States v. Emery, B. T. Realty Co. 237 U. S. 28, 59 L. ed. 825, 35 Sup. Ct. Rep. 499; Christie-Street Commission Co. v. United States, 69 C. C. A. 464, 136 Fed. 326; United States v. Finch, 119 C. C. A. 433, 201 Fed. 95, Ann. Cas. 1916A, 319; United States v. Hyams, 76 C. C. A. 523, 146 Fed. 15.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

Appellant's alleged claim is predicated upon an action sounding in tort, and the court of claims has, therefore, no jurisdiction of the same.

Schillinger v. United States, 155 U. S. 163-168, 39 L. ed. 108-110, 15 Sup. Ct. Rep. 85.

Mr. Justice McKenna delivered the opinion of the court:

Appellant is a Spanish subject who resided, at the time his alleged cause of action accrued and at the time his petition was filed in the court of claims, in the island of Porto Rico.

Porto Rico was ceded to the United States by the Treaty of Paris, ratifications of which were exchanged April 11, 1899 [30 Stat. at L. 1754]. The island was occupied by the military forces of the United States prior to January 1, 1899, and February 1, 1899, the President of the United States, by order, promulgated the "Amended Customs Tariff and Regulations for Ports in Porto Rico," which fixed and provided for the collection of duties upon all articles imported into [605] Porto Rico. And duties were collected thereafter in accordance with such tariff and the amendments thereto made from time to time until May 1, 1900.

Certain officers of the Army were designated to act and did act as collectors of customs under such tariff at the several ports of entry in Porto Rico, and enforced such tariff upon merchandise brought into Porto Rico from the United States and from foreign countries.

Under authority of general order No. 88, the general commanding in the island established a provisional court of the United States for the department of Porto Rico.

On or about July 13, 1899, by information filed by the prosecuting officer of the provisional court, appellant was charged before that court with the crime of having imported from the United States into Porto Rico certain merchandise without having made entry of the same in the customhouse, and without having paid duty thereon. He was arraigned, pleaded not guilty, and the case was set for trial.

At the trial he entered a plea that §§ 2865 and 3082 of the Revised Statutes of the United States (Comp. Stat. 1913, §§ 5548, 5785) were without force or effect in Porto Rico, that the latter was part of the United States, and that there was no warrant in law for imposing duties on goods brought from the United States into the island.

The defenses were not allowed, he was found guilty, sentenced to imprisonment, and was imprisoned for twenty-seven days.

He alleged the foregoing facts in his petition, and that he suffered damages thereby in the sum of $10,000, $7,500 general and $2,500 special damages. That he is advised by counsel that the act for which he was accused and condemned did not then constitute a crime; that the said sections of the Revised Statutes of the United States under which the provisional court claimed authority to act were not in force in Porto Rico, and the court was [606] wholly without jurisdiction in the premises, and its sentence was null and void, and that, by reason of such accusation, trial, conviction, sentence, and imprisonment, he was deprived of his liberty without due process of law in violation of the Constitution of the United States.

Judgment was prayed for the sum of $10,000.

The United States filed a general traverse

of the petition, but subsequently moved to dismiss upon the ground that the court had no jurisdiction to consider it, it presenting "an action for damages in a case sounding in tort."

The motion was sustained and judgment entered dismissing the petition for want of jurisdiction. This appeal was then taken.

Appellant concedes that "the cause of action not merely 'sounds in tort,' but is based wholly upon the tortious actions of the agents of the United States." He, however, contends that the court of claims has jurisdiction under the Tucker act over claims ex delicto founded upon the Constitution of the United States. And this, he further contends, is supported by the recent decisions of this court, and relies especially upon Dooley v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

But that case did not overrule Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85, which, counsel says, holds directly contrary to his contention, and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the Schillinger Case. We are not disposed to overrule the case, either directly or by implication. The court found nothing in it antagonistic to the reasoning and conclusion reached in the Dooley Case.

In United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349, the Schillinger Case was treated as subsisting authority, and Mr. Justice Brown, who wrote the opinion in the Dooley Case, in his concurring opinion in the Lynah Case, considered it as correctly declaring the law.

[607] The Dooley Case and cases subsequent to it which are relied upon by appellant concerned the exaction of duties or taxes by the United States or its officers, or property taken by the government for public purposes.[1] In such cases jurisdiction in the court of claims for the recovery of the duties and taxes or for the value of the property taken was declared.

In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted, after judgment upon issues openly framed by the opposing parties, both of fact and the applicable law, whether that law was §§ 2865 and 3082 of the Revised Statutes or the Constitution of the United States (Comp. Stat. 1913, §§ 5548, 5785). But, conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different character from the Dooley Case, as was also the Schillinger Case. The latter case passed upon the jurisdiction of the court of claims in actions founded on tort, and declared the general principle to be, based on a policy imposed by necessity, that governments are not liable "for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties." And it was further said: "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government." Gibbons v. United States, 8 Wall. 269, 275, 19 L. ed. 453, 454; Morgan v. United States, 14 Wall. 531, 534, 20 L. ed. 738, 739.

The Schillinger Case was cited in the New Orleans-Belize Royal Mail & C. A. S. S. Co. v. United States, 239 U. S. 202, ante, 227, 36 Sup. Ct. Rep. 76, in rejection of a contention that the United States was liable for services imposed by their officers outside of a contract [608] with the Royal Mail Company, in the performance of which the vessel owned by the company was damaged.

We repeat, therefore, that the Schillinger Case being subsisting authority, and appellant conceding that, if such be its value, it is controlling, further discussion is unnecessary.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

WILLIAM W. WHITE, Appt.,
v.
UNITED STATES. (No. 153.)

JOHN D. FORD, Appt.,
v.
UNITED STATES. (No. 154.)

(See S. C. Reporter's ed. 608–614.)

Navy — pay of retired officer — active service.

Officers in the Navy transferred to the retired list with an increase in rank are not entitled to pay and allowances of the higher grade during active service after retirement, by virtue of the provision of the act of March 4, 1913 (37 Stat. at L. 891, chap. 148, Comp. Stat. 1913, § 2838), that all naval officers who have been or shall be advanced since March 3, 1899, shall have

[1] United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162; United States v. Emery, B. T. Realty Co. 237 U. S. 28, 59 L. ed. 825, 35 Sup. Ct. Rep. 499.

the pay and allowances of the higher grade from the dates of their commission, since such provision must be read as applying only to advanced officers upon the active list.

[For other cases, see Army and Navy, VI. b, in Digest Sup. Ct. 1908.]

[Nos. 153 and 154.]

Argued January 7, 1916. Decided January 17, 1916.

APPEALS from the Court of Claims to review judgments sustaining demurrers to petitions of retired naval officers for increased pay while in active service. Affirmed.

See same case below, 49 Ct. Cl. 702.

The facts are stated in the opinion.

Mr. Simon Lyon argued the cause, and, with Messrs. Edward S. McCalmont and R. B. H. Lyon, filed a brief for appellant in No. 153:

So long as the language used is unambiguous, a departure from the natural meaning is not justified by any consideration of its consequence or public policy; and it is the plain duty of the court to give it force and effect.

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; Johnson v. Southern P. Co. 196 U. S. 15, 49 L. ed. 368, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

It is fairly and justly presumable that the legislature, which was unrestrained in its authority over the subject, has so shaped the law as, without ambiguity or doubt, to bring within it everything that was meant should be embraced.

Cooley, Taxn. 3d ed. p. 464.

The statute must be held to mean what its language imports; when it is clear and imperative, reasoning ab inconvenienti is of no avail, and there is no room for construction.

Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227; Lewis v. United States, 92 U. S. 621, 23 L. ed. 514; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Construction and interpretation have no function where the terms of the statute are plain and certain, and its meaning clear.

Colorado & N. W. R. Co. v. United States, 209 U. S. 544, 52 L. ed. 919, 28 Sup. Ct. Rep. 510.

The statute is a remedial one and should be liberally interpreted.

Silver v. Ladd, 7 Wall. 219, 19 L. ed. 138; Johnson v. Southern P. Co. supra; Merchants' Nat. Bank v. United States, 42 Ct. Cl. 6; 1 Kent, Com. 465.

In expounding remedial laws, the courts will extend the remedy as far as the words will admit.

Heyden's Case, 3 Coke, 7; Pierce v. Hopper, 1 Strange, 253.

A remedial statute ought not to be construed so as to defeat in part the very purpose of its enactment.

Beley v. Naphtaly, 169 U. S. 353, 42 L. ed. 775, 18 Sup. Ct. Rep. 354; Jones v. New York Guaranty & I. Co. 101 U. S. 626, 25 L. ed. 1034; Twenty Per Cent Cases (United States v. Fitzpatrick) 13 Wall. 575, 20 L. ed. 708; Ross v. Doe, 1 Pet. 667, 7 L. ed. 307.

Although the pendency of one class of claims may have induced the passage of an act of Congress providing for their adjustment, the act may embrace other claims if its terms are sufficiently wide so to do.

United States v. Hvoslef, 237 U. S. 1, 59 L. ed. 813, 35 Sup. Ct. Rep. 459, Ann. Cas. 1916A, 286; Thames & M. M. Ins. Co. v. United States, 237 U. S. 19, 59 L. ed. 821, 35 Sup. Ct. Rep. 496, Ann. Cas. 1915D, 1087.

Where a law is plain and unambiguous, whether expressed in general or limited terms, there is no room left for construction, and a resort to extrinsic facts is not permitted to ascertain its meaning.

Bartlett v. Morris, 9 Port. (Ala.) 266; United States v. Musgrave, 160 Fed. 700; Lake County v. Rollins, 130 U. S. 671, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

Assistant Attorney General Thompson argued the cause, and, with Mr. Richard P. Whiteley, filed a brief for the United States in No. 153.

Mr. Frederick A. Fenning argued the cause, and, with Messrs. Lloyd Odend'hal and Spencer Gordon, filed a brief for appellant in No. 154:

The act of March 4, 1913, should be interpreted according to the usual meaning of its words.

Maillard v. Lawrence, 16 How. 255, 261, 14 L. ed. 927, 930; Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 620, 20 L. ed. 227, 229; United States v. Temple, 105 U. S. 97, 99, 26 L. ed. 967, 968; Knox County v. Morton, 15 C. C. A. 673, 32 U. S. App. 513, 68 Fed. 787; Union Cent. L. Ins. Co. v. Champlin, 54 C. C. A. 208, 116 Fed. 858.

A retired officer is certainly an officer of the Navy.

Franklin v. United States, 29 Ct. Cl. 6; Tyler v. United States, 16 Ct. Cl. 223, 10[illegible]

U. S. 244, 26 L. ed. 985; Fowler v. United States, 31 Ct. Cl. 35.

A grade is a step in a series, a rank (Schuetze v. United States, 24 Ct. Cl. 229), such as from commander to captain, to admiral. It has nothing to do with the question of active or retired service.

Assistant Attorney General Thompson argued the cause and filed a brief for the United States in No. 154.

Mr. Justice Holmes delivered the opinion of the court:

These claims raise the same question. The claimant White was a lieutenant commander in the Navy. On June 30, 1905, he was transferred to the retired list, on his own request, with the rank of commander (act of March 3, 1899, chap. 413, §§ 8, 9, 30 Stat. at L. 1004, Comp. Stat. 1913, §§ 2636, 2637), and on April 13, 1911, was commissioned a commander on the retired list from June 30, 1905. (Act of March 4, 1911, chap. 266, 36 Stat. at L. 1354, Comp. Stat. 1913, § 2068.) He was continued in active service from June 30, 1905, until October 31, 1911. (Act of June 7, 1900, chap. 859, 31 Stat. at L. 703.) The claimant Ford was a captain, was retired on May 19, 1902, under Rev. Stat. § 1444, Comp. Stat. 1913, § 2622, with the rank of rear admiral (act of March 3, 1899, chap. 413, § 11, 30 Stat. at L. 1007, Comp. Stat. 1913, § 2641), and was commissioned rear admiral on the retired list from May 19, 1902. (Act of March 4, 1911, chap. 266, 36 Stat. at L. 1354, Comp. Stat. 1913, § 2068.) He was continued on active duty from May 19, 1902, until December 25, 1907. (Act of June 7, 1900, chap. 859, 31 Stat. at L. 703.) As provided by the last-mentioned statute, both of these officers received the pay and allowances of the rank they held before they were retired. By the naval appropriation act of March 4, 1913, chap. 148, 37 Stat. at L. 891, 892, Comp. Stat. 1913, § 2838, it was enacted that "all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher [612] grade or rank from the dates stated in their commissions." The claims are made under this act for the difference between the pay and allowances received during active service after retirement and that of the higher grade to which the claimants respectively had been advanced. Demurrers to the petitions were sustained by the court of claims.

The claimants, although pressing the universal application of the statute according to the literal meaning of its words, still tacitly concede that we must go behind the letter of the law. For while the statute says that all officers who have been advanced since the date mentioned shall have the pay of the higher grade, and says nothing about active service, the claims are confined to the periods of active service named, which implies a concession that the advance in grade by itself was not enough. And this concession was required by the fact that the statute grants allowances as well as pay, and that allowances are an incident of active duty alone.

As it stands admitted that the statute is of more limited scope than is apparent on its face, to an untrained reader, at least, the question is whether it is to be read as applying to all advanced officers who have been on active service, or only to all such officers upon the active list. We are of opinion that the latter is the true meaning, and that the decision of the court of claims was right. The general rule of the statutes is found in Rev. Stat. § 1462, Comp. Stat. 1913, § 2652. "No officer on the retired list of the Navy shall be employed on active duty except in time of war." An exception, limited to twelve years from its passage, was made by the act of June 7, 1900, allowing officers on the retired list, in the discretion of the Secretary of the Navy, to be ordered to such duty as they might be able to perform, and giving them while so employed the pay and allowances of the grade on the active list from which they were retired. When the act of 1913, under which these claims are made, [613] was passed, this exception had expired,—all services under it had been rendered and paid for, and, with other exceptions not affecting this case, the general rule was in force. It is more rational to suppose that Congress was dealing with present affairs than that it was reopening transactions that might be ten years old, and that must have been finished, at the latest, nearly a year before. And this construction is confirmed when we notice that the increased pay and allowances are given from the date of the commission; that is, if the claimants are right, from the date of their retirement, without regard to the time when their active duty began. In these cases it was continuous with their service before retirement. But it might have begun years afterwards, and yet, by the statute, the date of the increase in pay and the allowances would have been the same.

The conclusion to which the statutes directly concerned would lead us is confirmed still further by consideration of the act of August 22, 1912, chap. 335, 37 Stat. at L. 328, 329. This act provided that thereafter any naval officer on the retired list might,

with his consent, in the discretion of the Secretary of the Navy, be ordered to such duties as he might be able to perform, and while so employed in time of peace should receive the pay and allowances of an officer on the active list of the same rank, provided that he was not to receive more than the pay and allowances of a lieutenant, senior grade, on the active list of like length of service, and, if his retired pay exceeded that, then he was to receive his retired pay only. The clash that there would be between the policy of this act and that of 1913, if construed as the claimants would have it construed, is plain.

Finally, it may be worth noticing that the reports that introduced the enactment pointed out as the evil to be remedied that, under the act of June 22, 1874, chap. 392, 18 Stat. at L. 191, Comp. Stat. 1913, § 2837, the only officers who did not receive the pay of [614] their grade from the time they took rank as stated in their commissions were the youngest officers, who were appointed to the lowest grade, and therefore not promoted to fill a vacancy, as contemplated in the act of 1874. House Rep. No. 1089. 62d Cong. 2d Sess. Senate Rep. No. 1217. 62d Cong. 3d Sess.

Judgments affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

NORTHERN PACIFIC RAILWAY COMPANY, Petitioner,
v.
MARY A. MEESE et al.

(See S. C. Reporter's ed. 614–620.)

Federal courts — following state decisions — construction of workmen's compensation act.

1. The Federal courts must accept the conclusion of the highest state court that the Washington workmen's compensation act (Wash. Laws 1911, chap. 74) took away any existing right under Rem. & Bal. Code, §§ 183, 194, to maintain an action for the wrongful death of an employee, not only as against the employer, but as against any third person by whose negligence the death may have been caused, where the employee sustained the fatal injury while engaged about his ordinary duties at his employer's plant.

[For other cases, see Courts, VII. c, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — workmen's compensation act — taking away remedy against third person.

2. The equal protection of the laws is not denied by construing the Washington workmen's compensation act (Wash. Laws 1911, chap. 74), as taking away any existing right, under Rem. & Bal. Code, §§ 183, 194, to maintain an action for the wrongful death of an employee, not only as against the employer, but as against any third person by whose negligence the death may have been caused, where the employee sustained the fatal injury while engaged about his ordinary duties at his employer's plant.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 133.]

Argued and submitted December 13, 1915. Decided January 17, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which reversed, with directions to overrule a demurrer to the complaint, a judgment of the District Court for the Western District of Washington, dismissing a complaint in an action for death. Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

See same case below, 127 C. C. A. 622, 211 Fed. 254, 4 N. C. C. A. 819.

The facts are stated in the opinion.

Mr. Charles W. Bunn argued the cause and filed a brief for petitioner.

Mr. Govnor Teats submitted the cause for respondents. Messrs. Leo Teats and Ralph Teats were on the brief.

Mr. Justice McReynolds delivered the opinion of the court:

Benjamin Meese, an employee of the Seattle Brewing & Malting Company, was fatally injured on April 12, 1913, while engaged about his ordinary duties at its plant in Seattle. Alleging that his death resulted from the negligence of the petitioner railway company, his wife and children brought this action for damages in the district court

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NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

On workmen's compensation acts, generally—see note to Milwaukee v. Miller, L.R.A.1916A, 23.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

of the United States. They relied upon the following sections, Remington & Ballinger's Annotated Codes and Statutes of Washington:

"Section 183. . . . When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death."

"Section 194. No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, . . .; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children. . . ."

The railway company demurred, specifying as one of the grounds therefor: "That there is no authority in law under which the plaintiffs' action can be maintained as against this answering defendant, it appearing from the complaint that Benjamin Meese, on account of whose wrongful death this action was brought, sustained the injuries [618] of which complaint is made, at the place of work and plant of his employer, and that plaintiffs' claim comes within the terms of chapter 74 of the Session Laws of the state of Washington for 1911, being an act relating to compensation of injured workmen," approved March 14, 1911.

By the act referred to the legislature of Washington specifically repealed certain sections of Remington & Ballinger's Code, not including §§ 183 and 194; established a comprehensive plan for the relief of workmen injured in extrahazardous work, and their families and dependents, regardless of the question of fault; and likewise made provision for raising the necessary funds by enforced contributions from specified employers, both breweries and railroads being included.

The trial court (206 Fed. 222) held that the purpose of the act of March 14, 1911, was not merely to end controversies between employers and employees in respect of injuries to the latter, but to end all suits at law for the injury or death of employees while engaged in certain occupations, no matter by whom injured or killed, with certain exceptions not here important. And by a judgment dated July 11, 1913, the demurrer was accordingly sustained and the complaint dismissed.

This action of the trial court was reversed by the circuit court of appeals (127 C. C. A. 622, 211 Fed. 254, 4 N. C. C. A. 819), the latter being of opinion that the act in question did not, and was not intended to, deprive complainants of their right to proceed under §§ 183 and 194 of the Code, since deceased was not its employee when the accident occurred. Counsel for the railway called especial attention to Peet v. Mills, 76 Wash. 437, L.R.A.1916A, 358, 136 Pac. 685, Ann. Cas. 1915D, 154, 4 N. C. C. A. 786, decided November 28, 1913, and insisted that the conclusions there announced were in accord with the opinion and judgment of the district court then under review; but the circuit court of appeals rejected this view, saying: "We are unable to agree [619] with counsel that the supreme court of the state of Washington in that case reached a conclusion different from that reached by us in the present case."

The error now assigned and relied on is: "That the circuit court of appeals should have followed Peet v. Mills, and have affirmed the judgment of the district court."

It is settled doctrine that Federal courts must accept the construction of a state statute deliberately adopted by its highest court. Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967; Fairfield v. Gallatin County, 100 U. S. 47, 52, 25 L. ed. 544, 546. The supreme court of Washington in Peet v. Mills construed the statute in question, and we think its opinion plainly supports the holding of the district court and is in direct opposition to the conclusion reached by the circuit court of appeals. The following excerpts from the opinion will suffice to indicate its import:

"By this appeal, we are again called upon to review the workmen's compensation act of 1911 (Laws 1911, chap. 74, p. 345, 3 Rem. & Bal. Code, §§ 6604–1 et seq.), under appellant's contention that the act is applicable only where recovery is sought upon the ground of negligence of the employer. . . .

". . . The conclusion is evident that, in the enactment of this new law, the legislature declared it to be the policy of this state that every hazardous industry within the purview of the act should bear the burden arising out of injuries to its employees; and that it was the further policy of the state to do away with the recognized evils attaching to the remedies under existing forms of law and to substitute a new remedy that should be ample, full, and complete, reaching every injury sustained by any workman while employed in any such industry, regardless of the cause of the injury or the negligence to which it might be attributed. We can conceive of no language the legislature might have employed that would make its purpose and intent more ascertainable than that made use of in the 1st section of the act.

To say with [620] appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law,—that the industry itself was the primal cause of the injury, and, as such, should be made to bear its burdens. . . . That in so doing the legislative mind was intent upon the abolishment of all causes of action that may have theretofore existed, irrespective of the persons in favor of whom or against whom such right might have existed, is equally clear from the language of § 5 of the act, containing a schedule of awards, and providing that each workman injured in the course of his employment should receive certain compensation, and 'such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever.' . . . For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupation was intended to be exclusive of every other remedy, and that all causes of action theretofore existing, except as they are saved by the provisos of the act, are done away with."

Respondents' suggestion that the construction of the act adopted by the trial court would cause it to conflict with the equal protection clause of the 14th Amendment is without merit. They have raised no other question involving application of the Federal Constitution.

The judgment of the Circuit Court of Appeals must be reversed and the action of the District Court affirmed.

And it is so ordered.

Mr. Justice McKenna is of opinion that the statute was properly construed by the circuit court of appeals, and that its conclusions do not conflict with the opinion of the state supreme court. He therefore dissents.

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[621] GEORGE D. ROGERS, Frank E. Crandall, et al., Appts.,

v.

COUNTY OF HENNEPIN, Henry C. Hanke, as Its County Treasurer and Individually, and Al P. Erickson, as County Auditor and Individually.

(See S. C. Reporter's ed. 621, 622.)

Courts — amount in controversy — uniting claims.

Members of a chamber of commerce cannot unite the amounts for which they are individually assessed on account of such membership in order to make up the amount necessary to sustain the jurisdiction of a Federal district court of a suit to prevent the collection of such taxes as illegal.

[For other cases, see Courts, 908–911, in Digest Sup. Ct. 1908.]

[No. 411.]

Argued December 6, 1915. Decided January 17, 1916.

APPEAL from the District Court of the United States for the District of Minnesota to review a decree which dismissed the bill in a suit to enjoin the collection of taxes. Affirmed.

The facts are stated in the opinion.

Mr. H. V. Mercer argued the cause and filed a brief for appellants:

The district court improperly decided the question of the amount in controversy.

Ex parte Baltimore & O. R. Co. 106 U. S. 5, 27 L. ed. 78, 1 Sup. Ct. Rep. 35; Troy Bank v. G. A. Whitehead & Co. 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9; Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; Smithers v. Smith, 204 U. S. 633, 51 L. ed. 656, 27 Sup. Ct. Rep. 297; Central of Georgia R. Co. v. Wright, 207 U. S. 134, 52 L. ed. 139, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463.

Dismissal should not be made for want of jurisdiction except in case of legal certainty.

Ralston Steel Car Co. v. National Dump Car Co. 222 Fed. 590; Boyd v. New York & H. R. Co. 220 Fed. 174; Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Put-in-Bay Waterworks, Light & R. Co. v. Ryan, 181 U. S. 409, 45 L. ed. 927, 21 Sup. Ct. Rep. 709; Kearny County v. Vandriss, 53 C. C. A. 192, 115 Fed. 866.

The general allegation of amount is sufficient.

Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217–227, 52 L. ed. 1031–1037, 28 Sup. Ct. Rep. 638; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350–362, 59 L. ed. 265–271, 35 Sup. Ct. Rep. 99; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

The plaintiffs are not bound to sit idle year after year, because the damage, taken separately each year, is not up to the juris-

dictional amount. Federal courts do not allow wrongful confiscation by degrees.

Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 28; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Scott v. Donald, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; Ex parte Young, 209 U. S. 146, 52 L. ed. 723, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Berryman v. Whitman College, 222 U. S. 334, 56 L. ed. 225, 32 Sup. Ct. Rep. 147; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722.

Regardless of whether one or many of the members are plaintiffs, the decision would dispose of the whole question as to all and make it res judicata.

McIntosh v. Pittsburg, 112 Fed. 705; Smith v. Swormstedt, 16 How. 302, 14 L. ed. 942; Illinois C. R. Co. v. Caffrey, 128 Fed. 770; Lyman v. Faris, 53 Iowa, 498, 5 N. W. 621; Sauls v. Freeman, 24 Fla. 222, 12 Am. St. Rep. 190, 4 So. 525; Ashton v. Rochester, 133 N. Y. 193, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Fitch v. Stanton Twp. 111 C. C. A. 210, 190 Fed. 310; Hickman v. Fletcher, 115 C. C. A. 595, 195 Fed. 907.

Where the controlling object of the suit is, as here, something common to all, and indivisible, the amounts may be aggregated, although each interest, in so far as divisible, is insufficient in amount and divisible as to all others.

Troy Bank v. G. A. Whitehead & Co. 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9; Shields v. Thomas, 17 How. 3, 15 L. ed. 93; Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; Davies v. Corbin, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; Shields v. Thomas, 17 How. 3, 15 L. ed. 93; Overby v. Gordon, 177 U. S. 214, 219, 44 L. ed. 741, 743, 20 Sup. Ct. Rep. 603; Berryman v. Whitman College, 222 U. S. 334, 56 L. ed. 225, 32 Sup. Ct. Rep. 147.

Members of this sort of association have interwoven and common interests unknown to ordinary stockholders. Even ordinary stockholders would be indispensable in such case, and the members here are clearly indispensable. Even though omitted in name, their rights are indispensably controlled.

Williams v. Bankhead, 19 Wall. 563, 22 L. ed. 184; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610; McAndrews v. Chicago, L. S. & E. R. Co. 89 C. C. A. 546, 162 Fed. 856; Cooper v. Reynolds, 10 Wall. 308, 315, 19 L. ed. 931, 932; Wisconsin v. Torinus, 28 Minn. 175, 9 N. W. 725; 30 Cyc. 115; Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308; 1 Street, Fed. Eq. Pr. §§ 426, 507, pp. 260, 311; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244.

It was good practice to sue in the name of three members, representing themselves and others similarly situated.

Platt v. Lecocq, 15 L.R.A.(N.S.) 558, 85 C. C. A. 621, 158 Fed. 723; Penny v. Central Coal & Coke Co. 71 C. C. A. 135, 138 Fed. 769; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Bedford v. Ellis [1901] A. C. 8, 70 L. J. Ch. N. S. 102, 83 L. T. N. S. 686, 17 Times L. R. 139; Smith v. Swormstedt, 16 How. 288, 14 L. ed. 942; Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; Watson v. National Life & T. Co. 88 C. C. A. 380, 162 Fed. 7; Evans v. Chamber of Commerce, 86 Minn. 453, 91 N. W. 8.

A contention, here made in good faith, is that the rights of these parties are joint and inseparable for the purposes of this case; this contention alone involves more than the jurisdictional amount; it must be decided,—that alone is sufficient.

Smithers v. Smith, 204 U. S. 633, 51 L. ed. 656, 27 Sup. Ct. Rep. 297; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 561, 41 L. ed. 1114, 1115, 17 Sup. Ct. Rep. 653; Southern P. R. Co. v. California, 118 U. S. 109, 30 L. ed. 103, 6 Sup. Ct. Rep. 993; St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co. 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2; Green County v. Thomas, 211 U. S. 598, 53 L. ed. 343, 29 Sup. Ct. Rep. 168.

Mr. Lyndon A. Smith, Attorney General of Minnesota, and Mr. William J. Stevenson argued the cause, and, with Mr. John M. Rees, filed a brief for appellees:

Each member in the chamber of commerce is assessed individually for his personal property taxes. The assessment is against the person, and not against the property. The person is taxed on account of his ownership of the property, and the value of the property determines the amount of the tax, but the liability is purely personal; consequently the proceedings for the collection of delinquent personal property taxes are in personam.

Clarke v. Stearns County, 47 Minn. 552, 50 N. W. 615; State v. Red River Valley Elevator Co. 69 Minn. 131, 72 N. W. 60; Laird, N. Co. v. Pine County, 72 Minn. 409, 75 N. W. 723; State ex rel. Vossen v. Eber-

hard, 90 Minn. 120, 95 N. W. 1115; Du Page County v. Jenks, 65 Ill. 281.

The claims of plaintiffs cannot be aggregated to make up the jurisdictional amount.

Sioux Falls Nat. Bank v. Swenson, 48 Fed. 621; Smithson v. Hubbell, 81 Fed. 594; Whelas v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, affirming 96 Fed. 865; Russell v. Stansell, 105 U. S. 303, 26 L. ed. 989; Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Henderson v. Wadsworth, 115 U. S. 264, 29 L. ed. 377, 6 Sup. Ct. Rep. 140; Farmers' Loan & T. Co. v. Waterman, 106 U. S. 265, 27 L. ed. 115, 1 Sup. Ct. Rep. 131; Adams v. Crittenden, 106 U. S. 576, 27 L. ed. 99, 1 Sup. Ct. Rep. 92; Clay v. Field, 138 U. S. 479, 34 L. ed. 1049, 11 Sup. Ct. Rep. 419; Gibson v. Shufeldt, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; Davis v. Schwartz, 155 U. S. 647, 39 L. ed. 296, 15 Sup. Ct. Rep. 237; Hagge v. Kansas City Southern R. Co. 104 Fed. 393.

The effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute.

Holt v. Indiana Mfg. Co. 176 U. S. 68–72, 44 L. ed. 374–376, 20 Sup. Ct. Rep. 272; New England Mortg. Secur. Co. v. Gay, 145 U. S. 123, 36 L. ed. 646, 12 Sup. Ct. Rep. 815; Clay Center v. Farmers' Loan & T. Co. 145 U. S. 224, 36 L. ed. 685, 12 Sup. Ct. Rep. 817; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

Mr. Justice McReynolds delivered the opinion of the court:

Three complainants, claiming to represent themselves and others like situated (numbering altogether 550), instituted this proceeding in equity against Hennepin county, Minnesota, and certain of its officers, in the district court of the United States, seeking an injunction to prevent collection of a tax under $40 assessed against each of them, for the year 1913, on account of his membership in the Minneapolis Chamber of Commerce. [622] Defendants challenged the court's power to entertain the cause upon the ground that the amount in controversy as to each complainant is the sum charged against him, and demands against all cannot be aggregated in order to confer jurisdiction. The district court sustained this objection upon authority of Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, and dismissed the bill. It committed no error in so doing, and its judgment is affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[625] GEORGE D. LANCASTER et al., Plaintiffs in error, v. JAMES W. THACKER et al. [No. 530.]

Error to state court—frivolous Federal question—validity of state local option law.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Scott County, in that state, adjudging valid a local option election.

See same case below, 164 Ky. 177, 175 S. W. 366.

Messrs. Bynum E. Hinton and J. H. Hazelrigg for plaintiffs in error.

Mr. T. L. Edelen for defendants in error.

October 25, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133; (2) Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

WILLIAM WALLBRECHT, SR., et al., Plaintiffs in Error, v. E. N. INGRAM et al. [No. 549.]

Error to state court—frivolous Federal question—validity of state prohibitory law.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Bell County, in that state, adjudging valid a local option election.

See same case below, 164 Ky. 463, 175 S. W. 1022.

Messrs. James H. Hazelrigg and Lawrence Maxwell for plaintiffs in error.

Mr. T. L. Edelen for defendants in error.

October 25, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14.

LONG BELL LUMBER CO., Appellant, v. WALTER MOSES. [No. 18.]

Appeal—final judgment.

Appeal from the United States Circuit [626] Court of Appeals for the Fifth Circuit to review a decree which reversed, with instructions to sustain the demurrer to the bill, a decree of the Circuit Court of the United States for the Western District of Louisiana in favor of complainant in a suit to establish title to timber, and enjoin interference with the cutting of such timber.

See same case below, 124 C. C. A. 185, 206 Fed. 51.

Mr. William R. Thurmond for appellant.

Mr. Elijah Robinson for appellee.

October 25, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of United States v. Krall, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712; Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 105; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392.

FIRST NATIONAL BANK OF BELL FOURCHE, S. DAK., Plaintiff in Error, v. ADOLPH O. EBERHART et al [No. 155.]

Error to district court—jurisdiction—prior appeal to district court of appeals.

In Error to the District Court of the United States for the District of Minnesota to review a judgment entered pursuant to the mandate of the Circuit Court of Appeals for the Eighth Circuit, which, revers-

ing the judgment below, remanded the same for a new trial.

Messrs. Norman T. Mason and James A. George for plaintiffs in error.

Mr. Harrison L. Schmitt for defendants in error.

October 25, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Aspen Min. & Smelting Co. v. Billings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4; Brown v. Alton Water Co. 222 U. S. 325, 56 L. ed. 221, 32 Sup. Ct. Rep. 156; Union Trust Co. v. Westhus, 228 U. S. 519, 57 L. ed. 947, 33 Sup. Ct. Rep. 593; Shapiro v. United States, 235 U. S. 412, 59 L. ed. 291, 35 Sup. Ct. Rep. 122.

James Duval et al., Plaintiff in Error, v. State of Louisiana. [No. 223.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a conviction of murder in the District Court for the Parish of Acadia, in that state.

See same case below, 135 La. 710, L.R.A. —, —, 65 So. 904.

Messrs Edward N. Pugh and [627] Philip S. Pugh, for plaintiffs in error.

Messrs. R. G. Pleasant and Daniel Wendling for defendant in error.

October 25, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14; (2) Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Howard v. Kentucky, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189.

John R. Greenlees, Plaintiff in Error, v. Fred L. Morris. [No. 36.]

Indian allotments—restriction on alienation.

In Error to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Douglas County, in that state, in favor of plaintiff upon a breach of warranty as to title to an Indian allotment.

See same case below, 90 Kan. 472, 135 Pac. 569.

Mr. C. A. Magaw for plaintiff in error.

Mr. Charles Blood Smith for defendant in error.

November 1, 1915. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings upon the authority of Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, 32 Sup. Ct. Rep. 494; Adkins v. Arnold, 235 U. S. 417, 59 L. ed. 294, 35 Sup. Ct. Rep. 118; Skelton v. Dill, 235 U. S. 206, 59 L. ed. 198, 35 Sup. Ct. Rep. 60.

Peterborough Railroad, Appellant, v. Boston & Maine Railroad et al. [No. 29.]

Appeal—from district court — Federal question.

Appeal from the District Court of the United States for the District of New Hampshire to review a decree which refused to enforce provisions for free transportation, contained in a railway lease.

Mr. Henry A. Cutter for appellant.

Messrs. Edgar J. Rich and Archibald R. Tisdale for appellees.

November 1, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Carey v. Houston & T. C. R. Co. 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63; Cornell v. Green, 163 U. S. 75, 41 L. ed. 76, 16 Sup. Ct. Rep. 969; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; Childers v. McClaughry, 216 U. S. 139, 54 L. ed. 420, 30 Sup. Ct. Rep. 370.

Charles P. Bowditch et al., Plaintiffs in Error, v. Jackson Company et al. [No. 20.]

Error to state court—Federal question.

In Error to the Superior Court of the State of New Hampshire to review a decree dismissing the bill in a suit to enjoin a sale of the assets of a corporation, entered pursuant to the opinion of the New Hampshire Supreme Court on a case reserved.

See same case below, in New Hampshire Supreme Court, 76 N. H. 351, L.R.A.—, —, 82 Atl. 1014, Ann. Cas. 1913A, 366.

Mr. Burton E. Eames for plaintiffs in error.

Mr. Frank S. Streeter for defendants in error.

November 1, 1915. [628] *Per Curiam:* Dismissed for want of jurisdiction upon the authority of F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Mallers v. Commercial Loan & T. Co. 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21.

GARDINER INVESTMENT COMPANY et al., Appellants, v. JACKSON COMPANY et al. [No. 455.]

Appeal—from circuit court of appeals—Federal question.

Appeal from the United States Circuit Court of Appeals for the First Circuit to review a decree which, reversing a decree of the District Court of the United States for the District of New Hampshire, directed the dismissal upon specified terms of the bill in a suit to enjoin the sale of the assets of a corporation.

See same case below, 133 C. C. A. 266, 217 Fed. 350.

Mr. Burton E. Eames for appellants.

Mr. Frank S. Streeter for appellees.

November 1, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; St. Anthony's Church v. Pennsylvania R. Co. 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729.

M. J. BRAY, Trustee, etc., et al., Appellants, v. UNITED STATES FIDELITY & GUARANTY COMPANY. [No. 354]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which dismissed a petition to superintend and revise proceedings in bankruptcy in the District Court for the Northern District of West Virginia, and affirmed a decree of that court, confirming the report of a referee.

See same case below, 133 C. C. A. 669, 218 Fed. 987.

Mr. Philip W. Frey for appellants.

Mr. B. M. Ambler for appellee.

November 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Chapman v. Bowen, 207 U. S. 89, 91, 52 L. ed. 116, 117, 28 Sup. Ct. Rep. 32; J. W. Calnan Co. v. Doherty, 224 U. S. 145, 56 L. ed. 702, 32 Sup. Ct. Rep. 460; Synnott v. Tombstone Consol. Mines Co. 234 U. S. 749, 58 L. ed. 1575, 34 Sup. Ct. Rep. 674. See United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055, 32 Sup. Ct. Rep. 620.

[629] LAURA EICHEL et al., Appellants, v. UNITED STATES FIDELITY & GUARANTY COMPANY [No. 397.]

Appeal—final judgment.

Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a decree which, reversing a decree of the District Court for the Western District of Pennsylvania, directed the entry of a decree in accordance with its opinion.

See same case below, 135 C. C. A. 473, 219 Fed. 803.

Mr. William M. Hall for appellants.

Mr. B. M. Ambler for appellee.

November 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of United States v. Krall, 174 U. S. 385, 43 L. ed. 1017, 19 Sup. Ct. Rep. 712; German Nat. Bank v. Speckert, 181 U. S. 405, 45 L. ed. 926, 21 Sup. Ct. Rep. 688; United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392.

DAVID C. ANDREWS et al., Copartners, etc., Appellants, v. HARRY V. OSBORN, Trustee, etc. [No. 57.]

Appeal—review of facts—concurrent findings.

Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed an order of the District Court for the District of New Jersey, reversing an order of a referee in bankruptcy.

See same case below, 126 C. C. A. 96, 209 Fed. 148.

Mr. David C. Myers for appellants.

Mr. Nathan Bilder for appellee.

November 8, 1915. *Per Curiam:* Judgment affirmed with costs upon the authority of First Nat. Bank v. Littlefield, 226 U. S. 110, 112, 57 L. ed. 145, 146, 33 Sup. Ct. Rep. 69; Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 58 L. ed. 630, 34 Sup. Ct. Rep. 438; Greey v. Dockendorff, 231 U. S. 513, 58 L. ed. 339, 34 Sup. Ct. Rep. 166.

FRANK ZODROW, Plaintiff in Error, v. STATE OF WISCONSIN. [No. 43.]

Error to state court—frivolous Federal question—state limitation of number of saloons.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a conviction in the Municipal Court of Milwaukee County, in that state, for selling intoxicating liquors without a license.

See same case below, 154 Wis. 551, 143 N. W. 693.

Mr. David S. Rose for plaintiff in error.

Messrs. Walter C. Owen and J. E. Messerschmidt for defendant in error.

November 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 143, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parker v. McLain, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632.

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[630] Joe Maboun, Plaintiff in Error, v. State of Louisiana. [No. 45.]

Error to state court—Federal question—how raised and decided—due process of law.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a conviction in the City Court of the City of Shreveport, in that state, for selling liquors without a license.

See same case below, 133 La. 1083, 63 So. 593.

Messrs. A. L. Alexander and Taliaferro Alexander for plaintiff in error.

Mr. Ruffin G. Pleasant for defendant in error.

November 8, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Phœnix R. Co. v. Landis, 231 U. S. 578, 582, 58 L. ed. 377, 381, 34 Sup. Ct. Rep. 179; John v. Paullin, 231 U. S. 583, 58 L. ed. 381, 34 Sup. Ct. Rep. 178; (2) Hallinger v. Davis, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Jordan v. Massachusetts, 225 U. S. 167, 176, 56 L. ed. 1038, 1041, 32 Sup. Ct. Rep. 651; Frank v. Mangum, 237 U. S. 309, 340, 59 L. ed. 969, 985, 35 Sup. Ct. Rep. 582.

Ex parte: In the Matter of Cloyd H. Duncan, Petitioner. [No. ——.]

Motion for Leave to File Petition for Writ of Mandamus.

Mr. Cloyd H. Duncan, petitioner, pro se.

November 15, 1915. Denied.

W. N. Shewalter, Administrator of Robert Shewalter, Deceased, Plaintiff in Error, v. Carolina, Clinchfield, & Ohio Railway. [No. 60.]

Death—action under employers' liability act—survival—action by father—pecuniary loss.

In Error to the Supreme Court of the State of Tennessee to review a judgment which reversed a judgment of the Circuit Court of Sullivan County, in that state, in favor of plaintiff in an action under the Federal employers' liability act for damages for the death of plaintiff's son.

See same case below, 128 Tenn. 363, L.R.A.1916C, 964, 161 S. W. 1136, Ann. Cas. 1915C, 605.

Mr. Robert [631] Burrow for plaintiff in error.

Mr. J. Norment Powell for defendant in error.

November 15, 1915. *Per Curiam:* Judgment affirmed, with costs, upon the authority of (1) Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Garrett v. Louisville & N. R. Co. 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; St. Louis, I. M. & S. R. Co v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844; (2) Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Jack v. Kansas, 199 U. S. 372, 379, 380, 50 L. ed. 234, 236, 26 Sup. Ct. Rep. 73, 4 Ann. Cas. 689; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U. S. 78, 93, 53 L. ed. 97, 103, 29 Sup. Ct. Rep. 14.

Pennsylvania Railroad Company v. W. F. Jacoby & Company. [No. 139.]

Carriers—duty to furnish cars—damages.

On a Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, bringing up for review a cause pending in that court on writ of error to a judgment of the District Court for the Eastern District of Pennsylvania, enforcing an award of damages made by the Interstate Commerce Commission because of discrimination in distribution of coal cars.

Messrs. Francis I. Gowen and John G. Johnson for petitioner.

Mr. William A. Glasgow, Junior, for respondent.

November 15, 1915. Judgment affirmed, with costs, by a divided court, and cause remanded to the District Court of the United States for the Eastern District of Pennsylvania.

YORK & WHITNEY COMPANY, plaintiff in Error, v. NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY. [No. 62.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Superior Court of Massachusetts to review a judgment entered pursuant to the mandate of the Massachusetts Supreme Judicial Court for the recovery of an unpaid balance of freight charges which, through the carrier's mistake, had not been claimed or collected at the time of the delivery of the shipment.

See same case below, in Supreme Judicial Court of Massachusetts, 215 Mass. 36, 102 N. E. 366.

Mr. Amos L. Taylor for plaintiff in error.

Mr. John L. Hall for defendant in error.

November 29, 1915. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of (1) Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Yazoo & M. Valley R. Co. v. Brewer, 231 U. S. 245, 249, 58 L. ed. 204, 205, 34 Sup. Ct. Rep. 90; Mellon Co. v. McCafferty, this day decided, 239 U. S. 134, ante, 181, 36 Sup. Ct. Rep. 94; (2) Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133. See Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 97, 98, 59 L. ed. 853, 855, L.R.A.1915E, 665, P. U. R.1915C, 300, 35 Sup. Ct. Rep. 494, and cases cited.

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[632] GEORGE M. DIENER et al., Plaintiffs in Error, v. I. M. LANE et al. [No. 689.]

Error to state court—frivolous Federal question—validity of state local option law.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Mason County, in that state, sustaining the validity of a local option election.

See same case below, 165 Ky. 396, 176 S. W. 1157.

Messrs. J. M. Collins and J. H. Hazelrigg for plaintiffs in error.

Mr. E. L. Worthington for defendants in error.

December 6, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of: (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133; (2) Lancaster v. Thacker, 239 U. S. 625, ante, 473, 36 Sup. Ct. Rep. 162; Wallbrecht v. Ingram, 239 U. S. 625, ante, 473, 36 Sup. Ct. Rep. 162; (3) Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14.

HALIFAX TONOPAH MINING COMPANY, Plaintiff in Error, v. JOHN W. LAWSON. [No. 113.]

Constitutional law—freedom to contract—employers' liability—release as defense.

In Error to the Supreme Court of the State of Nevada to review a judgment of the District Court of Nye County, in that state, in favor of plaintiff in a personal-injury action.

See same case below, 39 Nev. 591, 135 Pac. 611, 138 Pac. 261.

Mr. Henry M. Hoyt, 2d, for plaintiff in error.

Mr. E. C. Brandenburg for defendant in error.

December 13, 1915. *Per Curiam:* Judgment affirmed with costs upon the authority of Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 32 Sup. Ct. Rep. 589, 1 N. C. C. A. 892.

WASHINGTON DREDGING & IMPROVEMENT COMPANY, Plaintiff in Error, v. GEORGE KINNEAR and Angie Kinnear, His Wife; John R. Kinnear and Leta Kinnear, His Wife, et al. [No. 115.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Thurston County, in that state, dismissing the amended complaint in a suit to vacate certain judgments affecting the title to tide lands.

See same case below, 63 Wash. 696, 115 Pac. 1135.

Mr. W. F. Hays for plaintiff in error.

Messrs. W. V. Tanner, G. E. De Steiguer, and George B. Cole for defendants in error.

[633] December 13, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Washington Dredging & Improv. Co. v. Washington, 231 U. S. 742, 58 L. ed. 463, 34 Sup. Ct. Rep. 318; Washington Dredging & Improv. Co. v. Washington, 235 U. S. 688, 59 L. ed. 426, 35 Sup. Ct. Rep. 204.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, v. SAMUEL P. McCONNELL. [No. 119.]

Error to state court—decision on non-Federal ground.

In Error to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Moore County, in that state, in favor of plaintiff in a suit to recover damages from the initial carrier of an interstate shipment.

See same case below, 163 N. C. 504, 79 S. E. 974.

Mr. Walter H. Neal for plaintiff in error.

Mr. S. S. Gregory for defendant in error.

December 13, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Wood v. Chesborough, 228 U. S. 672, 677, 57 L. ed. 1018, 1020, 33 Sup. Ct. Rep. 706; New Orleans & N. E. R. Co. v. National Rice Mill. Co. 234 U. S. 80, 86, 58 L. ed. 1223, 1226, 34 Sup. Ct. Rep. 726; Mellon Co. v. McCafferty, 239 U. S. 134, ante, 181, 36 Sup. Ct. Rep. 94.

CHARLES H. FOUTS, Plaintiff in Error, v. BALTIMORE & OHIO RAILROAD COMPANY. [No. 307.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Ohio to review a judgment which, reversing a judgment of the Circuit Court of Mahoning County, in that state, ordered judgment for defendant in a personal-injury action.

See same case below, 88 Ohio St. 306, 104 N. E. 544, Ann. Cas. 1915A, 1256.

Mr. David F. Anderson for plaintiff in error.

Messrs. George F. Arrel, James P. Wilson, and Union C. De Ford for defendant in error.

December 13, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

DIRECTOR OF PRISONS, Plaintiff in Error and Appellant, v. COURT OF FIRST INSTANCE [634] OF THE PROVINCE OF CAVITE, TENTH JUDICIAL DISTRICT. [No. 452.]

Appeal—moot case.

In Error to, and Appeal from, the Supreme Court of the Philippine Islands, to review a judgment sustaining the jurisdiction of the Court of First Instance of the Province of Cavite to grant a stay of execution to convicts under sentence of death which has since been executed.

Messrs. S. T. Ansell and C. J. Gerkin for plaintiff in error and appellant.

Mr. C. W. O'Brien for defendant in error and appellee.

December 13, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Lewis v. United States, 216 U. S. 611, 54 L. ed. 637, 30 Sup. Ct. Rep. 438; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Stearns v. Wood, 236 U. S. 75, 59 L. ed. 475, 35 Sup. Ct. Rep. 229.

SADIE A. STEAD, Executrix, etc., et al., Appellants, v. ISABELLA M. CURTISS et al. [No. 132.]

Appeal—from circuit court of appeals—jurisdiction.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California, sustaining demurrers to and dismissing the bill in a suit to cancel certain deeds and vacate the probate of a will.

See same case below, 112 C. C. A. 463, 191 Fed. 529, on rehearing, 123 C. C. A. 507, 205 Fed. 439.

Mr. Horace W. Philbrook for appellants.

Mr. Garret W. McEnerney for appellees.

December 20, 1915. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of: (1) Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 235, 236, 51 L. ed. 779, 783, 784, 27 Sup. Ct. Rep. 476; (2) Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Hull v. Burr, 234 U. S. 712, 720, 58 L. ed. 1557, 1561, 34 Sup. Ct. Rep. 892; G. & C. Merriam Co. v. Syndicate Pub. Co. 237 U. S. 618, 621, 59 L. ed. 1148, 1149, 35 Sup. Ct. Rep. 708.

MORTIMER M. ELKAN, Plaintiff in Error, v. STATE OF MARYLAND. [No 144.]

Constitutional law—equal protection of the laws—state regulation of pay and hours of labor on public works.

In Error to the Court of Appeals of the State of Maryland to review a judgment which affirmed a conviction in the Criminal

Court of Baltimore City, of violating the law regulating the pay and hours of labor on public works.

See same case below, 122 Md. 642, 90 Atl. 183.

Mr. Joseph S. Goldsmith for plaintiff in error.

Mr. Edgar Allan Poe for defendant in error.

December 20, 1915. *Per Curiam:* Judgment affirmed with costs upon the authority of Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Heim v. McCall, 239 [635] U. S. 175, ante, 206, 36 Sup. Ct. Rep. 78; Crane v. New York, 239 U. S. 195, ante, 218, 36 Sup. Ct. Rep. 85.

MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILROAD COMPANY, Plaintiff in Error, v. LOUISE ALEXANDER, Administratrix, etc. [No. 148.]

Error to state court—frivolous Federal question—requiring railway companies to fence roads.

In Error to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court of Marquette County, in that state, in favor of plaintiff in an action of death founded upon a violation of a state statute requiring railway companies to fence their roads.

See same case below, 156 Wis. 477, 146 N. W. 510.

Mr. William A. Hayes for plaintiff in error.

Mr. D. W. McNamara and Miss Anna B. Hull for defendant in error.

January 10, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133; (2) Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; (3) Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 118, 53 L. ed. 431, 434, 29 Sup. Ct. Rep. 227; Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14.

ROBERT M. PURCELL et al., Plaintiffs in Error, v. QUAKER REALTY COMPANY, LIMITED. [No. 152.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the Civil District Court for the Parish of Orleans, in that state, in favor of plaintiff in an action to confirm title to land sold to the state for delinquent taxes.

See same case below, 134 La. 1022, 64 So. 894.

Mr. E. Howard McCaleb for plaintiffs in error.

Mr. William Winans Wall for defendants in error.

January 10, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; De Bearn v. Safe Deposit & T. Co. 233 U. S. 24, 34, 58 L. ed. 833, 837, 34 Sup. Ct. Rep. 584; McDonald v. Oregon R. & Nav. Co. 233 U. S. 665, 669, 670, 58 L. ed. 1145, 1148, 1149, 34 Sup. Ct. Rep. 772; (2) Ross v. Oregon, 227 U. S. 150, 161, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 624, 58 L. ed. 1503, 1505, 34 Sup. Ct. Rep. 941; Willoughby v. [636] Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21.

EX PARTE: IN THE MATTER OF ROBERT B. WHITT, Petitioner. [No. —, Orig.]

Motion for leave to file petition for Writ of Mandamus.

Messrs. Frank W. Clancy, A. C. Voorhees, and H. L. Bickley for petitioner.

No appearance for respondent.

January 10, 1916. Denied.

LEONARD R. COATES, Plaintiff in Error, v. DISTRICT OF COLUMBIA. [No. 156.]

Appeal—from District of Columbia courts—construction of Federal law.

In Error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing an action to recover damages for the negligence of the defendant's health department.

See same case below, 42 App. D. C. 194.

Mr. F. P. B. Sands for plaintiff in error.

Messrs. Conrad H. Syme and Robert L. Williams for defendant in error.

January 17, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the

authority of American Security & T. Co. v. District of Columbia, 224 U. S. 491, 56 L. ed. 856, 32 Sup. Ct. Rep. 553; District of Columbia v. Philadelphia, B. & W. R. Co. 232 U. S. 716, 58 L. ed. 812, 34 Sup. Ct. Rep. 331; Washington, A. & Mt. V. R. Co. v. Downey, 236 U. S. 190, 59 L. ed. 533, 35 Sup. Ct. Rep. 406.

WILLIAM B. THOMPSON, Plaintiff in Error, v. CITY OF ST. LOUIS. [No. 157.]

Appeal—final judgment.

In Error to the Supreme Court of the State of Missouri to review a judgment which reversed a judgment of the Circuit Court of the City of St. Louis, dismissing the petition in condemnation proceedings, and remanding the cause for further proceedings.

See same case below, 257 Mo. 541, 165 S. W. 1057.

Mr. William B. Thompson for plaintiff in error.

Mr. Truman P. Young for defendant in error.

January 17, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; United States v. Beatty, 232 U. S. 463, 58 L. ed. 686, 34 Sup. Ct. Rep. 392; Pons v. Yazoo & M. Valley R. Co. 232 U. S. 720, 58 L. ed. 814, 34 Sup. Ct. Rep. 602.

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[637] HILMA NELSON, Plaintiff in Error, v. RICHARD G. WOOD. [No. 158.]

Error to circuit court of appeals—finality of decision—diverse citizenship.

In Error to the United States Circuit Court of Appeals for the Third Circuit to review a judgment dismissing a writ of error to the District Court for the Eastern District of Pennsylvania in a personal-injury action.

See same case below, 126 C. C. A. 598, 210 Fed. 18.

Mr. A. J. H. Frank for plaintiff in error.

Messrs. C. E. Morgan, 3d, and R. Stuart Smith for defendant in error.

January 17, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; McCormick v. Oklahoma City, 236 U. S. 657, 59 L. ed. 771, 35 Sup. Ct. Rep. 455; St. Anthony Church v. Pennsylvania R. Co. 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729; G. & C. Merriam Co. v. Syndicate Pub. Co. 237 U. S. 618, 59 L. ed. 1148, 35 Sup. Ct. Rep. 708.

VANDALIA RAILROAD COMPANY, Plaintiff in Error, v. CHARLES STILWELL. [No. 172.]

Constitutional law—equal protection of the laws—due process of law—workmen's compensation act.

In Error to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the Circuit Court of Morgan County, in that state, in favor of plaintiff in a personal-injury action.

See same case below, 181 Ind. 267, 104 N. E. 289, 5 N. C. C. A. 483.

Mr. Samuel O. Pickens for plaintiff in error.

Mr. Wymond J. Beckett for defendant in error.

January 17, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570.

ROBERT KITCHENS, Appellant, v. J. C. HAMILTON, Sheriff, etc. [No. 672.]

Habeas corpus—Federal interference with state administration of criminal law.

Appeal from the District Court of the United States for the Southern District of Georgia to review a decree denying a petition for a writ of habeas corpus on behalf of a person in custody under a conviction of crime in a court of that state.

Mr. John R. Cooper for appellant.

Mr. Clifford Walker for appellee.

January 17, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of Andrews v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389; Frank v. Mangum, 237 U. S. 309, 59 L. ed. 969, 35 Sup. Ct. Rep. 582.

FRANK R. SHATTUCK, Trustee, etc., et al., Appellants, v. TITLE GUARANTY & SURETY COMPANY. [No. 729.]

Appeal—from circuit court of appeals—bankruptcy case.

[638] Appeal from the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Pennsylvania, allowing or disallowing certain claims against a bankrupt estate, and ordered the reinstatement of the orders of the referee.

See same case below, 140 C. C. A. 87, 224 Fed. 401.

Mr. Walter Lee Sheppard for appellants.

Mr. Frank Rogers Donahue for appellee.

January 17, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of act of Congress of January 28, 1915. See Central Trust Co. v. Lueders, 239 U. S. 11, ante, 119, 36 Sup. Ct. Rep. 1.

L. STEINER and B. Frank, Individually, etc., et al., Petitioners, v. T. S. FAULK & COMPANY. [Nos. 558 and 559.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 137 C. C. A. 599, 222 Fed. 61.

Messrs. Leon Weil and Horace Stringfellow for petitioners.

Messrs. W. A. Blount, A. C. Blount, and F. B. Carter for respondent.

October 18, 1915. Denied.

TRINITY GOLD DREDGING & HYDRAULIC COMPANY, Petitioner, v. ANGELE BEAUDRY, as Executrix, etc. [No. 582.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 139 C. C. A. 269, 223 Fed. 739.

Messrs. Edward J. McCutchen, A. Crawford Greene, Alex. Britton, Evans Browne, and F. W. Clements for petitioner.

Messrs. Thomas B. Dozier and F. S. Brittain for respondent.

October 18, 1915. Denied.

ROBERT H. MONTGOMERY, as Trustee, etc., Petitioner, v. BOTTLERS SEAL COMPANY. [No. 594.]

[639] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 140 C. C. A. 200, 224 Fed. 492.

Mr. Selden Bacon for petitioner.

Mr. Alfred D. Lind for respondent.

October 18, 1915. Denied.

CITY OF NEW ORLEANS et al., Petitioners, v. PENN BRIDGE COMPANY. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 138 C. C. A. 191, 222 Fed. 737.

Messrs. I. D. Moore and Percy S. Benedict for petitioners.

Messrs. R. E. Milling and William Grant for respondent.

October 18, 1915. Denied.

IDA R. ROBERTS et al., Petitioners, v. MYRA J. ROBERTS. [No. 635.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 138 C. C. A. 102, 223 Fed. 775.

Messrs. M. F. Watts and William R. Gentry for petitioners.

No counsel appeared for respondent.

October 18, 1915. Denied.

JOHN A. LEWIS, as Executor, etc., et al., Petitioners, v. WILLIAM B. HOLMES et al. [Nos. 636 and 637,]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 140 C. C. A. 8, 224 Fed. 410.

Messrs. Jackson H. Ralston and Morton S. Cressy for petitioners.

Messrs. John P. Wilson, Eli B. Felsenthal, Nathan G. Moore, William B. McIlvaine for respondents.

October 18, 1915. Denied.

MIENE WILCKENS, Petitioner, v. ALWINE S. WILCKENS. [No. 640.]

Petition for a Writ of [640] Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 138 C. C. A. 202, 217 Fed. 208.

Mr. William J. Courtright for petitioner.

Mr. C. S. Montgomery for respondent.

October 18, 1915. Denied.

LILLIE W. REED, Petitioner, v. BALTIMORE & OHIO RAILROAD COMPANY. [No. 642.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 139 C. C. A. 192, 223 Fed. 689, 10 N. C. C. A. 107.

Mr. Charles W. Baker for petitioner.

Messrs. Judson Harmon, Edward Colston, George Hoadly, and A. W. Goldsmith for respondent.

October 18, 1915. Denied.

CHARLES G. GUTH, Petitioner, v. GUTH CHOCOLATE COMPANY. [No. 647.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 140 C. C. A. 410, 224 Fed. 932.

Messrs. Charles F. Harley and George W. Lindsay for petitioner.

Mr. Frederick L. Emery for respondent.

October 18, 1915. Denied.

CHARLES S. HINCHMAN, Petitioner, v. CONSOLIDATED ARIZONA SMELTING COMPANY. [No. 652.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 129 C. C. A. 267, 212 Fed. 813.

Mr. Charles H. Burr for petitioner.

Mr. J. Markham Marshall for respondent.

October 18, 1915. Denied.

EGBERT WHITNEY, Petitioner, v. NEW YORK SCAFFOLDING COMPANY. [No. 661.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 C. C. A. 138, 224 Fed. 452.

Messrs. James A. [641] Carr, Wallace R. Lane, Edwin S. Clarkson, and Walter A. Johnston for petitioner.

Mr. Paul Bakewell for respondent.

October 18, 1915. Denied.

AMERICAN ROTARY VALVE COMPANY, Petitioner, v. ALBERT E. MOORHEAD. [No. 662.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 130 C. C. A. 662, 224 Fed. 1019.

Messrs. W. Clyde Jones and John Ridout for petitioner.

Mr. James W. Noel for respondent.

October 18, 1915. Denied.

HAMILTON TRUST COMPANY et al., Petitioners, v. JOHN L. BISHER, JR., etc. [No. 621.]

Petition for Writs of Mandamus and Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 139 C. C. A. 42, 223 Fed. 494.

Mr. Emmett Callahan for petitioners.

Messrs. William P. Richardson and Will R. King for respondent.

October 18, 1915. Denied.

UNITED STATES EX REL. STATE OF LOUISIANA, Petitioner, v. HON. ALECK BOARMAN, Judge, etc. [No. 667.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Ruffin G. Pleasant and Daniel Wendling for petitioner.

Messrs. Edgar H. Farrar, Henry Bernstein, and Willard F. Keeney for respondent.

October 25, 1915. Granted.

W. F. JIMMERSON, as Assessor, etc., et al., Petitioner, v. UNITED STATES EX REL. FALL CITY CONSTRUCTION CO. [No. 512.]

Petition for a Writ of Certiorari to the United States Circuit Court [642] of Appeals for the Eighth Circuit.

See same case below, 138 C. C. A. 85, 222 Fed. 489.

Mr. C. F. Greenlee for petitioner.

No counsel appeared for respondent.

October 25, 1915. Denied.

VANDALIA RAILROAD COMPANY, Petitioner, v. UNITED STATES. [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 141 C. C. A. 469, 226 Fed. 713.

Messrs. John G. Williams, Thomas W. White, Lindorf O. Whitnel, and Samuel W. Fordyce, Jr., for petitioner.

Mr. G. Carroll Todd, Assistant to the Attorney General, for respondent.

October 25, 1915. Denied.

NATIONAL BANK OF COMMERCE OF ST. LOUIS, Petitioner, v. E. B. ALLEN, United States Collector, etc. [No. 663.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 139 C. C. A. 20, 223 Fed. 472.

Messrs. A. C. Stewart, T. Taylor Bryan, and George H. Williams for petitioner.

No counsel appeared for respondent.

October 25, 1915. Denied.

EDMUND W. MUDGE et al., Petitioners, v. BLACK, SHERIDAN, & WILSON et al. [No. 665.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 C. C. A. 397, 224 Fed. 919.

Messrs. Frank T. Gladney and Frank J. Hogan for petitioners.

No counsel appeared for respondents.

October 25, 1915. Denied.

MORRIS L. BETTMAN, Petitioner, v. UNITED STATES. [No. 669.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 140 C. C. A. 265, 224 Fed. 819.

Mr. Frank F. Dinsmore for [643] petitioner.

Mr. Solicitor General Davis for respondent.

October 25, 1915. Denied.

GEORGE L. COLBURN et al., Petitioners, v. UNITED STATES. [No. 671.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 139 C. C. A. 136, 223 Fed. 590.

Mr. Chester H. Krum for petitioners.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

October 25, 1915. Denied.

ARTHUR C. BRADY, Petitioner, v. MARTIN E. KERN. [No. 545.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 138 C. C. A. 299, 222 Fed. 873.

Mr. E. Spencer Miller for petitioner.

Mr. Owen J. Roberts for respondent.

November 1, 1915. Denied.

LEONARD CECIL PARKER et al., Petitioners, v. BARBARA PARKER. [No. 675.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 137 C. C. A. 626, 222 Fed. 186.

Messrs. Theodore Mack and Gaines B. Turner for petitioners.

Messrs. F. M. Etheridge and J. M. McCormick for respondent.

November 1, 1915. Denied.

GERARD B. TOWNSEND et al., Petitioners, v. GEORGIA SOUTHERN & FLORIDA RAILWAY COMPANY et al. [No. 678.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 133 C. C. C. 657, 218 Fed. 55.

Messrs. Louis Marshall, Marion [644] Erwin, and Joseph Fried for petitioners.

Messrs. J. Ellsworth Hall and Alexander C. King for respondents.

November 1, 1915. Denied.

CAMBRIA IRON COMPANY, Petitioner, v. CARNEGIE STEEL COMPANY (LTD.). [No. 561.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 140 C. C. A. 437, 224 Fed. 947.

Messrs. Francis T. Chambers and James I. Kay for petitioner.

Messrs. Charles C. Linthicum and David A. Reed for respondent.

November 8, 1915. Denied.

MARY M. HILL, Executrix, etc., et al., Petitioners, v. JAMES H. LOVEWELL, etc., et al. [No. 668.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 133 C. C. A. 449, 217 Fed. 689.

Mr. Caruthers Ewing for petitioners.

Messrs. W. J. Lamb, W. M. Randolph, and Wassell Randolph for respondents.

November 8, 1915. Denied.

LILLY BUSCH et al., etc., Petitioners, v. STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY. [No. 686.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 141 C. C. A. 130, 226 Fed. 200.

Joseph H. Zumbalen for petitioners.

Messrs. Warwick M. Hough and Walter H. Saunders for respondent.

November 15, 1915. Denied.

BARBER ASPHALT PAVING COMPANY, Petitioner, v. CITY OF ST. PAUL. [No. 691.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 138 C. C. A. 558, 224 Fed. 842.

Mr. [645] Morris M. Townley for petitioner.

Mr. Thomas D. O'Brien for respondent.

November 15, 1915. Denied.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 674.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. Robert Dunlap, E. W. Camp, Paul Burks, Alexander Britton, and Evans Browne for petitioner.

No counsel appeared for respondent.

November 29, 1915. Granted.

FRED VON BAUMBACH, Collector, etc., Petitioner, v. SARGENT LAND COMPANY [No. 707]; FRED VON BAUMBACH, Collector, etc., Petitioner, v. SUTTON LAND COMPANY [No. 708]; and FRED VON BAUMBACH, Collector, etc., Petitioner, v. KEARSARGE LAND COMPANY [No. 709].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General and the Solicitor General for petitioner.

No counsel appeared for respondents.

November 29, 1915. Granted.

OTOMAN ZAR ADUSHT HANISH, Petitioner, v. UNITED STATES. [No. 677.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 227 Fed. 584.

Mr. James R. Ward for petitioner.

No counsel appeared for respondent.

November 29, 1915. Denied.

DON A. MOUN DAY and L. D. Moun Day, Petitioners, v. UNITED STATES. [No. 692.]

[646] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 C. C. A. 93, 225 Fed. 965.

Mr. Charles Blood Smith and Mr. Chapin Brown for petitioners.

The Solicitor General and Mr. Assistant Attorney General Wallace for respondent.

November 29, 1915. Denied.

WEBSTER BALLINGER, Petitioner, v. WEST PUBLISHING COMPANY. [No. 704.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 44 App. D. C. 49.

Mr. Webster Ballinger for petitioner.

Mr. H. Winship Wheatley for respondent.

November 29, 1915. Denied.

E. I. DU PONT DE NEMOURS POWDER COMPANY et al., Petitioners, v. WALTER E. MASLAND et al. [No. 581.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Edwin J. Prindle and Warren H. Small for petitioners.

No appearance for respondents.

December 6, 1915. Granted.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner, v. OSCAR H. PIPER, et al. [No. 718.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 228 Fed. 30.

Messrs. Henry N. Paul, Jr., Jos. C. Fraley, and Edward Rector for petitioner.

Mr. Charles A. Brown for respondents.

December 6, 1915. Granted.

THOMPSON & FORD LUMBER COMPANY, Petitioner, v. CHARLES DILLINGHAM, Receiver, etc., et al. [No. 684.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the [647] Fifth Circuit.

See same case below, 139 C. C. A. 376, 223 Fed. 1000.

Messrs. H. M. Garwood and William A. Vinson for petitioner.

Mr. Thomas M. Kennerly for respondents.

December 6, 1915. Denied.

MARION W. ROSE, Petitioner, v. UNITED STATES. [No. 723.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 227 Fed. 357.

Messrs. George X. McLanahan and James T. Neville for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

December 6, 1915. Denied.

CHARLES EDWARD GRELLE et al., Petitioners, v. CITY OF EUGENE, Oregon, et al. [No. 724.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 137 C. C. A. 18, 221 Fed. 68.

Mr. T. J. Geisler for petitioners.

Mr. Martin L. Pipes for respondents.

December 6, 1915. Denied.

HUGH MCCURDY EATON, Administrator, etc., Petitioner, v. COUNTY OF SHIAWASSEE. [No. 734.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 134 C. C. A. 316, 218 Fed. 588.

Mr. Bernard B. Selling for petitioner.

Mr. Harrison Geer for respondent.

December 13, 1915. Denied.

ROCK SPRING DISTILLING COMPANY et al., Petitioners, v. W. A. GAINES & COMPANY. [No. 747.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. William T. Ellis and [648] Luther Ely Smith for petitioners.

Messrs. James L. Hopkins, Daniel W. Lindsey, and Edmund F. Trabue for respondent.

December 20, 1915. Granted.

ST. LOUIS UNION TRUST COMPANY, Petitioner, v. MARY E. MELLON et al. [No. 735.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 C. C. A. 567, 225 Fed. 693.

Mr. W. F. Wilson for petitioner.

No counsel appeared for respondents.

December 20, 1915. Denied.

DAN A. WARD et al., Petitioners, v. THOMAS W. MORGAN, Warden, etc. [No. 744.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 140 C. C. A. 238, 224 Fed. 698.

Mr. Edwin A. Krauthoff for petitioners.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

December 20, 1915. Denied.

NATIONAL BANK OF COMMERCE IN ST. LOUIS, Petitioner, v. EQUITABLE TRUST COMPANY OF NEW YORK. [No. 751.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 227 Fed. 526.

Mr. George L. Edwards for petitioner.

Messrs. Charles S. Howland, Frederick N. Judson, and John F. Green for respondent.

December 20, 1915. Denied.

WESTERN GLASS COMPANY, Petitioner, v. SCHMERTZ WIRE GLASS COMPANY et al. [No. 752.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 141 C. C. A. 486, 226 Fed. 730.

Messrs. Albert H. Graves and Louis [649] Quarles for petitioner.

Messrs. Thomas B. Kerr, Drury W. Cooper, and Arthur J. Baldwin for respondents.

December 20, 1915. Denied.

ABERCROMBIE & FITCH COMPANY et al., Petitioners, v. FREDERICK E. BALDWIN et al. [No. 767.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. James R. Offield and Charles K. Offield for petitioners.

No appearance for respondents.

January 10, 1916. Granted.

CHOY GUM, etc., Petitioner, v. SAMUEL W. BACKUS, Commissioner, etc. [No. 749.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 139 C. C. A. 35, 223 Fed. 487.

Mr. Corry M. Stadden for petitioner.

The Solicitor General and Assistant Attorney General Wallace for respondent.

January 10, 1916. Denied.

JOHN M. BURROUGHS et al., Petitioners, v. FLORENCE L. CHAMBERS. [No. 755.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 44 App. D. C. 168.

Messrs. B. F. Leighton and Wharton E. Lester for petitioners.

Messrs. George E. Sullivan and Walter C. English for respondent.

January 10, 1916. Denied.

SANGAMON LOAN & TRUST COMPANY, Trustee, etc., Petitioner, v. UNITED SHOE MACHINERY COMPANY. [No. 765.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 227 Fed. 401.

Messrs. Henry Lyman Child and Otis [650] Scott Humphrey for petitioner.

No counsel appeared for respondent.

January 10, 1916. Denied.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Petitioner, v. STREETS WESTERN STABLE CAR COMPANY. [No. 770.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. George Thompson and J. H. Barwise, Jr. for petitioner.

Messrs. Levy Mayer and Carl Meyer for respondent.

January 10, 1916. Denied.

WELLS FARGO & COMPANY, Petitioner, v. MAYOR AND ALDERMEN OF JERSEY CITY. [No. 792.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 135 C. C. A. 371, 219 Fed. 699.

Mr. Chas. W. Stockton for petitioner.

Mr. John Bentley for respondents.

January 17, 1916. Denied.

THOMAS W. MCCOMB, Plaintiff in Error, v. COMMONWEALTH OF PENNSYLVANIA. [No. 2.]

In Error to the Supreme Court of the State of Pennsylvania.

See same case below, in Superior Court of Pennsylvania, 39 Pa. Super. Ct. 411, in Supreme Court of Pennsylvania, 227 Pa. 377, 76 Atl. 100.

Mr. John G. Johnson for plaintiff in error.

Messrs. William M. Hargest and Lyman D. Gilbert for defendant in error.

October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error, v. BARBORA ZITNIK, Administratrix, etc. [No. 151.]

[651] In Error to the Supreme Court of the State of Nebraska.

See same case below, 95 Neb. 152, 145 N. W. 344.

Mr. N. H. Loomis for plaintiff in error.

Messrs. Constantine J. Smyth and Edward J. Smith for defendant in error.

October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, v. ARTHUR SLAUGHTER. [No. 195.]

In Error to the Supreme Court of the State of Minnesota.

See same case below, first appeal, 125 Minn. 96, 145 N. W. 790, second appeal, 125 Minn. 532, 147 N. W. 284.

Messrs. Pierce Butler, Blewett Lee, and W. S. Horton for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

October 12, 1915. Dismissed per stipulation.

RAILWAY TRANSFER COMPANY OF THE CITY OF MINNEAPOLIS, Plaintiff in Error, v. JOSEPH LA MERE. [No. 202.]

In Error to the Supreme Court of the State of Minnesota.

Messrs. William H. Bremner and F. M. Miner for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

October 12, 1915. Dismissed per stipulation.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. A. B. BRAMLETT. [No. 255.]

In Error to the Supreme Court of the State of South Carolina.

Mr. L. E. Jeffries for plaintiff in error.

No counsel appeared for defendant in error.

October 12, 1915. Dismissed, with costs, on motion of counsel for the plaintiff in error.

MCALESTER EDWARDS COAL COMPANY et al., Plaintiffs in Error, v. M. E. TRAPP, State Auditor, etc. [No. 256.]

In Error to the Supreme Court of the State [652] of Oklahoma.

Messrs. Charles B. Stuart and James H. Gordon for plaintiffs in error.

Mr. Robert E. Wood for defendant in error.

October 12, 1915. Judgment reversed at the costs of the plaintiffs in error, and cause remanded for further proceedings per stipulation of counsel.

W. S. ALLEN, Secretary of State, et al., Appellants, v. WILLIAM R. COMPTON COMPANY et al. [No. 305.]

Appeal from the District Court of the United States for the Southern District of Iowa.

Mr. George Cosson for appellants.

No appearance for appellees.

October 12, 1915. Dismissed with costs, on motion of counsel for the appellants.

QUINCY, OMAHA, & KANSAS CITY RAILROAD COMPANY, Plaintiff in Error, v. SHELBY P. NOEL. [No. 378.]

In Error to the Kansas City Court of Appeals, State of Missouri.

Mr. Willard P. Hall for plaintiff in error.

No appearance for defendant in error.

October 12, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, Petitioner, v. MATT YURKONIS. [No. 548.]

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 137 C. C. A. 23, 220 Fed. 429.

Mr. William S. Jenney for petitioner.

No appearance for respondent.

October 12, 1915. Dismissed on motion of counsel for the petitioner.

JOHN DEERE PLOW COMPANY, Petitioner, v. LEON D. MOWRY, Trustee, etc. [No. 588.]

On Petition for a Writ [653] of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Duane E. Fox for petitioner.

No appearance for respondent.

October 12, 1915. Dismissed on motion of counsel for the petitioner.

COMMONWEALTH OF VIRGINIA, Complainant, v. JOHN PIERPONT MORGAN. [No 11, Orig.]

Original bill in equity filed by the Commonwealth of Virginia.

Mr. John Garland Pollard for complainant.

No counsel appeared for respondent.

October 18, 1915. Dismissed with costs, on motion of counsel for the complainant.

LEM MOTLOW, Plaintiff in Error, v. STATE OF TENNESSEE. [No. 7.]

In Error to the Supreme Court of the State of Tennessee.

See same case below, 125 Tenn. 547, L.R.A.—, —, 145 S. W. 177.

Mr. John J. Vertrees for plaintiff in error.

Messrs. Frank M. Thompson and William L. Granbery for defendant in error.

October 18, 1915. Dismissed with costs on motion of counsel for the plaintiff in error.

J. M. KILLMER et al., Plaintiffs in Error, v. SAMUEL STEWART, as Treasurer of Wyandotte County, Kans., et al. [No. 416.]

In Error to the Supreme Court of the State of Kansas.

Mr. L. W. Keplinger for plaintiffs in error.

No counsel appeared for defendants in error.

October 18, 1915. Dismissed with costs, on motion of counsel for the plaintiffs in error.

NICK ARRIGO, Plaintiff in Error, v. GUS A. HYERS, Sheriff, etc. [No. 590.]

In Error to the Supreme Court of [654] the State of Nebraska.

Messrs. Marquis Eaton and Thomas S. Allen for plaintiff in error.

Mr. Willis E. Reed for defendant in error.

October 21, 1915. Dismissed with costs, per stipulation.

MIKE INDOVINA, Plaintiff in Error, v. GUS A. HYERS, Sheriff, etc. [No. 591.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. Marquis Eaton and Thomas S. Allen for plaintiff in error.

Mr. Willis E. Reed for defendant in error.

October 21, 1915. Dismissed with costs, per stipulation.

ROSA GUNDALL, Individually, etc., et al., Appellants, v. MANHATTAN RAILWAY COMPANY et al. [No. 19.]

Appeal from the District Court of the United States for the Southern District of New York.

See same case below, 205 Fed. 410.

Messrs. Edward S. Hatch and Vincent P. Donihee for appellants.

Mr. James L. Quackenbush for appellees.

October 21, 1915. Dismissed, per stipulation.

AUGUST BOULANGER, Plaintiff in Error, v. STATE OF LOUISIANA. [No. 46.]

In Error to the Supreme Court of the State of Louisiana.

Mr. Taliaferro Alexander for plaintiff in error.

No counsel appeared for defendant in error.

October 28, 1915. Dismissed with costs, pursuant to the Tenth Rule.

STANDARD FASHION COMPANY, Plaintiff in Error, v. J. L. GRANT. [No. 459.]

In Error to the Supreme Court of [655] the State of North Carolina.

See same case below, 165 N. C. 453, 81 S. E. 606.

Messrs. J. S. Manning and Francis Rooney for plaintiff in error.

Mr. James R. Price for defendant in error.

November 1, 1915. Dismissed with costs, on motion of counsel for the plaintiff in error.

OZARK OIL COMPANY, Appellant, v. WILLIAM BERRYHILL. [No. 75.]

In Error to the District Court of the United States for the Eastern District of Oklahoma.

Mr. Haskell B. Talley for appellant.

No counsel appeared for appellee.

November 10, 1915. Dismissed with costs, pursuant to the Tenth Rule.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, v. W. L. PELTON. [No. 569.]

In Error to the Supreme Court of the State of Iowa.

Messrs. Walter S. Horton and Blewett Lee for plaintiff in error.

Messrs. William Squire Kenyon and Dennis M. Kelleher for defendant in error.

November 15, 1915. Dismissed, per stipulation.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 92]; ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 93]; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 94]; CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 95]; [656] ST. LOUIS, KANSAS CITY, & COLORADO RAILROAD COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 96]; KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 97]; MISSOURI PACIFIC RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 98]; ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 99]; MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 100]; CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 101]; CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 102]; and CHICAGO & ALTON RAILROAD COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION OF MISSOURI et al. [No. 103].

Appeals from the District Court of the United States for the Western District of Missouri.

See same case below, 210 Fed. 902.

Messrs. Frank Hagerman and Edward J. White for appellants.

Messrs. John T. Barker and William G. Busby for appellees.

November 29, 1915. Dismissed with costs, on motion of counsel for the appellant.

WILLIAM J. DEUPREE, Trustee, etc., Appellant, v. ALICE P. WATSON. [No. 215.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Frederick W. Schmitz for appellant.

No counsel appeared for appellee.

December 2, 1915. Dismissed with costs, on motion of [657] counsel for the appellant.

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. STATE OF MISSOURI AT THE RELATION OF THE CITY OF ST. LOUIS. [No. 349.]

In Error to the Supreme Court of the State of Missouri.

Messrs. Ernest A. Green and James F. Green for plaintiff in error.

No counsel appeared for defendant in error.

December 2, 1915. Dismissed with costs, per stipulation.

RALSA F. MORLEY et al., Plaintiffs in Error, v. WILLIAM M. FEWEL. [No. 105.]

In Error to the Supreme Court of the State of Oklahoma.

Mr. A. J. Biddison for plaintiffs in error.

Mr. Henry B. Martin for defendant in error.

December 2, 1915. Dismissed with costs, pursuant to the Tenth Rule.

MARIANO RIERA PALMER, on Behalf of Himself and other Notaries, Appellant, v. SAMUEL D. GROMER, Treasurer, A. R. Sawyer, Auditor, and Foster V. Brown, Attorney General of Porto Rico. [No. 741.]

Appeal from the Supreme Court of Porto Rico.

Mr. Samuel T. Ansell for appellees.

December 6, 1915. Docketed and dismissed with costs, on motion of counsel for the appellees.

CLARENCE H. VENNER, Plaintiff in Error, v. CHICAGO CITY RAILWAY COMPANY et al. [No. 125.]

In Error to the Supreme Court of the State of Illinois.

Mr. Elijah N. Zoline for plaintiff in error.

No counsel appeared for defendants in error.

December 8, 1915. Dismissed with costs, pursuant to the [658] Tenth Rule.

MARIA L. OVERTON et al., Appellants, v. UNITED STATES. [No. 130.]

Appeal from the Court of Claims.

See same case below, 49 Ct. Cl. 700.

Mr. W. H. Conaway for appellants.

The Attorney General and Mr. Solicitor General Davis for appellee.

December 9, 1915. Judgment reversed and cause remanded for further proceedings, upon confession of error and motion of Mr. Solicitor General Davis for the appellee.

ARTHUR RYLE et al., as Trustees, etc., Appellants, v. UNITED STATES. [No. 150.]

Appeal from the Court of Claims.

See same case below, 49 Ct. Cl. 699.

Messrs. H. T. Newcomb and Morris F. Frey for appellants.

The Attorney General and Mr. Solicitor General Davis for appellee.

December 17, 1915. Judgment reversed and cause remanded for further proceedings upon confession of error and motion of Mr. Solicitor General Davis for the appellee.

UNITED STATES, Appellant, v. JEFFERSON F. MOSER. [No. 159.]

Appeal from the Court of Claims.

See same case below, 49 Ct. Cl. 285.

The Attorney General for appellant.

Messrs. George A. King and William B. King for appellee.

December 17, 1915. Dismissed, on motion of counsel for the appellant.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Plaintiff in Error, v. HENRY M. PFEIFFER. [No. 407.]

In Error to the Supreme Court of the State of [659] Oregon.

Messrs. W. W. Cotton and Henry W. Clark for plaintiff in error.

Mr. H. M. Pfeiffer defendant in error, pro se.

December 20, 1915. Dismissed with costs on motion of counsel for the plaintiff in error.

NETTIE L. SCOTT, Appellant, v. Mrs. E. N. PHILIPO et al. [No. 334.]

Appeal from the Supreme Court of the Territory of Hawaii.

See same case below, 22 Haw. 412.

Mr. John W. Cathcart for appellant.

No appearance for appellees.

January 6, 1916. Dismissed with costs on motion of counsel for the appellant.

COON RAPIDS NATIONAL BANK et al., Plaintiffs in Error, v. MAGGIE I. LEE,[1] Executrix, etc. [No. 796.]

In Error to the Supreme Court of the State of Iowa.

No appearance for plaintiffs in error.

Mr. A. B. Cummins in behalf of Mr. O. M. Brockett for defendant in error.

January 10, 1916. Docketed and dismissed with costs, pursuant to the Ninth Rule.

STATE OF WASHINGTON EX REL. AUGUSTUS S. PEABODY, Plaintiff in Error, Trustee, v. CITY OF SEATTLE et al. [No. 191.]

In Error to the Supreme Court of the State of Washington.

Messrs. George Donworth and Elmer E. Todd for plaintiff in error.

Mr. Howard A. Hanson for defendants in error.

September 7, 1915. Dismissed pursuant to the Twenty-eighth Rule, per stipulation of counsel.

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[1] Death of Anderville Lee suggested, and appearance of Maggie I. Lee, as party defendant in error herein, filed and entered on January 10, 1916.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1915.

Vol. 240.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1915.

FRANK R. BRUSHABER, Appt.,
v.
UNION PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 1–26.)

Injunction — against illegal tax — stockholder's suit.

1. The maintenance by a stockholder of a suit to restrain a corporation from voluntarily complying with the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), upon the grounds of the repugnancy of the statute to the Federal Constitution, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress, which will result if the corporation pays the tax and complies with the act in other respects without protest, as it is alleged it is its intention to do, is not forbidden by the prohibition of U. S. Rev. Stat. § 3224, Comp. Stat. 1913, § 5947, against enjoining the enforcement of taxes.
[For other cases, see Injunction, I. k, in Digest Sup. Ct. 1908.]

Internal revenue — power of Congress — income tax.

2. The whole purpose of U. S. Const., 16th Amend., giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," was to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes.
[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — retroactive effect.

3. The retroactive effect of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), which fix the preceding March 1st as the time from which the taxed income for the first ten months is to be computed, does not render the tax repugnant to the due process of law clause of U. S. Const., 5th Amend., nor inconsistent with the 16th Amendment itself, since the date of retroactivity did not extend beyond the time when the latter Amendment became operative.
[For other cases, see Constitutional Law, IV. b, 6; IV. f, 2, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — exemptions.

4. Power to exclude from taxation some income of designated persons and classes, and to exempt entirely certain enumerated organizations or corporations, such as labor, agricultural, or horticultural organizations, mutual savings banks, etc., was not by implication forbidden to Congress by the provisions of U. S. Const., 16th Amend., that Congress may lay and collect taxes on incomes "from whatever source derived."
[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — exemptions.

5. Labor, agricultural, or horticultural organizations, mutual savings banks, etc., could be excepted from the operation of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap.

NOTE.—On injunction to restrain the collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

On the constitutionality of income taxes see notes to Alderman v. Wells, 27 L.R.A. (N.S.) 864, and State ex rel. Bolens v. Frear, L.R.A. 1915B, 569.

16), without rendering the tax repugnant to the Federal Constitution.

[For other cases, see Internal Revenue, I. b; III. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — uniformity.

6. A geographical uniformity alone is what is exacted by the provisions of U. S. Const., art. 1, § 8, that "all duties, imposts, and excises shall be uniform throughout the United States."

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax.

7. The due process of law clause of U. S. Const., 5th Amend., is not a limitation upon the taxing power conferred upon Congress by the Federal Constitution unless, under a seeming exercise of the taxing power, the taxing statute is so arbitrary as to compel the conclusion that it was not the exertion of taxation, but the confiscation of property, or is so wanting in basis for classification as to produce such a gross and patent inequality as inevitably to lead to the same conclusion.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax.

8. The progressive rate feature of the income tax imposed by the act of October 3, 1913 (38 Stat. at L. 166, chap. 16), does not cause such tax to transcend the conception of all taxation, and to be a mere arbitrary abuse of power which must be treated as wanting in due process of law.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

9. The methods of collection at the source, prescribed by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), are not wanting in due process of law because of the cost to which corporations are subjected by the duty of collection cast upon them, nor because of the resulting discrimination between corporations indebted upon coupon and registered bonds and those not so indebted, nor because of the discrimination against corporations which have assumed the payment of taxes on their bonds which results from the fact that some or all of their bondholders may be exempt from the income tax, nor because of the discrimination against owners of corporate bonds in favor of individuals none of whose income is derived from such property, nor because the law does not release corporate bondholders from the payment of a tax on their bonds, even after such taxes have been deducted by the corporation, if, after the deduction, the corporation should fail, nor because the payment of the tax by the corporation does not relieve the owners of bonds, the taxes on which have been assumed by the corporation, from their duty to include the income from such bonds in making a return of all income.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

10. Limiting the amount of interest which may be deducted from gross income of a corporation for the purpose of fixing the taxable income to interest on indebtedness not exceeding one half the sum of bonded indebtedness and paid-up capital stock, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), is not wanting in due process of law because discriminating between different classes of corporations and individuals.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

11. Allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), does not render the tax wanting in due process of law.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

12. The allowance of a deduction of $3,000 or $4,000 to those who pay the normal tax, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), is not wanting in due process of law because those whose incomes are greater than $20,000 are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the $3,000 or $4,000 which they have already enjoyed, nor because, for the purpose of the additional tax, no second right to deduct dividends received from corporations is permitted.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

13. The allowance of a deduction of stated amounts for the purpose of ascertaining the taxable income, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), does not render the tax wanting in due process of law because of the discrimination between married and single people, and between husbands and wives who are living together and those who are not.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

14. No unconstitutional discrimination and want of due process of law results because the owners of houses in which they live are not compelled by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), to estimate the rental value in making up their incomes, while those who live in rented houses are not allowed, in making up their taxable income, to deduct the rent which

they have paid, nor because of the fact that although family expenses are not, as a rule, permitted to be deducted from gross income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power — administration of income tax.

15. An unwarrantable delegation of legislative authority was not made by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), because certain administrative powers to enforce the act were conferred by it upon the Secretary of the Treasury.

[For other cases, see Constitutional Law, III. b, in Digest Sup. Ct. 1908.]

[No. 140.]

Argued October 14 and 15, 1915. Decided January 24, 1916.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree dismissing the bill in a suit by a stockholder to restrain the corporation from voluntarily complying with the Federal income tax. Affirmed.

The facts are stated in the opinion.

Mr. Julien T. Davies argued the cause, and, with Messrs. Brainard Tolles, Garrard Glenn, and Martin A. Schenck, filed a brief for appellant:

Arbitrary selection under the guise of classification is uniformly condemned.

Santa Clara County v. Southern P. R. Co. 18 Fed. 385, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; San Bernardino County v. Southern P. R. Co. 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144; San Mateo County v. Southern P. R. Co. 13 Fed. 145; 1 Cooley, Taxn. 3d ed. 1, 4; Gray, Limitations of Taxing Power, p. 353; Cooley, Const. Lim. pp. 607, 615; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; United States v. Singer, 15 Wall. 111, 21 L. ed. 49; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Ward v. Maryland, 12 Wall. 418, 20 L. ed. 449; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

Unapportioned compulsory service is not a tax.

United States v. Baltimore & O. R. Co. 17 Wall. 322, 326, 21 L. ed. 597, 599; Re Farrell, 211 Fed. 213, 6 N. C. C. A. 853; Savannah v. Cooper, 131 Ga. 674, 63 S. E. 60 L. ed.

138; Bouvier's Law Dict.; Toone v. State, 178 Ala. 70, 42 L.R.A.(N.S.) 1045, 59 So. 665; New Jersey v. Anderson, 203 U. S. 483, 51 L. ed. 284, 27 Sup. Ct. Rep. 137.

Enforced labor by legislative enactment without compensation is an unconstitutional taking of property.

Louisville & N. R. Co. v. Central Stockyards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; United States v. Welch, 217 U. S. 333, 339, 54 L. ed. 787, 789, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Buffalo Pitts Co. 234 U. S. 228, 58 L. ed. 1290, 34 Sup. Ct. Rep. 840; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; McCully v. Chicago, B. & Q. R. Co. 212 Mo. 1, 110 S. W. 711; Atty. Gen. v. Old Colony R. Co. 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; Chicago, M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491, 59 L. ed. 1423, L.R.A.1916A, 1133, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869; United States v. Mitchell, 58 Fed. 993.

Congress, in the exercise of its taxing power, is nevertheless bound by the express and implied provisions of the Constitution.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The grant of power to Congress by the Constitution does not become effective until Congress exercises the power by legislation.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612–623, 53 L. ed. 352–361, 29 Sup. Ct. Rep. 214; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352–398, 57 L. ed. 1511–1540, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18.

No legislative fiat of October 3, 1913, could change what already existed. Such amounts as had been received by the taxpayer prior to that date were no longer income, but had become capital, and merged in the general corpus of his estate.

Merchants' Ins. Co. v. McCartney, 1 Low. Dec. 447, Fed. Cas. No. 9,443; People ex rel. Cornell University v. Davenport, 30 Hun, 177; Sun Mut. Ins. Co. v. New York, 8 N. Y. 241; Gray v. Darlington, 15 Wall. 63, 21 L. ed. 45; Biddle's Appeal, 99 Pa. 279; Goodwin v. McGaughey, 108 Minn. 248, 122 N. W. 6; Kalbach v. Clark, 133 Iowa, 215, 12 L.R.A.(N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647.

Where an assessment rests in part upon

a subject over which the assessing authority has no jurisdiction, or where the tax is levied in part for an illegal purpose, and no method appears whereby the legal element can be separated from that which is illegal, the whole tax, or the whole assessment, as the case may be, is void.

Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Libby v. Burnham, 15 Mass. 144; Joyner v. School Dist. 3 Cush. 567; Freeland v. Hastings, 10 Allen, 570; Johnson v. Colburn, 36 Vt. 693; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Clarke v. Strickland, 2 Curt. C. C. 439, Fed. Cas. No. 2,864; Union Nat. Bank v. Chicago, 3 Biss. 82, Fed. Cas. No. 14,374; Worthen v. Badgett, 32 Ark. 496; Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Alexandria Canal, R. & Bridge Co. v. District of Columbia, 5 Mackey, 376; Alexandria Canal, R. & Bridge Co. v. District of Columbia, 1 Mackey, 217.

Solicitor General Davis and Assistant Attorney General Wallace argued the cause, and, with Attorney General Gregory, filed a brief for the United States:

The court below was without jurisdiction.

Snyder v. Marks, 109 U. S. 189, 27 L. ed. 901, 3 Sup. Ct. Rep. 157; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Straus v. Abrast Realty Co. 200 Fed. 327; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827.

No facts are alleged indicating any greater danger of multiplicity of suits, or clouds on titles, in connection with the enforcement of these taxes, than in the case of any other tax.

Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Southern R. Co. v. King, 217 U. S. 524, 534, 536, 54 L. ed. 868, 871, 872, 30 Sup. Ct. Rep. 594.

The uniformity requirement of clause 1 of § 8 of article I. of the Constitution is limited to duties, imposts, and excises, and does not apply to direct taxes.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 557, 39 L. ed. 810, 15 Sup. Ct. Rep. 673; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 413, 48 L. ed. 496, 501, 24 Sup. Ct. 376; License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500.

Apportionment being restricted to direct taxes only (Flint v. Stone Tracy Co. 220 U. S. 107, 152, 177, 55 L. ed. 389, 413, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312), the 16th Amendment, in removing *that* restriction, recognized any tax upon income "from whatever source derived" as a direct tax, and, as such, subject to the apportionment rules unless specially exempted.

The Constitution imposes on the taxing power no rule of implied or inherent uniformity.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 557, 39 L. ed. 810, 15 Sup. Ct. Rep. 673; License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The rule of uniformity, where applicable, is not violated by either exemption, classification, or discrimination unless these be so arbitrary and outrageous as to indicate favoritism or prejudice.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Flint v. Stone-Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

The express uniformity clause of the Constitution requires only geographical, and not intrinsic, uniformity.

Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Billings v. United States, 232 U. S. 261, 58 L. ed. 596, 34 Sup. Ct. Rep. 421.

Assuming also that the 5th Amendment controls the taxing power,—as it does not,—and even that the "equal protection" requirement of the 14th Amendment may be either read into or spelled out of the language of the 5th Amendment,—as it may not,—neither would operate to forbid reasonable exemption, classification, or discrimination.

District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Barrett v. Indiana, 229 U. S. 26, 29, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; International Harvester Co. v. Missouri, 234 U. S. 199, 214, 215, 58 L. ed. 1276, 1283, 1284, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Metropolis Theater Co. v. Chicago, 228 U. S. 61, 69, 57 L. ed. 730, 733, 33 Sup. Ct. Rep. 441; Lindsley v. National Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Gibbons v. District of Columbia, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427;

Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 190; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 299, 42 L. ed. 1044, 18 Sup. Ct. Rep. 594; Welch v. Cook, 97 U. S. 541, 24 L. ed. 1112; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611.

Selection and classification is an exclusive function of Congress until its exercise becomes plainly the result of prejudice or favoritism.

Cooley, Const. Lim. 3d ed. p. 739; Pacific Ins. Co. v. Soule, 7 Wall. 433, 19 L. ed. 95; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Veazie Bank v. Fenno, 8 Wall. 548, 19 L. ed. 487; Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Metropolis Theater Co. v Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692.

None of the exemptions or discriminations here complained of produce lack of uniformity.

Nicol v. Ames, 173 U. S. 509, 43 L. ed 786, 19 Sup. Ct. Rep. 522; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. ed. 495; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 373, 20 L. ed. 611; Gibbons v. District of Columbia, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427; Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 777; Black, Income Taxes, p. 28; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 354, 35 L. ed. 1035, 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Income Tax Cases, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Tennessee v. Whitworth, 117 U. S. 129, 29 L. ed 830, 6 Sup. Ct. Rep. 645; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Powers v. Detroit, G. H. & M. R. Co. 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; Southern R. Co. v. King, 217 U. S. 534, 54 L. ed. 871, 30 Sup. Ct. Rep. 594; New York ex rel. Hatch v. Reardon, 204 U. S. 160, 51 L. ed. 422, 27 Sup. Ct. Rep. 188; Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Coltness Iron Co. v. Black, L. R. 6 App. Cas. 315, 51 L. J. Q. B. N. S. 626, 45 L. T. N. S. 145, 29 Week. Rep. 717, 46 J. P. 20; Alianza Co. v. Bell [1904] 2 K. B. 666, [1905] 1 K. B. 184, 74 L. J. K. B. N. S. 219, 53 Week. Rep. 257, 92 L. T. N. S. 184, 21 Times L. R. 134, [1906] A. C. 18, 75 L. J. K. B. N. S. 44, 54 Week. Rep. 413, 93 L. T. N. S. 705, 22 Times L. R. 94; Com. v. Ocean Oil Co. 59 Pa. 61, 14 Mor. Min. Rep. 126; Com. v. Penn Gas Coal Co. 62 Pa. 241, 14 Mor. Min. Rep. 163; Ohio Tax Cases, 232 U. S. 576, 590, 591, 58 L. ed. 738, 744, 745, 34 Sup. Ct. Rep. 372; Southwestern Oil Co. v. Texas, 217 U. S. 114, 126, 127, 54 L. ed. 688, 694, 30 Sup. Ct. Rep. 496; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 292, 293, 296, 42 L. ed. 1042, 1043, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 109, 44 L. ed. 996, 20 Sup. Ct. Rep. 747.

The tax is not an infraction of the general power of the states to authorize the formation of corporations and joint stock companies.

Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

The burden of "source collection," placed upon certain corporations, does not violate the Constitution.

First Nat. Bank v. Kentucky, 9 Wall. 353, 363, 19 L. ed. 701, 704; Home Sav. Bank v. Des Moines, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. Rep. 571; Cooley, Taxn. 3d ed. p. 832; Patton v. Brady, 184 U. S. 608, 620, 621, 46 L. ed. 713, 719, 720, 22 Sup. Ct. Rep. 493; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 156, 25 L. ed. 903, 904; National Safe Deposit Co. v. Stead, 232 U. S. 58, 70, 58 L. ed. 504, 510, 34 Sup. Ct. Rep. 209; Gray, Limitations of Taxing Power, § 1195; First Nat. Bank v. Chehalis County, 166 U. S. 440, 444, 41 L. ed. 1069, 1072, 17 Sup. Ct. Rep. 629; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; Carstairs v. Cochran, 193 U. S. 10, 48 L. ed. 596, 24 Sup. Ct. Rep. 318; Union Bank v. Richmond, 94 Va. 316, 26 S. E. 821; Com. v. Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158.

The taxation of income accrued prior to the passage of the act violates no constitutional nor equitable principle.

Drexel v. Com. 46 Pa. 31; Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 22 L. ed.

348; Income Tax Cases, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Cooley, Taxn. 3d ed. pp. 492–494. See also Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334; Gray v. Darlington, 15 Wall. 63, 66, 21 L. ed. 45, 46; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Interst. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; Flint v. Stone Tracy Co. 220 U. S. 108, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

There is no invalid delegation of judicial authority to the Secretary of the Treasury.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Fong Yeu Ting v. United States, 149 U. S. 698, 714, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; Lem Moon Sing v. United States, 158 U. S. 538, 544, 39 L. ed. 1082, 1084, 15 Sup. Ct. Rep. 967; Nishimura Ekiu v. United States, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; United States v. Duell, 172 U. S. 576, 586, 43 L. ed. 559, 563, 19 Sup. Ct. Rep. 286; Butterworth v. United States, 112 U. S. 50, 67, 18 L. ed. 656, 661, 5 Sup. Ct. Rep. 25; Runkle v. United States, 122 U. S. 543, 557, 30 L. ed. 1167, 1171, 7 Sup. Ct. Rep. 1141; United States v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644; Tang Tun v. Edsell, 223 U. S. 673, 56 L. ed. 606, 32 Sup. Ct. Rep. 359; United States v. Sing Tuck, 194 U. S. 161, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 98, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611; United States ex rel. Turner v. Williams, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719; Chin Bak Kan v. United States, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; Fok Yung Yo v. United States, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686; Union Bridge Co. v. United States, 204 U. S. 364, 386, 51 L. ed. 523, 533, 27 Sup. Ct. Rep. 367; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

There is ample provision for hearing and appeal upon the matter of assessment.

Kentucky R. Tax Cases, 115 U. S. 321, 331, 29 L. ed. 414, 416, 6 Sup. Ct. Rep. 57; People's Nat. Bank v. Marye, 107 Fed. 570; Hagar v. Reclamation Dist. 111 U. S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 45, 43 L. ed. 354, 358, 19 Sup. Ct. Rep. 90; Turpin v. Lemon, 187 U. S. 51, 58, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; Glidden v. Harrington, 189 U. S. 255, 258, 47 L. ed. 798, 801, 23 Sup. Ct. Rep. 574; Hodge v. Muscatine County, 196 U. S. 276, 281, 49 L. ed. 477, 478, 25 Sup. Ct. Rep. 237.

The invalidity of a part of the act would not invalidate the whole.

Cooley, Const. Lim. 7th ed. pp. 246, 247, 250; Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Huntington v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

Mr. Henry W. Clark filed a memorandum for appellee.

Mr. Chief Justice White delivered the opinion of the court:

As a stockholder of the Union Pacific Railroad Company, the appellant filed his bill to enjoin the corporation from complying with the income tax provisions of the tariff act of October 3, 1913 (§ II., chap. 16, 38 Stat. at L. 166). Because of constitutional questions duly arising the case is here on direct appeal from a decree sustaining a motion to dismiss because no ground for relief was stated.

The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity [10] of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these averments and the ruling in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of § 3224, Revised Statutes (Comp. Stat. 1913, § 5947), against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause, since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit. Before coming to dispose of the case on the merits, however, we observe that the defendant corporation having called the attention of the government to the pendency of the cause and the nature of the controversy and its unwillingness to voluntarily refuse to comply with the act assailed, the United States, as amicus curiæ, has at bar

been heard both orally and by brief for the purpose of sustaining the decree.

Aside from averments as to citizenship and residence, recitals as to the provisions of the statute, and statements as to the business of the corporation, contained in the first ten paragraphs of the bill, advanced to sustain jurisdiction, the bill alleged twenty-one constitutional objections specified in that number of paragraphs or subdivisions. As all the grounds assert a violation of the Constitution, it follows that, in a wide sense, they all charge a repugnancy of the statute to the 16th Amendment, under the more immediate sanction of which the statute was adopted.

The various propositions are so intermingled as to cause it to be difficult to classify them. We are of opinion, however, [11] that the confusion is not inherent, but rather arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes. And the far-reaching effect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it, as follows: (a) The Amendment authorizes only a particular character of direct tax without apportionment, and therefore if a tax is levied under its assumed authority which does not partake of the characteristics exacted by the Amendment, it is outside of the Amendment, and is void as a direct tax in the general constitutional sense because not apportioned. (b) As the Amendment authorizes a tax only upon incomes "from whatever source derived," the exclusion from taxation of some income of designated persons and classes is not authorized, and hence the constitutionality of the law must be tested by the general provisions of the Constitution as to taxation, and thus again the tax is void for want of apportionment. (c) As the right to tax "incomes from whatever source derived" for which the Amendment provides must be considered as exacting intrinsic uniformity, therefore no tax comes under the authority of the Amendment not conforming to such standard, and hence all the provisions of the assailed statute must once more be tested solely under the general and pre-existing provisions of the Constitution, causing the statute again to be void in the absence of apportionment. (d) As the power conferred by the Amendment is new and prospective, the attempt in the statute to make its provisions retroactively apply is void because, so far as the retroactive period is concerned, it is governed by the pre-existing constitutional requirement as to apportionment.

But it clearly results that the proposition and the contentions [12] under it, if acceded to, would cause one provision of the Constitution to destroy another; that is, they would result in bringing the provisions of the Amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned. Moreover, the tax authorized by the Amendment, being direct, would not come under the rule of uniformity applicable under the Constitution to other than direct taxes, and thus it would come to pass that the result of the Amendment would be to authorize a particular direct tax not subject either to apportionment or to the rule of geographical uniformity, thus giving power to impose a different tax in one state or states than was levied in another state or states. This result, instead of simplifying the situation and making clear the limitations on the taxing power, which obviously the Amendment must have been intended to accomplish, would create radical and destructive changes in our constitutional system and multiply confusion.

But let us by a demonstration of the error of the fundamental proposition as to the significance of the Amendment dispel the confusion necessarily arising from the arguments deduced from it. Before coming, however, to the text of the Amendment, to the end that its significance may be determined in the light of the previous legislative and judicial history of the subject with which the Amendment is concerned, and with a knowledge of the conditions which presumptively led up to its adoption, and hence of the purpose it was intended to accomplish, we make a brief statement on those subjects.

That the authority conferred upon Congress by § 8 of article 1 "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine. And it has also never [13] been questioned from the foundation, without stopping presently to determine under which of the separate headings the power was properly to be classed, that there was authority given, as the part was included in the whole, to lay and collect income taxes. Again, it has never moreover been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable, to limitations resulting from the requirements of art. 1, § 8, cl. 1, that "all duties, im-

posts and excises shall be uniform throughout the United States," and to the limitations of art I., § 2, cl. 3, that "direct taxes shall be apportioned among the several states," and of art 1, § 9, cl. 4, that "no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." In fact, the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two correlated limitations as to such power were thus aptly stated by Mr. Chief Justice Fuller in Pollock v. Farmers' Loan & T. Co. 157 U. S. supra, at page 557: "In the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts, and excises." It is to be observed, however, as long ago pointed out in Veazie Bank v. Fenno, 8 Wall. 533, 541, 19 L. ed. 482, 485, that the requirements of apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax, but in their essence were simply regulations concerning the mode in which the plenary power was to be exerted. In the whole history of the government down to the time of the adoption of the 16th Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes and embraced [14] by neither, no question has been anywhere made as to the correctness of these propositions. At the very beginning, however, there arose differences of opinion concerning the criteria to be applied in determining in which of the two great subdivisions a tax would fall. Without pausing to state at length the basis of these differences and the consequences which arose from them, as the whole subject was elaborately reviewed in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, we make a condensed statement which is in substance taken from what was said in that case. Early the differences were manifested in pressing on the one hand and opposing on the other, the passage of an act levying a tax without apportionment on carriages "for the conveyance of persons," and when such a tax was enacted the question of its repugnancy to the Constitution soon came to this court for determination. Hylton v. United States, 3 Dall. 171, 1 L. ed. 556. It was held that the tax came within the class of excises, duties, and imposts, and therefore did not require apportionment, and while this conclusion was agreed to by all the members of the court who took part in the decision of the case, there was not an exact coincidence in the reasoning by which the conclusion was sustained. Without stating the minor differences, it may be said with substantial accuracy that the divergent reasoning was this: On the one hand, that the tax was not in the class of direct taxes requiring apportionment, because it was not levied directly on property because of its ownership, but rather on its use, and was therefore an excise, duty, or impost; and on the other, that in any event the class of direct taxes included only taxes directly levied on real estate because of its ownership. Putting out of view the difference of reasoning which led to the concurrent conclusion in the Hylton Case, it is undoubted that it came to pass in legislative practice that the line of demarcation between the two great classes of direct taxes on the one hand and excises, duties, and [15] imposts on the other, which was exemplified by the ruling in that case, was accepted and acted upon. In the first place this is shown by the fact that wherever (and there were a number of cases of that kind) a tax was levied directly on real estate or slaves because of ownership, it was treated as coming within the direct class and apportionment was provided for, while no instance of apportionment as to any other kind of tax is afforded. Again the situation is aptly illustrated by the various acts taxing incomes derived from property of every kind and nature which were enacted beginning in 1861, and lasting during what may be termed the Civil War period. It is not disputable that these latter taxing laws were classed under the head of excises, duties, and imposts because it was assumed that they were of that character inasmuch as, although putting a tax burden on income of every kind, including that derived from property real or personal, they were not taxes directly on property because of its ownership. And this practical construction came in theory to be the accepted one, since it was adopted without dissent by the most eminent of the text writers. 1 Kent, Com. 254, 256; 1 Story, Const. § 955; Cooley, Const. Lim. 5th ed. *480; Miller, Constitution, 237; Pom. Const. Law, § 281; 1 Hare, Const. Law, 249, 250; Burroughs, Taxn. 502; Ordronaux, Constitutional Legislation, 225.

Upon the lapsing of a considerable period after the repeal of the income tax laws referred to, in 1894 [28 Stat. at L. 509, chap. 349], an act was passed laying a tax on incomes from all classes of property and other sources of revenue which was not ap-

portioned, and which therefore was of course assumed to come within the classification of excises, duties, and imposts which were subject to the rule of uniformity, but not to the rule of apportionment. The constitutional validity of this law was challenged on the ground that it did not fall within the class of excises, duties, and imposts, [16] but was direct in the constitutional sense, and was therefore void for want of apportionment, and that question came to this court and was passed upon in Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912. The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications, including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties, and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things, it was direct on property in a constitutional sense, since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived, and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover, in addition, the conclusion reached in the Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class [17] of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it. Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from "professions, trades, employments, or vocations" (158 U. S. 637), its validity was recognized; indeed, it was expressly declared that no dispute was made upon that subject, and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. Id. p. 635. The whole law was, however, declared unconstitutional on the ground that to permit it to thus operate would relieve real estate and invested personal property from taxation and "would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor" (id. p. 637),—a result which, it was held, could not have been contemplated by Congress.

This is the text of the Amendment:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a general sense,—an authority already possessed and never questioned, —[18] or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided; that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may

be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions which we have previously noticed concerning the assumed limitations to be implied from the language of the Amendment as to the nature and character of the income taxes which it authorizes find no support in the text and are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is also wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived [19] forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class. This must be unless it can be said that although the Constitution, as a result of the Amendment, in express terms excludes the criterion of source of income, that criterion yet remains for the purpose of destroying the classifications of the Constitution by taking an excise out of the class to which it belongs and transferring it to a class in which it cannot be placed consistently with the requirements of the Constitution. Indeed, from another point of view, the Amendment demonstrates that no such purpose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the Constitution and harmonizing their operation. We say this because it is to be observed that although from the date of the Hylton Case, because of statements made in the opinions in that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word "direct" had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution,—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes.

[20] We come, then, to ascertain the merits of the many contentions made in the light of the Constitution as it now stands; that is to say, including within its terms the provisions of the 16th Amendment as correctly interpreted. We first dispose of two propositions assailing the validity of the statute on the one hand because of its repugnancy to the Constitution in other respects, and especially because its enactment was not authorized by the 16th Amendment.

The statute was enacted October 3, 1913, and provided for a general yearly income tax from December to December of each year. Exceptionally, however, it fixed a first period embracing only the time from March 1, to December 31, 1913, and this limited retroactivity is assailed as repugnant to the due process clause of the 5th Amendment, and as inconsistent with the 16th Amendment itself. But the date of the retroactivity did not extend beyond the time when the Amendment was operative, and there can be no dispute that there was power by virtue of the Amendment during that period to levy the tax, without apportionment, and so far as the limitations of the Constitution in other respects are concerned, the contention is not open, since in Stockdale v. Atlantic Ins. Co. 20 Wall. 323, 331, 22 L. ed. 348, 351, in sustaining a provision in a prior income tax law which was assailed because of its retroactive character, it was said:

"The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864 [13 Stat. at L. 417], imposed a tax of 5 per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it."

[21] The statute provides that the tax should not apply to enumerated organizations or corporations, such as labor, agricultural or horticultural organizations, mutual savings banks, etc., and the argument is that as the Amendment authorized a tax on incomes "from whatever source derived," by

implication it excluded the power to make these exemptions. But this is only a form of expressing the erroneous contention as to the meaning of the Amendment, which we have already disposed of. And so far as this alleged illegality is based on other provisions of the Constitution, the contention is also not open, since it was expressly considered and disposed of in Flint v. Stone Tracy Co. 220 U. S. 108, 173, 55 L. ed. 389, 422, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

Without expressly stating all the other contentions, we summarize them to a degree adequate to enable us to typify and dispose of all of them.

1. The statute levies one tax called a normal tax on all incomes of individuals up to $20,000, and from that amount up, by gradations, a progressively increasing tax, called an additional tax, is imposed. No tax, however, is levied upon incomes of unmarried individuals amounting to $3,000 or less, nor upon incomes of married persons amounting to $4,000 or less. The progressive tax and the exempted amounts, it is said, are based on wealth alone, and the tax is therefore repugnant to the due process clause of the 5th Amendment.

2. The act provides for collecting the tax at the source; that is, makes it the duty of corporations, etc., to retain and pay the sum of the tax on interest due on bonds and mortgages, unless the owner to whom the interest is payable gives a notice that he claims an exemption. This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation, and we recapitulate various contentions as to discrimination against corporations and against individuals, [22] predicated on provisions of the act dealing with the subject.

(a) Corporations indebted upon coupon and registered bonds are discriminated against, since corporations not so indebted are relieved of any labor or expense involved in deducting and paying the taxes of individuals on the income derived from bonds.

(b) Of the class of corporations indebted as above stated, the law further discriminates against those which have assumed the payment of taxes on their bonds, since although some or all of their bondholders may be exempt from taxation, the corporations have no means of ascertaining such fact, and it would therefore result that taxes would often be paid by such corporations when no taxes were owing by the individuals to the government.

(c) The law discriminates against owners of corporate bonds in favor of individuals none of whose income is derived from such property, since bondholders are, during the interval between the deducting and the paying of the tax on their bonds, deprived of the use of the money so withheld.

(d) Again, corporate bondholders are discriminated against because the law does not release them from payment of taxes on their bonds even after the taxes have been deducted by the corporation, and therefore if, after deduction, the corporation should fail, the bondholders would be compelled to pay the tax a second time.

(e) Owners of bonds the taxes on which have been assumed by the corporation are discriminated against because the payment of the taxes by the corporation does not relieve the bondholders of their duty to include the income from such bonds in making a return of all income, the result being a double payment of the taxes, labor and expense in applying for a refund, and a deprivation of the use of the sum of the taxes during the interval which elapses before they are refunded.

[23] 3. The provision limiting the amount of interest paid which may be deducted from gross income of corporations for the purpose of fixing the taxable income to interest on indebtedness not exceeding one half the sum of bonded indebtedness and paid-up capital stock is also charged to be wanting in due process because discriminating between different classes of corporations and individuals.

4. It is urged that want of due process results from the provision allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations.

5. Want of due process is also asserted to result from the fact that the act allows a deduction of $3,000 or $4,000 to those who pay the normal tax, that is, whose incomes are $20,000 or less, and does not allow the deduction to those whose incomes are greater than $20,000; that is, such persons are not allowed, for the purpose of the additional or progressive tax, a second right to deduct the $3,000 or $4,000 which they have already enjoyed. And a further violation of due process is based on the fact that for the purpose of the additional tax no second right to deduct dividends received from corporations is permitted.

6. In various forms of statement, want of due process, it is moreover insisted, arises from the provisions of the act allowing a deduction for the purpose of ascertaining the taxable income of stated amounts, on the ground that the provisions discriminate between married and single people, and discriminate between husbands and wives

who are living together and those who are not.

7. Discrimination and want of due process result, it is said, from the fact that the owners of houses in which they live are not compelled to estimate the rental value in making up their incomes, while those who are living in rented houses and pay rent are not allowed, in making up their taxable income, to deduct rent which they have [24] paid, and that want of due process also results from the fact that although family expenses are not, as a rule, permitted to be deducted from gross, to arrive at taxable, income, farmers are permitted to omit from their income return certain products of the farm which are susceptible of use by them for sustaining their families during the year.

So far as these numerous and minute, not to say in many respects hypercritical, contentions are based upon an assumed violation of the uniformity clause, their want of legal merit is at once apparent, since it is settled that that clause exacts only a geographical uniformity, and there is not a semblance of ground in any of the propositions for assuming that a violation of such uniformity is complained of. Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Patton v. Brady, 184 U. S. 608, 622, 46 L. ed. 713, 720, 22 Sup. Ct. Rep. 493; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421.

So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause. Treat v. White, 181 U. S. 264, 45 L. ed. 853, 21 Sup. Ct. Rep. 611; Patton v. Brady, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421. And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking [25] of the same in violation of the 5th Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions. It is true that it is elaborately insisted that although there be no express constitutional provision prohibiting it, the progressive feature of the tax causes it to transcend the conception of all taxation and to be a mere arbitrary abuse of power which must be treated as wanting in due process. But the proposition disregards the fact that in the very early history of the government a progressive tax was imposed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 to which we have previously adverted. And over and above all this the contention but disregards the further fact that its absolute want of foundation in reason was plainly pointed out in Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, and the right to urge it was necessarily foreclosed by the ruling in that case made. In this situation it is, of course, superfluous to say that arguments as to the expediency of levying such taxes, or of the economic mistake or wrong involved in their imposition, are beyond judicial cognizance. Besides this demonstration of the want of merit in the contention based upon the progressive feature of the tax, the error in the others is equally well established either by prior decisions or by the adequate bases for classification which are apparent on the face of the assailed provisions; that is, the distinction between individuals and corporations, the difference between various kinds of corporations, etc., etc. Ibid.; Flint v. Stone Tracy Co. 220 U. S. 107, 158, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Billings v. United States, 232 U. S. 261, 282, 58 L. ed. 596, 605, 34 Sup. Ct. Rep. 421; First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; National Safe Deposit Co. v. Stead, 232 U. S. 58, 70, 58 L. ed. 504, 510, 34 Sup. Ct. Rep. 209. In fact, comprehensively surveying all the contentions [26] relied upon, aside from the erroneous construction of the Amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to differently tax them transcends the limit of taxation and

amounts to a want of due process, and that where a tax levied is believed by one who resists its enforcement to be wanting in wisdom and to operate injustice, from that fact in the nature of things there arises a want of due process of law and a resulting authority in the judiciary to exceed its powers and correct what is assumed to be mistaken or unwise exertions by the legislative authority of its lawful powers, even although there be no semblance of warrant in the Constitution for so doing.

We have not referred to a contention that because certain administrative powers to enforce the act were conferred by the statute upon the Secretary of the Treasury, therefore it was void as unwarrantedly delegating legislative authority, because we think to state the proposition is to answer it. Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 490, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[27] WILLIAM M. FLEITMANN, Suing on Behalf of Himself and All Other Stockholders of the Consolidated Street Lighting Company, Who Shall Elect to Come in and Contribute to the Expense of the Action, Appt.,

v.

WELSBACH STREET LIGHTING COMPANY OF AMERICA. (No. 145.)

WILLIAM M. FLEITMANN, Suing as Above, Appt.,

v.

ARTHUR E. SHAW. (No. 146.)

(See S. C. Reporter's ed. 27-29.)

Corporations — stockholder's suit — recovering penalty under anti-trust act — right to jury trial.

A stockholder may not maintain a suit in equity to recover for the corporation, upon the latter's refusal to sue, the penalty of threefold damages under the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820), from persons and corporations whom he charges with the ruin of his corporation in pursuance of a monopolistic combination, since the right of defendants to a jury trial cannot thus be taken away.

[For other cases, see Corporations, IX. d, 2; Jury, I. b, in Digest Sup. Ct. 1908.]

[Nos. 145 and 146.]

Argued December 17, 1915. Decided January 24, 1916.

TWO APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review decrees which affirmed decrees of the District Court for the Southern District of New York, dismissing the bills in suits in equity brought by a stockholder to recover for the corporation the penalty of threefold damages under the anti-trust act from persons and corporations whom he charges with the ruin of his corporation in pursuance of a monopolistic combination. Affirmed.

See same case below, 128 C. C. A. 31, 211 Fed. 103.

The facts are stated in the opinion.

Mr. Henry L. Scheuerman argued the cause, and, with Messrs. Henry A. Wise and Harry F. Mela, filed a brief for appellant:

Whenever a right of action exists in favor of a corporation, and the latter, by reason of its being under the control of the very parties against whom the right of action exists, fails and refuses to enforce it, any stockholder, upon the failure of his bona fide attempts to procure corporate action, or upon his showing that corporate action, if taken, would not be prosecuted in good faith, may maintain a suit in equity to secure redress to the corporation.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Delaware & H. Co. v. Albany & S. R. Co. 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540.

Is there any valid reason for denying the application of that rule to a case where the cause of action in favor of the corporation arises under the Sherman anti-trust law, and thus making such a case an exception to the general rule?

(1) Is there any reason based on the letter of the statute?

(2) Is there any reason based on precedent?

(3) Is there any reason based upon the general principles underlying stockholders' suits?

Alexander v. Central R. Co. 3 Dill. 487, Fed. Cas. No. 166; Morgan v. Kansas P. R. Co. 21 Blatchf. 134, 15 Fed. 55; Ervin v. Oregon R. & Nav. Co. 23 Blatchf. 517, 27 Fed. 625; Backus v. Brooks, 115 C. C. A. 364, 195 Fed. 452; Farmers' Loan & T. Co. v. New York & N. R. Co. 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Kavanaugh v. Commonwealth Trust Co. 181 N. Y. 121, 73 N. E. 562.

(4) Is there any reason based on the

circumstance that the right of action in favor of the corporation is one at common law for money damages?

Ætna Ins. Co. v. Albany & S. R. Co. 156 Fed. 132, affirmed on opinion below in 95 C. C. A. 393, 170 Fed. 1019; Delaware & H. Co. v. Albany & S. R. Co. 215 U. S. 601, 54 L. ed. 344, 30 Sup. Ct. Rep. 401.

(5) Is there any reason based on the circumstance that the right of the corporation is a statutory cause of action?

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401.

(6) Is there any reason based on expediency?

Minnesota v. Northern Securities Co. 194 U. S. 48, 70, 71, 48 L. ed. 870, 880, 881, 24 Sup. Ct. Rep. 598.

The object of the statute was to provide a right of action for such injuries, which did not exist at common law (Addyston Pipe & Steel Co. v. United States, 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96). It was designed to promote commerce, and to protect those who may have invested their capital in commercial enterprises from being oppressed and despoiled by unlawful combinations in violation of the act. The appellees seek such a construction of the act as would defeat the intent of Congress and the object of the legislation.

Mr. Edward W. Hatch argued the cause, and, with Mr. William F. Sheehan, filed a brief for appellees:

The courts below did not err in holding that the bill of complaint does not set forth a good cause of action in equity.

Blindell v. Hagan, 54 Fed. 40; Pidcock v. Harrington, 64 Fed. 821; Metcalf v. American School-Furniture Co. 108 Fed. 909, affirmed without opinion in 51 C. C. A. 599, 113 Fed. 1020; Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 659, affirmed on opinion below in 35 C. C. A. 172, 92 Fed. 1022; Irving v. Neal, 209 Fed. 477; Pollard v. Bailey, 20 Wall. 520, 527, 22 L. ed. 376, 378; Greer, M. & Co. v. Stoller, 77 Fed. 3; Ames v. American Teleph. & Teleg. Co. 166 Fed. 820; Loeb v. Eastman Kodak Co. 106 C. C. A. 142, 183 Fed. 704; Corey v. Independent Ice Co. 207 Fed. 459; United Copper Securities Co. v. Amalgamated Copper Co. L.R.A. —, —, 139 C. C. A. 15, 223 Fed. 421; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 35, 45 L. ed. 410, 412, 413, 21 Sup. Ct. Rep. 251; Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450–460, 26 L. ed. 827–832; Dodge v. Woolsey, 18 How. 331, 341, 15 L. ed. 401, 404; Dowell v. Mitchell, 105 U. S. 430–432, 26 L. ed. 1142, 1143; Buzard v. Houston, 119 U. S. 347–352, 30 L. ed. 451–453, 7 Sup. Ct. Rep. 249; Whitehead v. Shattuck, 138 U. S. 147–151, 34 L. ed. 873, 874, 11 Sup. Ct. Rep. 276; Scott v. Neely, 140 U. S. 106–113, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; Curriden v. Middleton, 232 U. S. 633, 636, 58 L. ed. 765, 767, 34 Sup. Ct. Rep. 458; Scott v. Armstrong, 146 U. S. 499, 512, 36 L. ed. 1059, 1063, 13 Sup. Ct. Rep. 148; Lindsay v. First Nat. Bank, 156 U. S. 485, 493, 39 L. ed. 505, 508, 15 Sup. Ct. Rep. 472; Gray v. Grand Trunk Western R. Co. 84 C. C. A. 392, 156 Fed. 741.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill by a stockholder of the Consolidated Street Lighting Company, against that company and a number [28] of other corporations and individuals, to compel the defendants other than his own company to pay to the latter threefold damages under the Sherman act. July 2, 1890, chap. 647, § 7, 26 Stat. at L. 209, 210, Comp. Stat. 1913, §§ 8820, 8829. According to the allegations the other defendants conspired to control the business of municipal lighting, etc., throughout the United States, and in pursuance of their conspiracy procured their agent to purchase from the former owners a majority of the stock in the plaintiff's company, and then proceeded to ruin it and drive it out of business by misconducting its affairs. The plaintiff has demanded of his company and its officers to institute proceedings, but they have refused. The bill was dismissed by the district court on motion of the appellees in the two appeals before this court, and the decree was affirmed by the circuit court of appeals. 128 C. C. A. 31, 211 Fed. 103.

The bill alleges in terms that it is brought to recover threefold the damages alleged; a decree for such damages was the decree prayed. The only specific error assigned on appeal to the circuit court of appeals was holding that such a suit in equity could not be maintained by a single stockholder; that was the only question dealt with by the district court, and that was the ground of decision in the circuit court of appeals. It really is the only question in the case.

Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue, —how the liability which is the principal matter can be converted into an incident

of the plaintiff's domestic difficulties with the company that has been wronged.

No doubt there are cases in which the nature of the [29] right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other. Pollard v. Bailey, 20 Wall. 520, 22 L. ed. 376. Even the act of October 15, 1914, chap. 323, § 16, 38 Stat. at L. 730, 737, passed since this suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss.

It now is suggested, evidently as an afterthought since the decision in the district court, that there might be a decree directing the corporation to sue, or, if it fails to do so, permitting the plaintiff to sue in its name and on its behalf. But the bill is not framed for that purpose, as the court below held.

Decree affirmed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

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[30] MT. VERNON-WOODBERRY COTTON DUCK COMPANY et al., Plffs. in Err.,

v.

ALABAMA INTERSTATE POWER COMPANY.

(See S. C. Reporter's ed. 30-33.)

Error to state court — final judgment.

1. A judgment of the highest court of a state, finally disposing of a writ of prohibition sued out under Ala. Code 1907, §§ 4864-4867, 4872, to prevent an inferior court from taking jurisdiction of an action, is a final judgment, within the meaning of the Judicial Code, § 237, governing writs of error to state courts, although such judgment does not determine the merits of the principal suit.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Error to state court — following decision below.

2. The Federal Supreme Court on writ of error to a state court to review a judgment dismissing a writ of prohibition to prevent a probate court from taking jurisdiction of condemnation proceedings will follow the rulings of the state court upon such objections urged in support of the writ of prohibition as the asserted invalidity of the state condemnation laws under the state Constitution, and the irregularity of the proceedings under those laws, and the insufficiency of the condemnation petition.

[For other cases, see Appeal and Error, 2154-2163, 2209-2226, in Digest Sup. Ct. 1908.]

Eminent domain — public use — distribution of power produced by water as motive force.

3. The manufacture, supply, and sale to the public of power produced by water as a motive force is a public use for which land, water, and water rights may, consistently with U. S. Const., 14th Amend., be condemned.

[For other cases, see Eminent Domain, I. d, in Digest Sup. Ct. 1908.]

Eminent domain — jurisdiction — validity of state statute.

4. Neither the jurisdiction of a state probate court over condemnation proceedings instituted by a corporation organized to manufacture, supply, and sell to the public power produced by water as a motive force, nor the constitutionality of the state laws authorizing the proceedings, are affected because the rights sought to be condemned are below instead of above the contemplated dam, nor because the corporation, before condemning rights, must have obtained, by other means, at least an acre on either side of the stream for a dam site, nor because the proceedings may be begun before the dam is built.

[For other cases, see Eminent Domain, I. a, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — exceptions in condemnation statute.

5. Excepting from the eminent domain powers conferred by state law upon corporations organized to manufacture, supply, and sell to the public power produced by water as a motive force, private residences, lands of other corporations having similar powers,

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NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what judgments or decrees are final for purposes of review—see notes to Gibbons v. Ogden, 5 L. ed. U. S. 302, and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

As to what is a public purpose which will justify the power of eminent domain—see notes to Pittsburg W. & K. R. Co. v. Benwood Iron Works, 2 L.R.A. 680; Barre R. Co. v. Montpelier & W. River R. Co. 4 L.R.A. 785; and Sweet v. Rechel, 40 L. ed. U. S. 188.

Generally, as to judicial power over the

and cotton factories, subject to the taking of the excess of water over that in actual use, or capable of use, at normal stages of the stream, is too plainly reasonable to come within the condemnation of the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. a, 1, in Digest Sup. Ct. 1908.]

[No. 200.]

Submitted January 10, 1916. Decided January 24, 1916.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which, on an appeal from the Circuit Court of Tallapoosa County, in that state, dismissed a writ of prohibition to prevent the Probate Court of that county from taking jurisdiction of condemnation proceedings. Affirmed.

See same case below, 186 Ala. 622, 65 So. 287.

The facts are stated in the opinion.

Messrs. **H. N. Randolph** and **Edwin G. Baetjer** submitted the cause for plaintiffs in error:

Eminent domain statutes are strictly construed.

Lewis, Em. Dom. 3d ed. ¶ 388; New York & H. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Re Poughkeepsie Bridge Co. 108 N. Y. 491, 15 N. E. 601; 15 Enc. Law & Proc. 567; United States v. Rauers, 70 Fed. 748; Cooley, Const. Lim. p. 61; Mills, Em. Dom. ¶ 48; McElroy v. Kansas City, 21 Fed. 260; Binney's Case, 2 Bland, Ch. 99; Ex parte Smith, 23 Ala. 94; Sadler v. Langham, 34 Ala. 311; Ex parte Hill, 38 Ala. 429; Ex parte Stickney, 40 Ala. 160; Bottoms v. Brewer, 54 Ala. 288; Ex parte Lyon, 60 Ala. 650; Nashville, C. & St. L. R. Co. v. Hobbs, 120 Ala. 600, 24 So. 933; Birmingham R. & Electric Co. v. Birmingham Traction Co. 121 Ala. 479, 25 So. 777; Hobbs v. Nashville, C. & St. L. R. Co. 122 Ala. 602, 82 Am. St. Rep. 103, 26 So. 139; Ex parte State, 150 Ala. 489, 10 L.R.A.(N.S.) 1129, 124 Am. St. Rep. 79, 43 So. 490; Moore v. Wright, 34 Ala. 311; McCulley v. Cunningham, 96 Ala. 583, 11 So. 694.

The authority must be strictly pursued.

Lewis, Em. Dom. ¶ 387; Darrow v. Chicago, L. S. & S. B. R. Co. 169 Ind. 99, 81 N. E. 1081; State, Vreeland, Prosecutor, v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052.

The due and orderly enactment of law is intimately and directly related to due process.

Cooley, Const. Lim. 7th ed. pp. 186, 259, 506; Lewis, Em. Dom. 3d ed. § 409, p. 738.

It follows that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.

Cooley, Const. Lim. 7th ed. p. 163.

Applying this principle, the supreme court of Oregon, in a case similar in some respects to the one at bar, held that the legislature cannot delegate to code commissioners the power to amend the laws of the state.

State v. Gaunt, 13 Or. 115, 9 Pac. 55.

Whether or not the use for which property is sought to be condemned is a public use is a question of law, and not of fact.

1 Lewis, Em. Dom. 3d ed. § 251, p. 497, and cases cited in note 8; London v. Sample Lumber Co. 91 Ala. 606, 8 So. 281; Sadler v. Langham, 34 Ala. 326.

A legislature has no power, in any case, to take the property of one individual and pass it over to another, without reference to some use to which it is to be applied for the public benefit.

Cooley, Const. Lim. 6th ed. p. 651, 7th ed. p. 764. See also Lewis, Em. Dom. § 250; New York, N. H. & H. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510; Arnsperger v. Crawford, 101 Md. 247, 70 L.R.A. 497, 61 Atl. 413; Re Eureka Basin Warehouse & Mfg. Co. 96 N. Y. 44; Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 420; Re Split Rock Cable Road Co. 128 N. Y. 408, 28 N. E. 506; Healy Lumber Co. v. Morris, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681; Re Tuthill, 163 N. Y. 133, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303.

This statute restricts to an exceedingly limited class the corporations (i. e., cotton

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right of eminent domain—see note to Grafton v. St. Paul, M. & M. R. Co. 22 L.R.A. (N.S.) 1.

As to whether generation of electrical power by private corporation is a public use—see notes to State ex rel. Tacoma Industrial Co. v. White River Power Co. 2 L.R.A.(N.S.) 842, and Walker v. Shasta Power Co. 19 L.R.A.(N.S.) 725.

On effect of offer to serve public on right to resort to eminent domain in aid of attempt to transmute water power into electricity for sale—see note to Jones v. North Georgia Electric Co. 6 L.R.A.(N.S.) 122.

On the duty to serve public as affecting liability of public utility for temporary interference with water rights—see note to Taylor v. Indiana & M. Electric Co. L.R.A. 1915E, 294.

On who may raise objection that state statute contains an unconstitutional discrimination—see note to Pugh v. Pugh, 32 L.R.A.(N.S.) 954.

On constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

factories owned by corporations possessing lands, hydraulic structures, water or water rights in excess of what is actually in use or may be used at normal stages of the stream) whose property can be condemned. This is a purely arbitrary classification of the kind of cotton mill corporations whose property rights may be condemned, and denies to such corporations the equal protection of the law guaranteed by the 14th Amendment.

Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668–671, 17 Sup. Ct. Rep. 255; Cooley, Const. Lim. 7th ed. 561 et seq.; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 560, 561, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431.

It is a denial of due process to undertake to condemn property in a court wholly without jurisdiction of such proceedings.

Cooley, Const. Lim. 7th ed. p. 760; 2 Lewis, Em. Dom. 3d ed. § 865; Richland School Twp. v. Overmyer, 164 Ind. 382, 73 N. E. 811; Re Poughkeepsie Bridge Co. 108 N. Y. 490, 15 N. E. 601.

A judgment of the highest court of a state in a proceeding for a prohibition is a "final" judgment in a "suit," from which a writ of error will lie to this court.

Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Colorado Eastern R. Co. v. Union P. R. Co. 36 C. C. A. 263, 94 Fed. 312; Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. ed. 822; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73; Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; Cook v. Cook, 18 Fla. 636; Atlanta v. First Methodist Church, 83 Ga. 449, 10 S. E. 231.

Messrs. Thomas W. Martin and Ray Rushton submitted the cause for defendant in error. Mr. Lawrence Macfarlane was on the brief:

Many of the questions which are suggested by the assignments of error, as well as by the brief for the plaintiffs in error, are not open here.

Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594; United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; Re Duncan, 139 U. S. 449, 35 L. ed. 210, 11 Sup. Ct. Rep. 573; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Smith v. Jennings, 206 U. S. 276, 51 L. ed. 1061, 27 Sup. Ct. Rep. 610.

The right of eminent domain antedates constitutions, and is an incident of sovereignty inherent in and belonging to every sovereign state.

United States v. Jones, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; Searl v. School Dist. 133 U. S. 553, 33 L. ed. 740, 10 Sup. Ct. Rep. 374.

All of the elements which enter into the value of the property to be taken are embraced within the term "just compensation."

Searl v. School Dist. supra; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; New York v. Sage, 239 U. S. 57, ante, 143, 36 Sup. Ct. Rep. 25; Alabama C. R. Co. v. Musgrove, 169 Ala. 424, 53 So. 1009; United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; Alabama Power Co. v. Carden, 189 Ala. 384, 66 So. 596; McEachin v. Tuscaloosa, 164 Ala. 263, 51 So. 153.

The legislature may classify subjects of condemnation.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

The state may authorize in condemnation cases the taking possession prior to the final determination of the amount of compensation, and payment thereof.

Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; Williams v. Parker, 188 U. S. 491, 47 L. ed. 559, 23 Sup. Ct. Rep. 440.

In the light of the holding by the supreme court of Alabama in the present and other cases, that the manufacture, supply, and sale to the public of electric power generated by water as a motive force is a public use or purpose for which property may be taken under the power of eminent domain, there is no question which can arise in this court.

Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 58 L. ed. 924, 34 Sup. Ct. Rep. 522; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 49

L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174; Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441.

The supreme court of Alabama referred to a number of cases which have sustained the principle that the furnishing of electricity to the public in such manner is a public use; and, in addition to the cases cited in the opinion, and in the note to § 268 of Lewis on Eminent Domain, 3d ed. the following recent cases sustain the same principle:

Lucas v. Ashland Light, Mill & P. Co. 92 Neb. 550, 138 N. W. 761; Tuttle v. Jefferson Power & Improv. Co. 31 Okla. 710, 122 Pac. 1102; Wisconsin River Improv. Co. v. Pier, 137 Wis. 325, 21 L.R.A.(N.S.) 538, 118 N. W. 857; Great Falls Power Co. v. Webb, 123 Tenn. 584, 133 S. W. 1105; Hagerla v. Mississippi River Power Co. 202 Fed. 776; State ex rel. Dominick v. Superior Ct. 52 Wash. 196, 21 L.R.A.(N.S.) 448, 100 Pac. 317; Deerfield River Co. v. Wilmington Power & Paper Co. 83 Vt. 548, 77 Atl. 862; Nolan v. Central Georgia Power Co. 134 Ga. 201, 67 S. E. 656; Otter Tail Power Co. v. Brastad, 128 Minn. 415, 151 N. W. 198; Pittsburg Hydro-Electric Co. v. Liston, 70 W. Va. 83, 40 L.R.A.(N.S.) 602, 73 S. E. 86.

Messrs. Thomas W. Martin and Ray Rushton filed a separate brief for defendant in error:

The effect of the judgment of the supreme court of Alabama is to leave the trial of the case to proceed in the court of first instance as if there had been no proceeding instituted to delay or prohibit the trial. The merits are yet to be determined. There is no exact judgment to be entered, granting or refusing to grant, or condemning or refusing to condemn, the property described in the petition, so that the case falls within the rule laid down in the following cases:

Benjamin v. Dubois, 118 U. S. 46, 30 L. ed. 52, 6 Sup. Ct. Rep. 925; Dainese v. Kendall, 119 U. S. 53, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Meagher v. Minnesota Thresher Mfg. Co. 145 U. S. 608, 36 L. ed. 834, 12 Sup. Ct. Rep. 876; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Clark v. Kansas City, 172 U. S. 334, 43 L. ed. 467, 19 Sup. Ct. Rep. 207; Grant v. Phœnix Mut. L. Ins. Co. 106 U. S. 429, 27 L. ed. 237, 1 Sup. Ct. Rep. 414; Moses v. Mobile, 15 Wall. 387, 21 L. ed. 176; Loeber v. Shroeder, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1001, 25 Sup. Ct. Rep. 654; Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; Lodge v. Twell, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; Bostwick v. Brinkeroff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition for a writ of prohibition to prevent the probate court of Tallapoosa county from taking [31] jurisdiction of condemnation proceedings instituted by the Alabama Interstate Power Company to take land, water, and water rights belonging to the petitioner. An alternative writ was issued, but the supreme court of the state ordered it to be quashed and the writ to be dismissed. 186 Ala. 622, 65 So. 287. The grounds of the petition are that the statutes of Alabama do not authorize the proceedings, and that if they do they contravene the 14th Amendment of the Constitution of the United States. The supreme court upheld the statutes and the jurisdiction of the probate court, but left the sufficiency of the petition for condemnation, whether every subject of which condemnation was sought could be condemned, and the ability of the Power Company to prove its case, to be determined in the condemnation case. There is a motion to dismiss the writ of error on the ground that the present decision is not final because it does not determine the merits; but this motion must be denied. Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code, act of March 3, 1911, chap. 231, § 237, 36 Stat. at L. 1087, 1156, Comp. Stat. 1913, §§ 968, 1214, under the statutes of Alabama and by the common law. Code of 1907, §§ 4864–4867, 4872; Weston v. Charleston, 2 Pet. 449, 464, 465, 7 L. ed. 481, 486, 487. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

The argument in favor of granting the

writ, presented by the plaintiffs in error, is addressed in great part to matters with which this court has no concern. It is argued that the probate court could not be given jurisdiction of the condemnation proceedings consistently with the Constitution of the state; that under the same instrument the state legislature had no power to pass the condemnation acts; that the petition was insufficient to found jurisdiction of the case and was defective in various [32] ways; that a part of the condemnation sought was bad under the statutes in any event; and that certain words in the Alabama Code under which it is sought to condemn rights below the contemplated dam of the Power Company never were properly enacted by the legislature of the state. All these points must be taken to have been decided adversely to the plaintiff in error by the supreme court of Alabama so far as they might furnish grounds for prohibition, and they all are matters on which this court follows the supreme court of the state.

The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the Power Company's incorporation, and that for which it seeks to condemn property of the plaintiff in error, is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. The respect due to the judgment of the state would have great weight if there were a doubt. Hairston v. Danville & W. R. Co. 208 U. S. 598, 607, 52 L. ed. 637, 641, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; O'Neill v. Leamer, 239 U. S. 244, 253, ante, 249, 265, 36 Sup. Ct. Rep. 54. But there is none. See Otis Co. v. Ludlow Mfg. Co. 201 U. S. 140, 151, 50 L. ed. 696, 705, 26 Sup. Ct. Rep. 353. We perceive no ground for the distinction attempted between the taking of rights below the contemplated dam, such as these are, and those above. Compensation is provided for according to rules [33] that the court below declares to be well settled and that appear to be adequate. The details as to what may be taken and what not under the statutes and petition are not open here. Before a corporation can condemn rights it is required to have obtained, by other means, at least an acre on each side of the stream for a dam site, and this is supposed to show that the use is not public. It is only a reasonable precaution to insure good faith. A hardly consistent argument is that the dam should be built before the necessity of taking waters below can be shown. But a plan may show the necessity beforehand. All that we decide is that no general objection based on these grounds affects the jurisdiction of the probate court or the constitutionality of the act.

Certain exceptions from the powers conferred, such as private residences, lands of other corporations having similar powers, and cotton factories, subject to the taking of the excess of water over that in actual use or capable of use at normal stages of the stream, are too plainly reasonable so far as they come in question here to need justification. Discrimination is alleged, but not argued. We see nothing that runs against the 14th Amendment. The right given to take possession before the compensation is finally determined also is not argued. Williams v. Parker, 188 U. S. 491, 502, 47 L. ed. 559, 562, 23 Sup. Ct. Rep. 440. Without further discussion of the minutiæ, we are of opinion that the decision of the Supreme Court of Alabama upon the questions arising under the Constitution of the United States was correct.

Judgment affirmed.

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[34] NEW YORK, PHILADELPHIA, & NORFOLK RAILROAD COMPANY, Plff. in Err.,

v.

PENINSULA PRODUCE EXCHANGE OF MARYLAND.

(See S. C. Reporter's ed. 34-42.)

Connecting carriers — delay beyond own line — Carmack amendment.

1. Damages for the loss of the market because of unreasonable delay in transportation occurring anywhere en route are comprehended by the provision of the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591), § 7, to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8592), § 20, which

NOTE.—As to the rights and liabilities of connecting carriers—see notes to Fox v. Boston & M. R. Co. 1 L.R.A. 703; Crossan v. New York & N. E. R. Co. 3 L.R.A. 766;

makes the initial carrier of an interstate shipment liable to the holder of the bill of lading for "any loss, damage, or injury to such property" caused by it or by any carrier in the chain of transportation, despite any agreement or stipulation to the contrary, with the right of recovery over against the carrier at fault in the amount of such "loss, damage, or injury" as the former carrier may have been required to pay to the owners of the property.

[For other cases, see Carriers, II. c, in Digest Sup. Ct. 1913 Supp.]

Error to state court — harmless error — instructions — evidence.

2. A judgment of the highest state court which affirms a judgment against a carrier for the damages sustained by a shipper through a decline in market value, due to an unreasonable delay in the transportation of an interstate shipment, will not be reversed because the trial court, by its instructions, erroneously permitted the jury to award as damages the amount of such decline in value without reference to a limitation in the bill of lading and in the carrier's published tariff that the carrier's liability for loss or damage is to be computed on the basis of the value of the shipment plus the freight at the time and place of shipment, unless a lower value is agreed upon, or because the trial court erroneously excluded such tariff with its conditions when offered in evidence, where, upon the facts as the highest court finds them to be, the agreed maximum of liability as stipulated is not exceeded by the judgment.

[For other cases, see Appeal and Error, 5051–5065, 5071–5126, in Digest Sup. Ct. 1908.]

[No. 137.]

Argued December 15 and 16, 1915. Decided January 24, 1916.

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment which affirmed a judgment of the Circuit Court for Somerset County, in that state, in favor of a shipper in an action against an initial carrier for the loss of the market, due to unreasonable delay in the transportation of an interstate shipment. Affirmed.

See same case below, 122 Md. 215, 89 Atl. 433.

The facts are stated in the opinion.

Messrs. **Henry Wolf Bikle** and **Frederic D. McKenney** argued the cause and filed a brief for plaintiff in error:

While it is well settled in this court that a carrier accepting property consigned to a point beyond its own line is not liable for the transportation of the property after it leaves its rails, in the absence of express agreement to assume such responsibility (Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827), in the present proceeding there is an express stipulation against the assumption of such liability, except as it has been imposed by law. It follows, therefore, that the plaintiff in error is under no liability to the shipper unless the Carmack amendment is sufficiently broad in its scope to include liability for delay occurring on the line of a connection.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; Wabash R. Co. v. Pearce, 192 U. S. 179, 48 L. ed. 397, 24 Sup. Ct. Rep. 231.

The Carmack amendment carefully confines the liability imposed on the initial carrier to loss, damage, or injury caused by it or by any common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line or lines such property may pass; and this liability is not coextensive with the common-law liability of the individual carriers.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. ed. 516, 523, 32 Sup. Ct. Rep. 205; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

From the earliest times the liability for delay has been an entirely different and distinct liability from that for loss, damage, or injury to the property. The latter liability has been the unique liability shared by the carrier and the innkeeper. (See Holmes, Common Law, chap. 5, and Professor Beale's article, 11 Harvard L. Rev. 158.) This liability required the carrier to answer at all events for the safety of the property except in those situations for which the law itself created excuses, *viz.*, the act of God, the act of the public enemy, the act of the law, the act of the shipper, and the nature of the goods. But delay in itself is not a cause of action; it must be negligent delay.

Story, Bailm. 9th ed. § 545A; Schouler, Bailm. & Carr. 3d ed. § 488; Hutchinson, Carr. 3d ed. § 653; Pennsylvania R. Co. v. Clark, 118 Md. 514, 85 Atl. 613.

Furthermore, where property having moved over the lines of several railroads is delivered at destination damaged, there

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Hill v. Denver & R. G. R. Co. 4 L.R.A. 376; International & G. N. R. Co. v. Tisdale, 4 L.R.A. 545; Browning v. Goodrich Transp. Co. 10 L.R.A. 415; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Miller v. South Carolina R. Co. 9 L.R.A. 833; and Roy v. Chesapeake & O. R. Co. 31 L.R.A.(N.S.) 1.

Effect of Carmack amendment on liability of connecting carrier for loss beyond its own line—see note to Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. U. S. 516.

is a presumption, when it is shown that such property was delivered to the initial carrier in good condition, that the damage occurred on the line of the final carrier. This presumption results from the application of another presumption, that a condition found to exist is presumed to continue until the contrary appears. In cases of delay resulting in no physical damage, no similar application of the more comprehensive presumption is possible, and it is settled in cases of delay that there is no presumption as to the line on which the delay occurred, but that the plaintiff must localize the delay on the line of the carrier selected by him for suit.

East Tennessee, V. & G. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. 809; Almand v. Georgia R. & Bkg. Co. 95 Ga. 775, 22 S. E. 674; Hutchinson, Carr. 3d ed. 1590; 6 Cyc. 490, note 40, p. 491; Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031.

It seems improbable that Congress could have intended to include liability for delay by the use of the words, "loss, damage, or injury to the property," which have a meaning that excludes delay. Moreover, in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, this court apparently recognizes delay as a distinct and separate cause of action from loss, injury, or damage to property.

But, if an initial carrier may be held for the delay of the connecting carrier if such delay causes damage or injury to the property, it would still remain to determine whether the initial carrier could be held where such delay caused no loss, damage, or injury to the property, but only loss, damage, or injury to the shipper consequent upon conditions having no reference to the actual transportation of the goods. To sustain such liability would involve the carrier in a liability uncertain in extent and speculative in character,—a liability which would contravene the public interest.

J. C. Shaffer & Co. v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 8.

Provisions of bills of lading requiring that notices of claims for loss or damage to shipments shall be filed within a specified time are not sufficient to justify a demand for a similar notice where the shipment has been delayed. "Loss or damage to the property, and injury to the shipper resulting from loss of market, are quite distinct."

Johnson v. Missouri, K. & T. R. Co. 107 App. Div. 374, 95 N. Y. Supp. 182; D. Klass Commission Co. v. Wabash R. Co. 80 Mo. App. 164; Leonard v. Chicago & A. R. Co. 54 Mo. App. 293; Frey v. New York C. & H. R. R. Co. 114 App. Div. 747, 100 N. Y. Supp. 225; Kramer v. Chicago, M. & St. P. R. Co. 101 Iowa, 178, 70 N. W. 119, 1 Am. Neg. Rep. 229.

The Peninsula Produce Exchange seeks in this case to recover upon a liability which not only is not offered in the tariffs of the carrier, but is specifically contrary to the contract of transportation into which the carrier, through the medium of its tariffs, offers to enter.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915B, 593; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

The reasonableness of the limitation was not open for discussion in the state court, since the shipment was an interstate shipment, and no complaint had been made to the Interstate Commerce Commission of the unreasonableness of the regulation in question. If any complaint could justly be lodged against the stipulation, clearly the Interstate Commerce Commission would be the tribunal primarily trusted with the jurisdiction to dispose of the controversy.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593.

Mr. James E. Ellegood argued the cause and filed a brief for defendant in error:

The status of the common law respecting carriers' liability, the Federal statute itself, its purpose, scope, and remedial provisions, must speedily remove any ambiguity, if there be any, in the language.

Hamilton v. Rathbone, 175 U. S. 420, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; United States v. Lexington Mill & Elevator Co. 232 U. S. 410, 58 L. ed. 662, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337.

The statute, original and amendments, is remedial, and, by the universal rule, must receive a liberal construction to effectuate its intent as an entirety; but that which

is contended for would defeat its purpose in part; that is, as a remedy for relief for "any loss," except for loss or damaged goods. This is not to be tolerated unless the words of the statute compel it.

Washington Market Co. v. Hoffman, 101 U. S. 112, 116, 25 L. ed. 782, 784.

Its operation may be restrained or enlarged beyond the ordinary import of the words when the purpose of the statute and public policy require it.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

It is with the right of the person sustaining the loss, and not with any specific cause of injury to the property, that the statute is concerned.

New York, P. & N. R. Co. v. Peninsula Produce Exch. 122 Md. 216, 89 Atl. 433.

The liability imposed by the statute is the liability imposed by the common law.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 492, 57 L. ed. 314, 315, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Galveston, H. & S. A. R. Co. v. Wallace, 56 L. ed. 517, and note, 223 U. S. 481, 32 Sup. Ct. Rep. 205; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 698, 33 Sup. Ct. Rep. 397.

The common-law duty required the carrier to transport and deliver within a reasonable time; and any failure of this duty within a reasonable time renders the carrier liable for all the consequences.

Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 233, 40 Am. Rep. 415.

The duty to deliver safely, and the duty to deliver in due time, are distinct obligations.

Baltimore & O. R. Co. v. Whitehill, 104 Md. 310, 64 Atl. 1033; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 509, 72 Atl. 193, 458; Baltimore, C. & A. R. Co. v. William Sperber & Co. 117 Md. 602, 84 Atl. 72; Philadelphia, W. & B. R. Co. v. Lehman, supra.

Mr. Justice Hughes delivered the opinion of the court:

On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia, & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York city. The conditions of the transportation were set forth in the bill of lading issued by the railroad company. The property was delivered at destination some hours later than the customary time of arrival, and this action was brought to recover damages for the failure to transport and deliver with reasonable despatch. Judgment in favor of the shipper was affirmed by the court of appeals of Maryland. 122 Md. 215, 89 Atl. 433.

The plaintiff in error, in its brief, states that "the questions involved are two—"

"1: Does the Carmack amendment [34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592] impose on the 'initial carrier' liability for delay occurring on the line of its connection without physical damage to the property?

"2. Was the plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon'?"

The first question, arising from the fact that it did not appear that the delay occurred on the line of the initial [37] carrier (the defendant) was raised by an unsuccessful demurrer to the declaration, and both questions were presented by prayers for instructions which were denied.

The amendment of § 20 of the interstate commerce act, known as the Carmack amendment (act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 595, Comp. Stat. 1913, § 8592), provides "that any common carrier . . . receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed."

We need not review at length the considerations which led to the adoption of this amendment. These were stated in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 199–203, 55 L. ed. 167, 179–181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only "for loss, damage, or delay" occurring on its own line. This "burdensome situation" was "the matter which Congress un-

dertook to regulate." And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled "as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies," was within the power of Congress. The rule, said the court in defining the purpose of the Carmack amendment, "is adapted to [38] secure the rights of the shipper by securing unity of transportation with unity of responsibility." And, again, we said in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, that this legislation embraces "the subject of the liability of the carrier under a bill of lading which he must issue." "The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." Id. p. 506.

It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words "any loss, damage, or injury to such property," caused by the initial carrier or by any connecting carrier, are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury," and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of [39] the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility. Further, it is urged that the amendment provides that the initial carrier may recover from the connecting carrier "on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property;" and this, it is said, shows that the "loss, damage, or injury" described is that which may be localized as having occurred on the line of one of the carriers, and therefore should be limited to physical loss or injury. But we find no difficulty in this, as the damages required to be paid by the initial carrier are manifestly regarded as resulting from some breach of duty, and the purpose is simply to provide for a recovery against the connecting carrier if the latter, as to its part of the transportation, is found to be guilty of that breach. The view we have expressed finds support in the explicit terms of the act of January 20, 1914, chap. 11, 38 Stat. at L. 278, which provides "that no suit brought in any state court of competent jurisdiction against a railroad company . . . to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the act to regulate commerce . . . shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000." If the language of § 20 can be regarded as ambiguous, this legislative interpretation of it as conferring a right of action for delay, as well as for loss or injury to the property in the course of transportation, is entitled to great weight.[1] Alexander v. Alexandria, 5 [40] Cranch, 1, 7, 8, 3 L. ed. 19-21; United States v. Freeman, 3 How. 556, 564, 565, 11 L. ed. 724, 727, 728; Cope v. Cope, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222.

The second question, as stated, is sought to be raised under the stipulation of the bill of lading (being one of the conditions filed with the tariffs under the interstate commerce act) that the carrier is not bound to transport "by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable des-

[1] The language of the Carmack amendment has been construed in various decisions by state courts as embracing damages for delay. Ft. Smith & W. R. Co. v. Awbrey, 39 Okla. 270, 134 Pac. 1117; Southern P. Co. v. Lyon, — Miss. —, 66 So. 209; Pecos & N. T. R. Co. v. Cox, — Tex. Civ. App. —, 150 S. W. 265; Norfolk Truckers Exch. v. Norfolk Southern R. Co. 116 Va. 466, 82 S. E. 92. Contra, Byers v. Southern Exp. Co. 165 N. C. 542, 81 S. E. 741.

patch." See Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556. But the argument upon this point is not addressed to the issue, as recovery was not sought or permitted, except for a failure to transport with reasonable despatch. The declaration alleged that the berries "were to be transported with safety, and with reasonable despatch, and delivered . . . in safe condition and with reasonable diligence;" that the defendant, or its connecting lines, did not "transport or deliver the same with reasonable despatch;" and that the damage was due to their failure to use "due and reasonable diligence." The court instructed the jury that it became the duty of the defendant and all connecting lines "to use reasonable care, diligence, and exertion in forwarding and transporting and delivering" the berries, and that if the jury should believe that the defendant and the connecting lines, or any of them, "did not use such care, diligence, and exertion," and that by reason of the failure so to do the berries arrived "too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence, and exertion, and that the plaintiff thereby sustained loss, then their verdict should be for the plaintiff." As the court of appeals of Maryland said, the ground of the [41] action was "the failure to carry with reasonable despatch, and the loss of marketability is mentioned as the element of damage." That is, the reference to the market said to have been lost was merely for the purpose of calculating damages which were sought solely because of lack of reasonable diligence, and not upon the allegation of any added duty with respect to a particular train or market. The stipulation invoked does not attempt to limit the duty of the carrier to transport with reasonable despatch, and we are not called upon to consider its effect in any other aspect.

The instructions, however, permitted the jury to award as damages the amount of the decline in value, due to the delay, at the place of destination, without stating the limitation set forth in the tariff of the plaintiff in error as filed; and this tariff, with the accompanying conditions, duly offered in evidence, was excluded. It was conceded by the court of appeals that these rulings were erroneous, but the court found that they worked no harm to the plaintiff in error. The condition in the bill of lading and in the filed tariff provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." Treating the rate charged for the transportation as based upon assent to this provision, the court of appeals construed the stipulation not as changing the basis of liability, but as limiting the amount of the recovery in any event to the value of the property [42] at the time and place of shipment, no other value having been agreed upon. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351. It appeared from the evidence that the berries were sold in New York city at an average price of 6½ cents a quart. It was also proved that the decline in value due to the delay was from 2 to 3 cents a quart. The jury gave a verdict for $180.48, which included $153.60, principal, and $26.88 interest. That is, the jury gave damages at the rate of 2 cents a quart for the 240 crates (7,680 quarts) shipped. The court held that it could not be said, as the defendant contended, that there was no proof of actual damage from the delay; and that, so far as the maximum liability fixed by the filed tariff was concerned, the court was justified in taking the value of the berries at the time and place of shipment as being at least equal to the 2 cents a quart allowed. Upon this point the court of appeals said: "It may be judicially assumed that their value at the time and place of shipment was at least equal to the 2 cents per quart which the jury allowed as damages, and in the view we have taken of the case no just purpose would be served in reversing the judgment and subjecting the parties to the expense of a new trial." That is to say, upon the facts as the state court found them to be, the agreed maximum of liability as stipulated was not exceeded.

We cannot say, in the light of the evidence, that the state court denied to the plaintiff in error any Federal right in holding as it did with respect to the amount

of the value of the berries at the time and place of shipment, and in this view we are unable to conclude that, in disposing of the Federal questions, there was any error which would require, or justify, a reversal.

Judgment affirmed.

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[43] LESLIE G. LOOMIS and Leslie G. Loomis, Jr., Plffs. in Err.,
v.
LEHIGH VALLEY RAILROAD COMPANY.

(See S. C. Reporter's ed. 43–51.)

State courts — jurisdiction — suit against interstate carrier — necessity of action by Interstate Commerce Commission.

Without preliminary action by the Interstate Commerce Commission a state court has no jurisdiction of an action by shippers to recover from an interstate carrier sums expended by them in constructing grain doors or bulkheads in cars furnished by the carrier for interstate carload shipments of farm products in bulk, the applicable duly filed interstate rate schedules making no reference to allowances for grain doors or bulkheads.

[For other cases, see Courts, VI. a; Carriers, III. c, in Digest Sup. Ct. 1908.]

[No. 106.]

Argued December 6, 1915. Decided January 24, 1916.

IN ERROR to the Supreme Court of the State of New York in and for the County of Ontario to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which modified, and affirmed as modified, a judgment of the Appellate Division of the Supreme Court, Fourth Department, directing a judgment for the plaintiffs upon a verdict in their favor at a trial term of the Supreme Court in an action by shippers to recover from an interstate carrier sums expended by them in constructing grain doors or bulkheads in cars furnished by the carrier. Affirmed.

See same case below, in appellate division, 147 App. Div. 195, 132 N. Y. Supp. 138; in court of appeals, 208 N. Y. 312, 101 N. E. 907.

The facts are stated in the opinion.

Mr. Edward P. White argued the cause, and, with Mr. John Colmey, filed a brief for plaintiffs in error:

It was the common-law duty of the defendant to furnish the lumber in suit.

Hutchinson, Carr. § 497; Cincinnati, N. O. & T. P. R. Co. v. N. K. Fairbanks & Co. 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467; Hilton Lumber Co. v. Atlantic Coast Line R. Co. 141 N. C. 171, 6 L.R.A.(N.S.) 225, 53 S. E. 823; Chicago & A. R. Co. v. Davis, 159 Ill. 58, 50 Am. St. Rep. 143, 42 N. E. 382; New York State Shippers' Protective Asso. v. New York C. & H. R. R. Co. 2 P. S. C. R. (2d Dist. N. Y.) 251.

An action will lie at common law in favor of the plaintiffs against the defendant for the moneys so paid, laid out, and expended by the plaintiffs for the defendant.

Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259; Farron v. Sherwood, 17 N. Y. 227.

While the action is one at law, yet the essence of it is in equity. It is in its nature equitable, and is founded upon the principle of fair play,—that is, no man should be compelled to pay another man's debts.

Commercial Nat. Bank v. Sloman, 121 App. Div. 874, 106 N. Y. Supp. 508; Roberts v. Ely, 113 N. Y. 131, 20 N. E. 606; Neass v. Mercer, 15 Barb. 321; Norton v. Coons, 6 N. Y. 40.

The common-law duty asserted by the plaintiffs is reaffirmed by § 1 of the interstate commerce act, the liability of the defendant is necessarily implied by § 15, and the common-law remedy is expressly saved by § 22.

Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Eastern R. Co. v. Littlefield, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760.

The common-law duty asserted in this action was enforceable at the place of shipment by the courts of the state of New York, whatever the destination of the freight.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 54 L. ed. 411, 30 Sup. Ct. Rep. 378; People ex rel. Pennsylvania R. Co. v. Knight, 171 N. Y. 354, 98 Am. St. Rep. 610, 64 N. E. 152, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 215; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Missouri P. R. Co. v. Castle, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

Mr. Lyman M. Bass argued the cause, and, with Messrs. Daniel J. Kenefick and Thomas R. Wheeler, filed a brief for defendant in error:

The courts of the state of New York had no jurisdiction over the interstate shipments involved, since Congress had legislated upon the field covering such interstate "transportation," and had assumed exclusive jurisdiction thereof.

Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Victor Fuel Co. v. Atchison, T. & S. F. R. Co. 14 Inters. Com. Rep. 119; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A. (N.S.) 203, 33 Sup. Ct. Rep. 174; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 446, 51 L. ed. 553, 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 206, affirmed in 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 256, 259, 57 L. ed. 1472, 1476, 1477, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 57 L. ed. 1446, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315; Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 58 L. ed. 568, 34 Sup. Ct. Rep. 291; National Wholesale Lumber Dealers' Asso. v. Atlantic Coast Line R. Co. 14 Inters. Com. Rep. 154.

Mr. Justice McReynolds delivered the opinion of the court:

Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending [47] May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in the cars which they loaded and delivered to defendant for transportation to points both within and beyond the state. The total cost of material used was $322.07, —it varied from 40 cents to $3.50 per car.

Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a state court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. Defendant denied liability, and further challenged the court's jurisdiction over claims incident to interstate shipments because: It was and remains an interstate carrier subject to the act to regulate commerce as amended and supplemented as well as the act of Congress passed February 19, 1903 [32 Stat. at L. 847, chap. 708, Comp. Stat. 1913, § 8597], known as the Elkins act, etc.; it had filed with the Interstate Commerce Commission the tariffs under which such shipments were made; these tariffs fixed rates for transportation only, and did not provide for payments or allowances for grain doors, bulkheads, or lumber for [48] constructing the same; the rates were reasonable and just and had not been held otherwise by the Interstate Commerce Commission.

The court of appeals held that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors or bulkheads for transporting grain or provisions in bulk, and unless local or Federal statutes had established different rules, plaintiffs were entitled to recover. Having considered the statutes, it concluded the local act created no bar to recovery on account of the intrastate shipments, but that Congress had assumed such control over interstate shipments as to deprive the state courts of power to consider claims arising out of them. 208 N. Y. 312, 101 N. E. 907. The judgment of the appellate division in favor of plaintiffs for total cost of material supplied by them was modified accordingly and the record and proceedings remitted to the supreme court, Ontario county. This writ of error was then sued out to obtain a review of the judgment of the court of appeals, being addressed to the supreme court because the record was in its possession. Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, ante, 436, 36 Sup. Ct. Rep. 188.

No serious dispute exists concerning the facts. The applicable duly-filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration.

The effect of the act to regulate commerce, as supplemented and amended, upon the jurisdiction of courts, has been expounded in many cases heretofore decided. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Robinson v. Baltimore & O. R. Co. 222 U. S. 506, 56 L. ed. 288, 32 Sup. Ct. Rep. 114; Mitchell [49] Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Morrisdale Coal Co. v. Pennsylvania R. Co. 230 U. S. 304, 57 L. ed. 1494, 33 Sup. Ct. Rep. 938; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729; Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. 138, 58 L. ed. 1255, 34 Sup. Ct Rep. 885, Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 59 L. ed. 1406, 35 Sup. Ct. Rep. 896.

Speaking through Mr. Justice Lamar in Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. supra, we said (p. 255): "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute."

In the Minnesota Rate Cases, 230 U. S. supra, we further said (p. 419): "The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative questions which the statute has primarily confided to it."

And in Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. supra, the rule was thus stated (p. 146): "It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which [50] it was the purpose of the act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and pre-

vention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. pp. 128, 129, 59 L. ed. 871, 872, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. pp. 469, 470, 59 L. ed. 1412, 35 Sup. Ct. Rep. 896.

If, in respect to interstate business, the courts of New York may determine, as original matters, rate-making problems, those in other states have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

On June 1, 1908, before this proceeding was begun, the Interstate Commerce Commission ruled: "A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff." (Conference Ruling No. 78.) In National Wholesale Lumber Dealers' Asso. v. Atlantic Coast Line R. Co. 14 Inters. Com. Rep. 154, [51] June 23, 1908, after much consideration, the Commission refused to order carriers either to furnish flat cars equipped in all respects for transporting lumber or grant allowances for cost incurred by shippers in connection therewith. In New York State Shippers' Protective Asso. v. New York C. & H. R. R. Co. 30 Inters. Com. Rep. 437 (1914), the regulations and practices of railroads in Western New York with respect to car fittings used in bulk transportation of grain and produce were challenged. The shippers claimed: "It is the carrier's duty to supply cars at all seasons of the year, fully equipped for the safe transportation of grain, potatoes, and other produce in bulk without further fitting; or, that if a car be tendered the shipper which cannot safely be used for such commodities, in view of their nature or of the condition of the weather, it is the carrier's duty to furnish, or to pay for, all materials and labor necessary to render the car reasonably safe." This was denied. The opinions in these causes strikingly indicate the complicated administrative problem involved.

We find no error in the judgment below and it is affirmed.

KANSAS CITY WESTERN RAILWAY COMPANY, Plff. in Err.,
v.
GEORGE B. McADOW.

(See S. C. Reporter's ed. 51–55.)

Error to state court — scope of review — non-Federal question.

1. No question under the laws of the United States which may be reviewed by writ of error to a state court may be based upon the fact that the applicability of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), first appeared from an amendment to the declaration which alleged the same facts except that it did not allege, as did the amendment, that plaintiff was injured on an interstate trip.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Pleading — amendment — bringing case under Federal employers' liability act.

2. The allowance of an amendment to the declaration expressly bringing the action within the Federal employer's liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), infringes no Federal right where it alleges the same facts as the original declaration, with the exception of an additional allegation that plaintiff was injured on an interstate trip.

[Amendment of pleadings, generally, see Pleading, I. n. in Digest Sup. Ct. 1908.]

Pleading — necessity of invoking statute — employers' liability — judicial notice.

3. The declaration need not invoke the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), in terms, if the facts stated bring the action under that statute, since the law governing the situation is equally the law of the state, whether derived from Congress or the state legislature, and must be noticed by the courts.

[For other cases, see Pleading, II; Evidence, I. b, in Digest Sup. Ct. 1908.]

Error to state court — scope of review.

4. Whether state or congressional legislation governs a personal-injury action brought by an employee against an electric

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Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state court—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

railway company need not be determined by the Federal Supreme Court on writ of error to a state court to review a judgment in favor of the employee, where the state and Federal statutes are so similar that the railway company's liability does not appear to be affected by the question which of them governed the case.

[For other cases, see Appeal and Error, 2070–2226, in Digest Sup. Ct. 1908.]

[No. 127.]

Submitted January 18, 1916. Decided January 31, 1916.

IN ERROR to the Kansas City Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, in favor of plaintiff in a personal-injury action. Affirmed.

See same case below, — Mo. App. —, 164 S. W. 188.

The facts are stated in the opinion.

Messrs. Charles F. Hutchings and McCabe Moore submitted the cause for plaintiff in error:

The questions of fact inherently involve the operation and effect of the Federal law and are therefore reviewable.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 862; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 620, 21 Am. Neg. Rep. 464; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 437.

Plaintiff in error was not a common carrier of interstate commerce by railroad within the purview and contemplation of the Federal statute on which the alleged cause of action was based.

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; Kansas City, O. B. & Electric R. Co. v. Railroad Comrs. 73 Kan. 168, 84 Pac. 755; Sams v. St. Louis & M. River R. Co. 174 Mo. 53, 61 L.R.A. 475, 73 S. W. 686.

The law denies the right to plaintiff to amend his declaration asserting a right of recovery at common law, so that a right to recover under a statute may be availed of.

Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877.

If it be a departure to file an amended petition in which the cause of action is based on a state statute, it certainly is more of a departure to base the cause of action in an amended petition on the Federal employers' liability act, which excludes the concurrent existence of any common-law action for negligence arising out of the facts necessary to maintain an action under its provisions, and which supersedes and makes inoperative all laws of the states by virtue of which a right of action heretofore existed to enable an interstate employee to recover damages for personal injuries against an interstate carrier.

Cound v. Atchison, T. & S. F. R. Co. 173 Fed. 531; Doherty, Liability of Railroads to Interstate Employees, p. 65; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 178, 1 N. C. C. A. 875.

A substantive right or defense arising under the Federal employers' liability act cannot be lessened or destroyed by a local rule of practice.

Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 76.

Messrs. John H. Atwood and Oscar S. Hill submitted the cause for defendant in error:

There was in fact no departure.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Midland Valley R. Co. v. Ellis, 109 Ark. 206, 159 S. W. 214; De Valle Da Costa v. Southern P. Co. 100 C. C. A. 313, 176 Fed. 843; Hudson v. Southwest Missouri R. Co. 173 Mo. App. 611, 159 S. W. 9; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Illinois C. R. Co. v. Nelson, 128 C. C. A. 525, 212 Fed. 69.

This court will not review questions of state procedure.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Texas & N. O. R. Co. v. Miller, 221 U. S. 408, 416, 55 L. ed. 789, 796, 31 Sup. Ct. Rep. 534.

Under the evidence in this case there can be no doubt but that the Federal employers' liability act applies.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed.

591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; United States v. Colorado & N. W. R. Co. 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 342, 13 Ann. Cas. 893; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Bennett v. United States, 114 C. C. A. 403, 194 Fed. 630; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196-203, 29 L. ed. 158-161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 217, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; The Passaic, 190 Fed. 644.

And interurban railroads are clearly embraced within the act.

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518; Washington, A. & Mt. U. R. Co. v. Downey, 40 App. D. C. 147.

The law of the state of Kansas applicable to railroad employees, pleaded by plaintiff in error in its answer, being identical in effect with the Federal employers' liability act, the question of whether the defendant in error was engaged in intrastate or interstate commerce is immaterial.

Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452; Illinois C. R. Co. v. Nelson, 128 C. C. A. 525, 212 Fed. 72.

This court accepts the findings of the Kansas City court of appeals upon the question of fact as final, and under those findings there is no escape for plaintiff in error from liability in this case.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 97, 53 L. ed. 424, 29 Sup. Ct. Rep. 220; King v. West Virginia, 216 U. S. 100, 54 L. ed 401, 30 Sup. Ct. Rep. 225; Chrisman v. Miller, 197 U. S. 319, 49 L. ed. 772, 25 Sup. Ct Rep. 468.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries, brought by the defendant in error against the plaintiff in error, in whose employ he was. The original petition alleged that the defendant operated a line of electric railway extending from Leavenworth, Kansas, through Wolcott and Kansas City, in the same state, into Kansas City, Missouri; that the plaintiff was a motorman upon a car on the line and was injured in Kansas by a collision due to the defendant's negligence. An amendment was allowed alleging that the [53] plaintiff was injured on a trip from Kansas City, Missouri, to Leavenworth, with further details, and that the defendant's negligent acts were in violation of the act of Congress controlling such matters when the parties were engaged in commerce among the states. The defendant was a Kansas corporation having an electric railway from Leavenworth into Kansas City, Kansas. It had a traffic agreement with the Metropolitan Street Railway Company operating street railways in Kansas City, Missouri, by which the latter was to receive the cars of the former, carrying passengers and freight, and move them through designated streets in Missouri and back to Kansas; each party to be liable for damage due to its negligence during this part of the transit, and the fares and freight money to be divided in certain proportions. By a later agreement the route was modified and it was provided that the defendant should pay the trainmen's wages during the movement in Missouri, but that they should be under the exclusive control of the Metropolitan Company, and, as between said companies, should in all respects be regarded for the time being as its employees. There was evidence that in fact, at the time of the accident, the only control exercised by the Missouri Company was to put a conductor upon the car to receive the fares; that while in Missouri it received its orders from the Kansas side; and that the company was in the hands of receivers, who seem not to have recognized the contract. The plaintiff got a verdict, which was sustained. The errors assigned are, in substance, that the amendment expressly bringing the case under the act of Congress ought not to have been allowed; that the act does not apply to electric roads, and that, if it does, the defendant was not engaged in commerce among the states, or at least was not if the contract between the companies governed the movement of the car.

As to the first, it would be enough to say that if the [54] declaration on which the case was tried brought it under the act, the fact that it appeared as an amendment to one that alleged the same facts with the exception of the plaintiff's coming from beyond the state raises no question under the laws of the United States. Central Vermont R. Co. v. White, 238 U. S. 507, 513, 59 L. ed. 1433, 1437, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 270, 56 L. ed. 758, 760, 32 Sup. Ct. Rep. 412. The state court sustained the amendment on the ground of waiver, but if it had held it allowable as a matter of course, no Federal right would have been infringed. Wabash R. Co. v. Hayes, 234 U. S. 86, 90, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224. It is said that by the amendment it gave a jurisdiction to the Missouri court

that otherwise it would not have had under the act of April 5, 1910, chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 1010. But actions of tort are transitory, and the argument based on the act of 1910 would have no application unless the defendant was engaged in business governed by that act. The argument would be that if so engaged, then, under the statute, the interstate road could not be sued in a state court unless it was doing business in that state. We express no assent to it, but if sound it would afford no ground for objecting to the amendment; and no question of jurisdiction was raised. The amendment introduced no fact inconsistent with those first alleged, and it was unnecessary when the facts were stated to invoke the act of Congress in terms. The law governing the situation is equally the law of the state, whether derived from Congress or the state legislature, and must be noticed by the courts. Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 48, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 57, 56 L. ed. 327, 349, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The defendant's road appears to be of the class of the traction company that was before the court in United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. Rep. 5, and that was excepted from the decision in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890. Such roads have been held [55] to be within the act of Congress. Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518. See act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 552, Comp. Stat. 1913, § 8583. So, again, many cases have intimated that the technical considerations by which the defendant seeks to establish that it was not engaged in commerce among the states are not final. Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 467, 59 L. ed. 1406, 1411, 35 Sup. Ct. Rep. 896; Savage v. Jones, 225 U. S. 501, 520, 56 L. ed. 1182, 1189, 32 Sup. Ct. Rep. 715; Swift & Co. v. United States, 196 U. S. 375, 398, 49 L. ed. 518, 523, 25 Sup. Ct. Rep. 276. But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances it is unnecessary to decide which law applied. Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452.

Judgment affirmed.

GAST REALTY & INVESTMENT COMPANY and Emily Gast, Plffs. in Err.,
v.
SCHNEIDER GRANITE COMPANY.

(See S. C. Reporter's ed. 55–60.)

Constitutional law — due process of law — equal protection of the laws — public improvements — assessment.

A municipal ordinance that, in creating the taxing district upon which, under the city charter, three fourths of the cost of paving a street is to be assessed according to area, established a boundary line that, after running for some distance on a line not 100 feet back from the street, jumped to nearly 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet and 240 feet away, violates U. S. Const., 14th Amend., where such differences were not based upon any consideration of difference in benefits conferred, but were established mechanically, in obedience to the criteria that the charter directed to be applied.

[For other cases, see Constitutional Law, 292–336, 559–581, in Digest Sup. Ct. 1908.]

[No. 211.]

Argued January 21, 1916. Decided January 31, 1916.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the St. Louis City Circuit Court in favor of plaintiff in a suit to collect a paving tax. Reversed.[1]

See same case below, 259 Mo. 153, 168 S. W. 687.

The facts are stated in the opinion.

Messrs. **Thomas G. Rutledge** and **David Goldsmith** argued the cause, and, with Messrs. Jacob M. Lashly and Robert A. Holland, Jr., filed a brief for plaintiffs in error:

A single legislative rule for fixing benefit districts in a city for special assessments for street improvements alike for platted and unplatted districts by providing that the district line be drawn half way between the improved streets and the next parallel street, no matter how far distant that street may be, and although property may

[1] Motion for leave to file petition for rehearing denied March 20, 1916. See post, 1239.

NOTE.—On the right to subdivide private owner's land for the purpose of assessment for public improvement—see note to Chicago v. Wells, 23 L.R.A.(N.S.) 405.

be subdivided and platted on one side of the improvement so that the next parallel street is far distant, is repugnant to the 14th Amendment to the Constitution of United States.

Louisville v. American Standard Asphalt Co. 125 Ky. 497, 102 S. W. 806; Cooper v. Nevin, 90 Ky. 85, 13 S. W. 841; McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438; Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso. 231 Mo. 589, 132 S. W. 657; Granite Bituminous Paving Co. v. Fleming, 251 Mo. 210, 158 S. W. 4; Loth v. St. Louis, 257 Mo. 399, 165 S. W. 1023; Schneider Granite Co. v. Gast Realty & Invest. Co. 259 Mo. 164, 168 S. W. 692.

The effect of this charter provision of the city of St. Louis is clearly shown in numerous reported decisions of the supreme court of Missouri, in which it was passed upon and applied to platted and unplatted tracts, regardless of the resulting injustice and inequality.

Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso. 231 Mo. 594, 132 S. W. 657; Granite Bituminous Paving Co. v. Fleming, 251 Mo. 216, 158 S. W. 4; Loth v. St. Louis, 257 Mo. 406, 165 S. W. 1023; William R. Bush Constr. Co. v. Withnell, 185 Mo. App. 408, 170 S. W. 361.

This court can take judicial notice of the streets of the city of St. Louis, their relation to and distance from each other, and of the fact that there are in such a city, whose bounds are established by public law, and therefore judicially known, large unplatted tracts of land lying in close proximity to land which is subdivided.

Redell v. Moores, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; Williams v. State, 64 Ind. 555, 31 Am. Rep. 135; Stout v. Grant County, 107 Ind. 348, 8 N. E. 222; Endlich, Interpretation of Statutes, § 29; 1 Greenl. Ev. Lewis's ed. § 6; Pacific Paving Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590; Brady v. Page, 59 Cal. 52; Stealey v. Kansas City, 179 Mo. 407, 78 S. W. 599; Skelly v. New York Elev. R. Co. 7 Misc. 88, 27 N. Y. Supp. 304; McMaster v. Morse, 18 Utah, 27, 55 Pac. 70; State ex rel. Mason v. Consumers' Power Co. 119 Minn. 225, 41 L.R.A.(N.S.) 1181, 137 N. W. 1104, Ann. Cas. 1914B, 19; Gardner v. Eberhart, 82 Ill. 316; 5 Wigmore, Ev. 2d ed. § 2571, pp. 673, 674; Jones v. United States, 137 U. S. 202, 216, 34 L. ed. 691, 697, 11 Sup. Ct. Rep. 80; State ex rel. Keck v. Seibert, 130 Mo. 202, 32 S. W. 670; Haaren v. Mould, 144 Iowa, 296, 24 L.R.A.(N.S.) 404, 122 N. W. 921.

The power of the legislature in providing for the assessment of special taxes for local improvements is not unlimited. Any rule or proceeding which arbitrarily charges land with an assessment greater than the benefits is, to the extent of the excess, a taking of private property for public use without compensation.

People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 4 Am. Rep. 400; Dietz v. Neenah, 91 Wis. 422, 64 N. W. 299; Norwood v. Baker, 172 U. S. 269, 278, 43 L. ed. 443, 447, 19 Sup. Ct. Rep. 187; 4 Dill. Mun. Corp. 5th ed. § 1443, p. 2567; Cooley, Taxn. 2d ed. 661; State, Agens, Prosecutor, v. Newark, 37 N. J. L. 421, 18 Am. Rep. 729; Stuart v. Palmer, 74 N. Y. 189, 30 Am. Rep. 289; King v. Portland, 38 Or. 414, 55 L.R.A. 812, 63 Pac. 2; Preston v. Roberts, 12 Bush, 570; Fulkerson v. Bristol, 105 Va. 555, 54 S. E. 468; Hyattsville v. Smith, 105 Md. 318, 66 Atl. 44; Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Davidson v. New Orleans, 96 U. S. 97, 104, 108, 24 L. ed. 616, 619, 621; 2 Page & J. Taxation by Assessment, § 665, p. 1141; White v. Gove, 183 Mass. 336, 67 N. E. 359; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 110, 46 L. ed. 92, 109, 22 Sup. Ct. Rep. 30; Gilsonite Roofing & Paving Co. v. St. Louis Fair Asso. 231 Mo. 589, 132 S. W. 657; Hagar v. Reclamation Dist. 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466.

A general, prospective law, providing for the apportionment of the cost of an improvement, must, in order to be valid, provide for the apportionment by some rule capable of producing reasonable equality between the parties assessed, and a fair distribution of the tax proportionately to the benefits.

Ibid.

The charter provision in this case is invalid because the rule provided by it for the apportionment of the cost of the improvement is not capable of producing reasonable equality between the parties assessed, is not based upon the idea of benefits, and makes equality and justice and apportionment according to benefits legally impossible. It is a vicious, arbitrary, and capricious rule which cannot be justly applied to unplatted tracts of land, and its application results in gross inequality and injustice and practical confiscation.

Ibid.

Mr. Hickman P. Rodgers argued the cause, and, with Mr. William K. Koerner, filed a brief for defendant in error:

The charter provisions under which this assessment was made are not repugnant to the 14th Amendment of the Constitution of the United States.

Shumate v. Heman, 181 U. S. 402, 45 L.

ed. 922, 25 Sup. Ct. Rep. 645; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Schulte v. Heman, 189 U. S. 507, 47 L. ed. 922, 23 Sup. Ct. Rep. 852.

An assessment against all the ground within an improvement district will not be overthrown merely because one part of ground within the district may have received greater benefit from the improvement than another part; nor for the reason that the improvement does not adjoin or abut a particular piece of ground within such district.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Cleveland, C. C. & St. L. R. Co. v. Porter, 210 U. S. 177, 184, 52 L. ed. 1012, 1015, 28 Sup. Ct. Rep. 647.

The question as to whether a particular piece of property is benefited by a local improvement, and to what extent, is legislative, and not subject to judicial review.

Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Chadwick v. Kelley, 187 U. S. 540, 545, 47 L. ed. 293, 295, 23 Sup. Ct. Rep. 175; Schaefer v. Werling, 188 U. S. 516, 47 L. ed. 570, 23 Sup. Ct. Rep. 449.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to collect a tax for paving Broadway, a street in St. Louis, levied upon land of the defendants fronting upon that street. The plaintiff, defendant in error, did the work, received an assignment of the tax, and got a judgment for the amount. The only question here is whether the ordinance levying the tax under the charter of the city is consistent with the 14th Amendment of the Constitution of the United States. The charter provides that one fourth of the total cost shall be levied upon all the property fronting upon or adjoining the improvement according to frontage and three fourths according to area upon all the property in the district, ascertained as follows: "A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. . . . If there is no parallel or converging street on either side of the street improved, the district lines shall be drawn 300 feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be [58] improved and at the average distance of the opposite district line so fixed and located." The defendants' land has a frontage on the west side of Broadway of 1,083.88 feet out of a total in the district constituted said to be 4,372 feet. It is an undivided tract extending back nearly a thousand feet to Church road. On the south the adjoining property was divided into lots of small depth, and on the opposite side of Broadway the next parallel street was about 300 feet from Broadway. The ordinance establishing the taxing district treated Church road as the next parallel street within the meaning of the charter, and included the defendants' tract to a depth of between 400 and 500 feet, while the small lots next to it were included to only about 100 feet, the opposite lots to about 150 feet, and another undivided tract on the east of Broadway was included by average distance to a depth of 240 feet. The ordinance establishing these lines was held to follow the charter and to be consistent with the 14th Amendment by the supreme court of the state. 259 Mo. 153, 168 S. W. 687.

The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. Houck v. Little River Drainage Dist. 239 U. S. 254, 262, ante, 266, 273, 36 Sup. Ct. Rep. 58. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness, or go beyond the reasonable probabilities. French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; Cass Farm Co. v. Detroit, 181 U. S. 396, 397, 45 L. ed. 914, 915, 21 Sup. Ct. Rep. 644. So in the case of a square bounded by principal streets, the land might be assessed half way back from the improvement to the next street. Louisville & N. R. Co. v. Barber Asphalt Paving Co. 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. But, as is implied by Houck v. Little River Drainage Dist., if the [59] law is of such a

character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440.

The city of St. Louis is shown by this case and by others in the Missouri reports to contain tracts not yet cut into city lots, extending back from streets without encountering a parallel street much farther than the distance within which paving could be supposed to be a benefit. See, for instance, Gilsonite Roofing & Paving Co. v St. Louis Fair Asso. 231 Mo. 589, 132 S. W 657; Granite Bituminous Paving Co. v. Fleming, 251 Mo. 210, 158 S. W. 4; Loth v. St. Louis, 257 Mo. 399, 165 S. W. 1023; William R. Bush Constr. Co. v. Withnell, 185 Mo. App. 408, 170 S. W. 361. The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near 500 feet when it encountered such a tract, and on the opposite side of the street was 150 and 240 feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the charter directed to be applied. The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual [60] exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts.

Judgment reversed.

By stipulation of counsel the same judgment will be entered in case No. 210 [GAST REALTY & INVESTMENT COMPANY v. SCHNEIDER GRANITE COMPANY].

DAVID LAMAR, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 60–66.)

Federal courts — jurisdiction — crimes.

1. A Federal district court which has jurisdiction under the Judicial Code, § 24, of all crimes cognizable under the authority of the United States, acts equally within its jurisdiction, whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong.

[For other cases, see Courts, V. c, 5, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — crimes.

2. The jurisdiction of a Federal district court over a prosecution under the Federal Criminal Code, § 32, for falsely pretending, with intent to defraud, to be a Federal officer, is not defeated because the indictment may not charge a crime against the United States, since such objection goes only to the merits.

[For other cases, see Courts, V. c, 5, in Digest Sup. Ct. 1908.]

Error to district court — Federal question.

3. The Federal Supreme Court cannot take jurisdiction of a writ of error to a district court on the theory that the construction of the Federal Constitution was involved in the decision that a Congressman is an officer of the United States within the meaning of the Criminal Code, § 32, under which a person may be criminally punished for falsely pretending, with intent to defraud, to be an officer of the United States.

[For other cases, see Appeal and Error, 938–959, in Digest Sup. Ct. 1908.]

Indictment — sufficiency — false personation of a Federal officer.

4. An indictment charging the false personation, with intent to defraud, of an officer of the United States, contrary to the Criminal Code, § 32, is not so insufficient as to infringe the accused's constitutional rights because the nature of the fraud intended was not set forth.

[For other cases, see Indictment, II., in Digest Sup. Ct. 1908.]

Courts — venue of crime — false personation.

5. The constitutional rights of a person accused of falsely pretending, with intent to defraud, contrary to the Criminal Code, § 32, to be an officer of the United States, are not infringed by his trial in the Federal district court for the southern district of New York, where the personation was by telephone to a person in that district.

[For other cases, see Courts, V. c, 7, b, in Digest Sup. Ct. 1908.]

[No. 434.]

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; B. Altman & Co. v. United States, 56 L. ed, U. S. 894.

Submitted January 17, 1916. Decided January 31, 1916.

IN ERROR to the District Court of the United States for the Southern District of New York to review a conviction for false personation of a Federal officer. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Messrs. Carl E. Whitney and A. Leo Everett submitted the cause for plaintiff in error:

When the district court assumes to entertain a controversy not among those enumerated by the Constitution or statutes, it is without jurisdiction, and the Supreme Court of the United States may, and always does, review, under § 238 of the Judicial Code, the jurisdictional question thus raised.

Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 32; Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907; American Surety Co. v. Shultz, 237 U. S. 159, 59 L. ed. 892, 35 Sup. Ct. Rep. 525; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410; Healy v. Sea Gull Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658; United States use of Alexander Bryant Co. v. New York Steam Fitting Co. 235 U. S. 327, 59 L. ed. 253, 35 Sup. Ct. Rep. 108.

A Congressman is not an officer of the United States.

Whart. St. Tr. 200, 317, note; Story, Const. 1st ed. § 791; Tucker, Const. § 199; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; United States v. Mouat, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505; United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595.

The proceedings below are fatally defective, in that it does not appear in what state or district the crime was committed.

Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 Sup. Ct. Rep. 793, Ann. Cas. 1914A, 614.

The failure of the indictment to describe the circumstances of the offense was a denial of defendant's constitutional right to be informed of the nature and cause of the accusation.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; United States v. Mills, 7 Pet. 142, 8 L. ed. 637; United States v. Cook, 17 Wall. 174, 21 L. ed. 539; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

The construction of the Constitution was necessarily involved in deciding that a Congressman was an officer, and in defining his duties.

Pettit v. Walshe, 194 U. S. 205, 48 L. ed. 938, 24 Sup. Ct. Rep. 657; Mackenzie v. Hare, 239 U. S. 299, ante, 297, 36 Sup. Ct. Rep. 106.

Solicitor General Davis submitted the cause for defendant in error:

The court below had jurisdiction to construe the statute in question. Its error, if any, in so doing, is one over which the circuit court of appeals has exclusive appellate jurisdiction.

Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 179, 55 L. ed. 163, 164, 31 Sup. Ct. Rep. 185; Smith v. McKay, 161 U. S. 355, 359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490; R. J. Darnell v. Illinois C. R. Co. 225 U. S. 243, 245, 56 L. ed. 1072, 1073, 32 Sup. Ct. Rep. 760; Illinois C. R. Co. v. Adams, 180 U. S. 28, 34, 45 L. ed. 410, 412, 21 Sup. Ct. Rep. 251.

It was the statute, and not the Constitution, which the court below was called upon to construe. No constitutional question, therefore, is involved.

Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 232, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476.

Members of Congress hold "office," and a member of Congress is an "officer."

2 Bouvier's Law Dict. 1897 ed. p. 540; Swafford v. Templeton, 185 U. S. 487, 492, 46 L. ed. 1005, 1007, 22 Sup. Ct. Rep. 783; The Floyd Acceptances, 7 Wall. 666, 676, 19 L. ed. 169, 173; United States v. Maurice, 2 Brock. 102, Fed. Cas. No. 15,747.

Decisions of state courts and state statutes recognize members of the state legislatures as "state officers." The analogy is complete.

Morril v. Haines, 2 N. H. 251; Shelby v. Alcorn, 36 Miss. 291, 72 Am. Dec. 169; State ex rel. Holmes v. Dillon, 90 Mo. 233, 2 S. W. 417.

A member of Congress is a Federal, and not a state, officer.

Eversole v. Brown, 21 Ky. L. Rep. 927, 53 S. W. 527; State ex rel. Spofford v. Gifford, 22 Idaho, 632, 126 Pac. 1060; State v. Russell, 10 Ohio S. & C. P. Dec. 264.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error was tried and convicted upon an indictment charging him with having falsely pretended to be an officer of the government of the United States, to wit, a member of the House of Representatives, that is to say, A. Mitchell Palmer, a member of Congress, with intent to defraud J. P. Morgan & Company and the

United States Steel Corporation. The case is brought here directly on the ground that the court had no jurisdiction because the indictment does not charge a crime against the United States, and that the interpretation of the Constitution was involved in the decision that a Congressman is an officer of the United States. There are subsidiary objections stated as constitutional that the indictment is insufficient, and that it does not appear in what district the crime was committed.

On the matter of jurisdiction it is said that when the controversy concerns a subject limited by Federal law, such as bankruptcy (Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332), copyright (Globe Newspaper Co. v. Walker, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726), patents (Healy v. Sea Gull Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658), or admiralty (The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907), the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the court (The Ira M. Hedges [Lehigh Valley R. Co. v. Cornell S. B. Co.] 218 U. S. 264, 270, 54 L. ed. 1039, 1040, 31 Sup. Ct. Rep. 17, 20 Ann. Cas. 1235; Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1). Jurisdiction is a matter of power, and covers wrong as well as right decisions. Fauntleroy v. Lum, 210 U. S. 230, 234, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641; Burnet v. Desmornes y Alvarez, 226 U. S. 145, 147, 57 L. ed. 159, 160, 33 Sup. Ct. Rep. 63. There may be instances in which it is [65] hard to say whether a law goes to the power or only to the duty of the court; but the argument is pressed too far. A decision that a patent is bad, either on the facts or on the law, is as binding as one that it is good. The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410. And nothing can be clearer than that the district court, which has jurisdiction of all crimes cognizable under the authority of the United States (Judicial Code of March 3, 1911, chap. 231, § 24, second [36 Stat. at L. 1091, Comp. Stat. 1913, § 991 (2)]), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

As to the construction of the Constitution being involved, it obviously is not. The question is in what sense the word "officer" is used in the Criminal Code of March 4, 1909, chap. 321, § 32 [35 Stat. at L. 1095, Comp. Stat. 1913, § 10,196]. The same words may have different meanings in different parts of the same act, and of course words may be used in a statute in a different sense from that in which they are used in the Constitution. American Security & T. Co. v. District of Columbia, 224 U. S. 491, 494, 56 L. ed. 856, 857, 32 Sup. Ct. Rep. 553.

There were fainter suggestions that the defendant's constitutional rights were infringed because the nature of the fraud intended was not set forth, and because the state and district wherein the crime was committed were not proved. The indictment is not for defrauding, but for personation with intent to defraud; the nature of the fraud intended is not material and even might not yet have been determined. It is not an indictment for a conspiracy to commit an offense against the United States, where the offense intended must be shown to be a substantive crime. It reasonably may be inferred from the evidence that the defendant was tried in the right state and district in fact. If so, his constitutional rights were preserved. The personation was by telephone to a person [66] in New York (southern district), and it might be found that the speaker also was in the southern district; but if not, at all events the personation took effect there. Burton v. United States, 202 U. S. 344, 389, 50 L. ed. 1057, 1074, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362. These objections are frivolous and the others have been shown to be unfounded. It follows that the writ of error must be dismissed.

Writ of error dismissed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

ILLINOIS CENTRAL RAILROAD COMPANY, Plff. in Err.,
v.
FULTON M. SKAGGS.

(See S. C. Reporter's ed. 66–74.)

Evidence — sufficiency — employers' liability.

1. A recovery under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), is supported by evidence upon

Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

which it could be found that a fellow servant was negligent, and that thereby the injury complained of resulted, although the injured employee may himself have participated in the act which caused the injury.
[For other cases, see Evidence, XII. d, in Digest Sup. Ct. 1908.]

Appeal — reversible error — instructions.

2. The failure of the trial court particularly to specify in its charge in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), some matters to which its attention was not suitably called, is not ground for reversal.
[For other cases, see Appeal and Error, 5127–5141, in Digest Sup. Ct. 1908.]

Appeal — reversible error — instructions.

3. The rule that a party is not entitled to sit silent until after the verdict, and then insist that it shall be set aside because of the failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called, was not altered by the provisions of Minn. Gen. Stat. § 7830, under which a party may (without taking exceptions at the trial) specify upon a motion for a new trial alleged errors in the ruling or instructions of the trial court.
[For other cases, see Appeal and Error, 5127–5141, in Digest Sup. Ct. 1908.]

Appeal — reversible error — instructions.

4. Error in instructing the jury in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), that if the injured employee was negligent "a comparative amount, depending upon the ratio of his negligence to the negligence of defendant," should be considered by the jury, and that the jury should "take into consideration his negligence in comparison with the negligence of the defendant," does not call for the reversal of a judgment in favor of plaintiff, where the court also read the applicable provisions of the statute to the jury and said: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame and the plaintiff would be responsible himself to the extent to which he was to blame," and no request was made for a correction of the first-mentioned parts of the charge.
[For other cases, see Appeal and Error, 5071–5126, in Digest Sup. Ct. 1908.]

[No. 194.]

Argued January 19 and 20, 1916. Decided January 31, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court for Ramsey County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, on first appeal, 124 Minn. 503, 145 N. W. 381; on second appeal, 125 Minn. 532, 147 N. W. 1135.

The facts are stated in the opinion.

Mr. W. S. Horton argued the cause, and, with Mr. Blewett Lee, filed a brief for plaintiff in error:

The state court erroneously applied the Federal employers' liability act to the facts.

29 Cyc. 419, 420; 1 Thomp. Neg. p. 4; Ellis v. Louisville, H. & St. L. R. Co. 155 Ky. 745, 160 S. W. 512.

The state court erroneously construed the part of the Federal employers' liability act regulating the damages as applied to the facts shown in this record.

Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. ed. 1069, 1070, 35 Sup. Ct. Rep. 653; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

Inasmuch as Skaggs directly participated in uncoupling the engine from the cars and leaving them at the place, the company was not negligent as to him, because it did not owe him the duty to see that he did his work properly, or to furnish another employee to advise whether his work was properly done; even though another employee jointly participated with Skaggs, yet, as between him and the company, it was none the less his act, for which there can be no liability.

Ellis v. Louisville, H. & St. L. R. Co. supra; Thomp. Neg. § 3879; Perigo v. Indianapolis Brewing Co. 21 Ind. App. 338, 52 N. E. 462; McKay v. Hand, 168 Mass. 270, 47 N. E. 104, 2 Am. Neg. Rep. 714; Callaway v. Allen, 12 C. C. A. 114, 24 U. S. App. 388, 64 Fed. 297; Davis v. Chicago Edison Co. 195 Ill. 31, 62 N. E. 829.

It is essential to liability that there shall exist a duty on the part of the company to protect plaintiff from the particular cause of injury.

29 Cyc. 419, 420; 1 Thomp. Neg. p. 4.

The trial court instructed that the plaintiff below was entitled to recover if Buchta, the other brakeman, was negligent; omitting in every respect from their consideration Skaggs's participation in the act and opportunity to know the condition. In thus stating a complete right to recover, it was essential that all the conditions shown by the undisputed testimony be included.

Pennock v. Dialogue, 2 Pet. 1, 15, 7 L. ed. 327, 332; Clarke v. Courtney, 5 Pet. 319, 354, 8 L. ed. 140, 152; Greenleaf v. Birth, 9 Pet. 292, 299, 9 L. ed. 132, 135.

Exceptions were taken and errors assigned in the state court in accordance with the method prescribed by the statutes of the state as construed by the courts. It is not required that for such an error an exception be taken at the time the instruction is given. It is sufficient to raise it in the motion for new trial.

Sassen v. Haegle, 125 Minn. 441, 52 L.R.A. (N.S.) 1176, 147 N. W. 445.

Mr. **Humphrey Barton** argued the cause, and, with Mr. John H. Kay, filed a brief for defendant in error:

The court cannot review the evidence merely for the purpose of determining on which side of the case the greater weight of the evidence is.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Bartlett v. Lockwood, 160 U. S. 368, 40 L. ed. 460, 16 Sup. Ct. Rep. 334; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Thayer v. Spratt, 189 U. S. 346, 354, 47 L. ed. 845, 849, 23 Sup. Ct. Rep. 576; Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

To be effective, the proper time to have had the court consider the question of reduction of damages was when the court was charging the jury; and either by a request to charge or by an exception to the charge as given.

Waligora v. St. Paul Foundry Co. 107 Minn. 559, 119 N. W. 395; State v. Zempel, 103 Minn. 429, 115 N. W. 275; Smith v. Great Northern R. Co. — Minn. —, 153 N. W. 513.

No instructions of any kind were requested by defendant, and no exceptions were taken at the time of the trial, and the trial court's attention was not, in any manner, at the time of the trial, called to the matters now complained of. Under these circumstances the plaintiff in error should not now be heard to complain of the court's charge.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

Mr. Justice **Hughes** delivered the opinion of the court:

This is a writ of error to review a judgment recovered under the Federal employers' liability act. There is no question but that the defendant in error, Fulton M. Skaggs, was injured while he was engaged in interstate commerce in the course of his employment by the plaintiff in error. It is contended that the state court erred in its application of the statute to the facts, both with respect to the conditions of liability and the measure of damages.

Skaggs had been employed by the company for about four years, first in connection with the building and repair of bridges, and then, for about two years, as a locomotive fireman. A few days before the accident he began work as a brakeman on a freight train, his first run being from Freeport to Clinton, Illinois, on January 10, 1913. It was on the return trip to Freeport, on January 13, 1913, that he was injured. The crew consisted of the conductor, the engineer, the fireman, the rear brakeman, named Buchta, [68] and Skaggs, who was head (or forward) brakeman. There was evidence that Buchta was assigned to the position of rear brakeman because of his greater experience. The train reached Amboy, an intermediate station, about 2 o'clock A. M. It was a dark, cold night. There were fifteen cars in the train, two of which were to be left at Amboy. The train was cut immediately behind these two cars; the engine with the forward string of cars proceeded northward on the main track to a point beyond a switch connecting with a passing track to the west; and the two cars were then pushed back on the passing track and cut off. The engine, with the remaining cars, then returned to the main track and backed down in the direction of the cars which had been left standing on that track. After backing a short distance, the engine was stopped, was uncoupled, and was moved forward alone across the switch leading to the passing track, the purpose being to return to the passing track and from thence to proceed to a further track to the west, in order to pick up certain other cars which were to be put into the train. There had not been left, however, a safe clearance for the engine, and, when the engine backed to the passing track, Skaggs, who was riding on the right side at the rear of the tender, was hit by the end of the foremost car left on the main track, was knocked to the ground, and was run over, this being the injury of which he complains.

While there is little or no dispute as to

these facts, there is a conflict of testimony as to the relation of Buchta, the other brakeman, to the occurrence. Omitting various details of the movements which, for the present purpose, need not be considered, and taking the testimony of Skaggs, which the jury was at liberty to believe, these facts appear: When, after leaving the two cars on the passing track, the engine, with the remaining string of cars, returned to the main track and backed down, Skaggs gave the signal to stop, repeating a signal which was received, as he [69] supposed, from the conductor. At that time Buchta was somewhere in the yard (he had been lining up switches for the intended movements), but Skaggs did not see him when the cars were stopped. Skaggs then went to the depot to ascertain the meaning of the signal, and was told by the conductor that it was necessary to pick up certain other cars. Returning to the engine, he attempted to uncouple it from the right-hand side, but found this difficult, and Buchta, who was then on the opposite side, effected the uncoupling and said, "Go ahead." On Skaggs's signal, the engine started forward; but Skaggs did not know whether the cars were left so as to give sufficient clearance for an engine going onto the passing track, and asked Buchta as to this. He did not receive a satisfactory answer; he stopped the engine, got off, and again asked Buchta, who replied: "They are clear a mile, go ahead, and if we don't get out of here the sixteen-hour law will catch us before we get into Freeport." Skaggs at that time was on the track at the rear of the tender and not more than a car's length from the standing car. He then got on the engine, rode up to the switch, through the switch, gave the back-up signal, stepped on the corner of the tender and was looking back for any signal that might be given by the other brakeman when he was caught between the rear right-hand side of the tender and the end of the standing car, as already stated.

It is contended that the state court erred in permitting a recovery under the Federal statute for the reason that the injury resulted from Skaggs's own act, or from an act in which he participated. The company, it is said, "cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition." It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, or [70] by reason of any defect or insufficiency, due to its negligence, in its property or equipment. 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted "in whole or in part" from the negligence of any of its other employees, it is liable under the express terms of the act. That is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployee in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it "shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." See Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 49, 50, 56 L. ed. 327, 345, 346, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 501, 59 L. ed. 1069, 1070, 35 Sup. Ct. Rep. 653. We think that the argument for the plaintiff in error overlooks the inferences of fact which the jury was entitled to draw. Thus, the jury could properly regard the two brakemen as assisting each other in the movement in question. Such assistance was certainly appropriate, if not absolutely necessary. The very purpose of having two brakemen was not to put upon either the entire responsibility. Working together under the exigencies of such operations, particularly when conducted in the nighttime, it was manifestly contemplated that the one brakeman would supplement the other, and not be compelled, at the peril of his rights, personally to examine what the other did, or the basis of the reports the other gave. Each had a reasonable latitude in relying upon the statements of the other, made in the course of the operation and as a part of it. The supreme court of the state said: "It was [71] a very dark night, and evidently there was necessity for haste. If plaintiff's story is true, Buchta was in a position to know about clearance, while plaintiff was not; and we are unable to say plaintiff had not the right to rely upon his statement in regard thereto." [124 Minn. 506, 145 N. W. 381.] In this we find no error. When the engine was uncoupled, Skaggs was on the right-hand side, while Buchta was on the other side,—the side of the passing track,—a better place to judge the clearance. The fact that Skaggs asked his questions is itself not without significance. These questions indicated doubt on Skaggs's

60 L. ed. 531

part, while Buchta's reply showed certainty on his. It was plainly permissible to infer from the testimony that the two men were not in positions of equal advantage, and Skaggs was entitled to the exercise of reasonable care on the part of Buchta in observing and reporting the position of the cars. As there was evidence upon which it could be found that Buchta was negligent, and that thereby injury resulted to Skaggs, it cannot be said that the recovery in this aspect of the case was contrary to the statute.

But it is urged that the trial court erred in its instructions to the jury. After stating that if any employee "was, at the time of this accident, negligent in the performance of his duty, which negligence was the direct cause of the injury sustained by the plaintiff, then the defendant . . . would be liable for that negligence," and after referring to the "direct conflict of testimony" with respect to what was said and done by Buchta, the trial court charged as follows: "Did the employee Buchta fail to exercise that ordinary and reasonable care which a prudent person would have exercised under the circumstances existing at that time? If he did fail to exercise such ordinary and reasonable care, then he would be guilty of negligence, and that negligence in this case would be the negligence of the defendant railway company. You must determine this question of fact from all of [72] the testimony in the case." It was added, in substance, that if Buchta did not fail to exercise reasonable care, the plaintiff was not entitled to recover. It is contended that the trial court erred in failing to qualify the instruction quoted, and other statements to the same effect, by reference to what Skaggs himself did, knew, or was in a position to know. But in view of the state of the testimony, and the point to which the court's instruction was addressed, we cannot say that it was in itself erroneous. If the plaintiff in error desired any addition, amplification, or qualification in order to present its point of view to the jury, it should have made appropriate request therefor. The record does not show that the plaintiff in error either objected at the time to any statement made by the court to the jury, or that it made any request whatever for instructions. While under the local statute (Gen. Stat. [Minn.] § 7830) the plaintiff in error was permitted (without taking exceptions at the trial) to specify upon a motion for a new trial alleged errors in the rulings or instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called. State v. Zempel, 103 Minn. 428, 429, 115 N. W. 275; Waligora v. St. Paul Foundry Co. 107 Minn. 554, 559, 119 N. W. 395; Sassen v. Haegle, 125 Minn. 441, 52 L.R.A.(N.S.) 1176, 147 N. W. 445; State v. Sailor, 130 Minn. 84, 153 N. W. 271; Smith v. Great Northern R. Co. — Minn. —, 153 N. W. 513. This, also, is a sufficient answer to the complaint of the failure of the trial court to charge the jury with respect to assumption of risk. There was no request for any instruction upon this point. So far as these criticisms are concerned, we are unable to say that any asserted Federal right was denied by the state court.

[73] The remaining question is with respect to the instructions of the trial court on the subject of contributory negligence. In the course of these the court fell into the error of saying that, if Skaggs was negligent, "a comparative amount, depending upon the ratio of his negligence to the negligence of the defendant, would be considered by you (the jury); and, again, that the jury should "take into consideration his negligence in comparison with the negligence of the defendant." But the court read the applicable provision of the statute to the jury and also said: "The design of this statute seems to be to place the responsibility for negligence in all cases just where it belongs, and to make everybody who is responsible for negligence which produces injury or an accident responsible for that part of it and to the extent to which they contributed to it, and so the law provides that contributory negligence does not bar a recovery, but that the damages to which one is entitled are to be reduced in proportion as his own negligence contributed to bring about the injury. That is, in a case like this, if it should be found that both parties were to blame, that both were negligent, both the defendant and the plaintiff, then the defendant company is to be responsible to the extent to which it was to blame, and the plaintiff would be responsible himself to the extent to which he was to blame." And no request was made for a correction of the first-mentioned parts of the charge. It was recognized by the supreme court of the state that those parts failed to conform to the correct interpretation of the statutory rule as defined in Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172, and the court quoted what we there said, as follows: "But for the use in the second instance of the additional words 'as compared with the negligence of

the defendant' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read 'as compared [74] with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both. . . . Not improbably the mistake in the instruction was purely verbal and would have been promptly corrected had attention been specially called to it, and possibly it was not prejudicial to the defendant."

The state court concluded that "upon the whole instruction no prejudice to defendant resulted." And in this view we concur.

Judgment affirmed.

FRANK CROCKER, Trustee in Bankruptcy, etc., Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 74–82.)

Appeal — from court of claims — findings of fact.

1. Findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury, and the Federal Supreme Court is not at liberty to refer to the opinion of the court of claims for the purpose of eking out, controlling, or modifying the scope of the findings.

[For other cases, see Appeal and Error, 4892–4902, in Digest Sup. Ct. 1908.]

Contracts — public policy — affecting official action.

2. The employment of a person by a corporation upon a compensation contingent upon success to secure a contract from the Postmaster General for furnishing letter carriers' satchels is invalid as against public policy.

[For other cases, see Contracts, IV. d, 3, in Digest Sup. Ct. 1908.]

Contracts — public policy — affecting official action.

3. Public policy forbids any secret arrangement between the agents of a corporation and the superintendent of the free delivery mail service, who is charged with important duties relating to the purchase of letter carriers' satchels for such service, whereby, in case the corporation shall secure the contract for furnishing such satchels, the superintendent is to receive a share of the profits.

[For other cases, see Contracts, IV. d, 3, in Digest Sup. Ct. 1908.]

United States — contracts — rescission for fraud.

4. The Postmaster General was justified in rescinding, because tainted with fraud, a contract with a corporation for furnishing letter carriers' satchels for the free delivery service upon his discovery of the existence of a secret arrangement whereby the superintendent of such service, in case the corporation secured the contract, was to receive a share of the profits, although the corporation may have been without actual knowledge of the corrupt

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NOTE.—Validity of agreement by which compensation is contingent upon success in procuring contract with, or allowance of claim against, the United States.

Very like CROCKER v. UNITED STATES is the case of Providence Tool Co. v. Norris, 2 Wall. 45, 17 L. ed. 868, where it was held that an agreement, for compensation contingent upon success, to procure contracts from the government to furnish it with supplies, was against public policy and void. The court said: "All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

So, in Hovey v. Storer, 63 Me. 486, where the owners of a vessel authorized their agent to charter her to the government for $100 per day, and relinquish all over that amount to the agent, it was held that a contract made by the agent with the government, through the intervention of another, by which the government was to pay $150 per day, was invalid as against public policy; but the court refused to disturb it in so far as it had been executed.

The New York courts view these contracts with less disfavor.

Thus, an agreement to procure orders from the United States government for supplies to be furnished for use upon vessels in the public service, in consideration of one half the net profits, is valid where it does not contemplate resort to any but legitimate methods in procuring the orders. Swift v. Aspell, 40 Misc. 453, 82 N. Y. Supp. 659.

And an agreement to pay a commission of 5 per cent on the amount of the charter for obtaining a charter from the United States for a steamship does not contravene public policy. Howland v. Coffin, 47 Barb. 653.

Nor does a contract by which one undertakes to pay a commission for chartering

arrangement, where it was made by the corporation's agents while endeavoring to secure the contract for the corporation, and was a means to that end, and the fruits of their efforts were accepted by the corporation.

[For other cases, see United States, VI., in Digest Sup. Ct. 1908.]

United States — contracts — quantum valebat.

5. The fact that no recovery can be had upon a contract with the Postmaster General for furnishing letter carriers' satchels, where such contract was tainted with fraud and has been rescinded by him upon that ground, is not an obstacle to a recovery upon a quantum valebat.

[For other cases, see United States, VI., in Digest Sup. Ct. 1908.]

Evidence — contract price as admission of value.

6. The contract price for letter carriers' satchels to be furnished under a contract with the Postmaster General cannot be treated as an admission by the government of the value of the satchels, for the purpose of sustaining a recovery upon a quantum valebat, where the contract had been rescinded because of a secret arrangement with a government official whereby he was to share in the contractor's profits.

[For other cases, see Evidence, XI. f, in Digest Sup. Ct. Rep. 1908.]

[No. 77.]

Argued December 1 and 2, 1915. Decided January 31, 1916.

APPEAL from the Court of Claims to review a judgment rejecting all but a small part of a claim for furnishing letter carriers' satchels under contract with the Postmaster General. Affirmed.

See same case below, 49 Ct. Cl. 85.

The facts are stated in the opinion.

Mr. James H. Hayden argued the cause, and, with Mr. Robert C. Hayden, filed a brief for appellant:

The fraudulent practices mentioned by the court of claims did not affect the rights or obligations that the parties acquired or assumed by the contract in suit.

If the fiction about the omission of straps, mentioned by the court of claims, had been the fact, and if it had been true that the company delivered only the body portions of satchels of classes A and C, the rates named in the contract would have furnished evidence by means of which the value of the incomplete satchels should have been ascertained.

Salomon v. United States, 19 Wall. 17, 19, 22 L. ed. 46, 47.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

This was one indivisible transaction permeated with fraud, of which appellant company was chargeable with constructive knowledge.

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his vessel to the government, to persons who are related to the government's agents in charge of selecting vessels for charter, where the agents so employed did not agree to use any corrupt means to procure the charter. Southard v. Boyd, 51 N. Y. 177.

And in Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502, a contract by which a broker undertook to dispose of certain steamers to the government for a commission of 10 per cent of the total amount received for them was held valid, and a recovery was allowed thereon.

In Cummins v. Barkalow, 1 Abb. App. Dec 479, a contract by a dealer in arms to pay an agent a share of the profits for obtaining from the government an order for the purchase of arms was held valid, there being nothing to show that it called for any illegal or improper action on the part of the agent.

In Winpenny v. French, 18 Ohio St. 470, it was held that a contract with a broker employed to negotiate contracts with the government for the sale of baskets to the Army for a certain commission was not illegal, the court elaborately distinguishing Providence Tool Co. v. Norris, supra.

Contracts to procure the allowance of a claim against the United States have also been condemned where compensation is made contingent upon success.

Thus, in Jones v. Blacklidge, 9 Kan. 562, 12 Am. Rep. 506, which was a case of the collection of a claim against the government, the court says that all contracts for the collection of claims, whether they are to be performed before the courts, before Congress or the legislature, or before any of the executive departments, for a compensation contingent upon success, are clearly against public policy; for compensation in such cases, being contingent, is often very large in amount, and holds out great inducements and temptations to the use of undue and even corrupt means for its collection.

A contract to give a percentage of a claim against the government for services in collecting it is void as against public policy, where the services in fact consisted largely in procuring legislation from Congress by which the Postoffice Department should be required to pay the claim. Spalding v. Ewing, 149 Pa. 375, 15 L.R.A. 727, 34 Am. St. Rep. 608, 24 Atl. 219, affirming 9 Pa. Co. Ct. 471.

An agreement by an attorney to obtain the allowance of a claim against the government, the services contemplated to be rendered consisting mainly in the procurement of legislation by Congress, and in personal solicitation of members for that purpose, will not be enforced by the courts, although no improper or unlawful means were used or intended to be used. Owens v. Wilkinson, 20 App. D. C. 51.

But a contract for the prosecution of a

Crawford v. United States, 212 U. S. 183, 53 L. ed. 465, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; Providence Tool Co. v. Norris, 2 Wall. 45, 56, 17 L. ed. 868, 871; Krumm v. Beach, 96 N. Y. 404; Den ex dem. Stewart v. Johnson, 18 N. J. L. 87; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779.

In addition to appellant company's constructive knowledge, the contract was inherently unlawful and therefore unenforceable.

2 Dill. Mun. Corp. 5th ed. p. 1146; San Diego v. San Diego & L. A. R. Co. 44 Cal. 106; Drake v. Elizabeth, 69 N. J. L. 190, 54 Atl. 248; Foster v. Cape May, 60 N. J. L. 78, 36 Atl. 1089; Heughes v. Board of Education, 37 App. Div. 180, 55 N. Y. Supp. 799; Jacques v. Louisville, 32 Ky. L. Rep. 574, 106 S. W. 308; 2 Century Dig. Contr. § 462; Woodward, Quasi Contr. 1913, chap. 8, p. 210; Hentig v. Staniforth, 5 Maule & S. 122, 17 Revised Rep. 293; Oom v. Bruce, 12 East, 225, 11 Revised Rep. 367; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; United States v. Carter, 217 U. S. 286, 54 L. ed. 769, 30 Sup. Ct. Rep. 515, 19 Ann. Cas. 594; Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144; West v. Camden, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a claim for furnishing letter carriers' satchels under a contract with the Postmaster General. The contractor was a New Jersey corporation and its trustee in bankruptcy is the present claimant. In the court of claims a small part of the claim was sustained and the balance rejected. 49 Ct. Cl. 85. Only the claimant appeals, so the part sustained is not here in controversy.

[76] As shown by the findings the facts are these: By public advertisement in May, 1902, the Postmaster General solicited bids for furnishing letter carriers' satchels for the free delivery service for a period of four years. Shortly after the advertisement the New Jersey company and one Lorenz entered into a written agreement whereby the company employed him to assist in securing for it the contract for furnishing the satchels, it being particularly stipulated that he and the company's vice president, one Crawford, should determine the bid to be made, and should present it in the company's name; that, if the company got the contract, Lorenz should receive all profits arising out of the same in excess of 25 cents on each satchel, and that, if the company

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claim against the Federal government, which provides for the presentation of the claims by the agent, and for "any diplomatic negotiations as may be deemed by him best for the interest of the party of the second part," is not void on its face, and where there is no improper personal solicitation of the members of Congress, the party performing the services is entitled to his compensation. Knut v. Nutt, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686, affirmed in 200 U. S. 13, 50 L. ed. 350, 26 Sup. Ct. Rep. 216.

A contract of employment of attorneys to obtain the allowance of a claim by the Federal government for property destroyed during the Civil War, where the chief obstacle to the allowance of the claim was a strong belief on the part of certain members of the Senate that the claimant had not been a loyal citizen, was sustained in Pennebaker v. Williams, 136 Ky. 120, 120 S. W. 321. The trial court answered the objection in a manner which was approved by the court of appeals, by stating that there was no proof in the record to show that any lobbying was done by the attorneys, but there was proof that such services were rendered as any reputable lawyer might render under the circumstances. A petition for modification and extension of this opinion was overruled in 136 Ky. 143, 123 S. W. 672.

Contracts to pay attorneys a contingent fee for purely professional services in prosecuting a claim against the United States are legitimate (Stanton v. Embrey, 93 U. S. 557, 23 L. ed. 985; Bemiss v. Taylor, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Wright v. Tebbitts, 91 U. S. 252, 23 L. ed. 320; Bergen v. Frisbie, 125 Cal. 168, 57 Pac. 784), except where such agreements are denounced by statute. For examples of such statutes, see Wailes v. Smith, 157 U. S. 271, 39 L. ed. 698, 15 Sup. Ct. Rep. 624; Ball v. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554; Bachman v. Lawson, 109 U. S. 659, 27 L. ed. 1067, 3 Sup. Ct. Rep. 479; Tanner v. United States, 32 Ct. Cl. 192; Lynch v. Pollard, 26 Tex. Civ. App. 103, 62 S. W. 945; Ralston v. Dunaway, — Ark. —, 184 S. W. 425.

As to the validity of contracts to procure legislative action, generally—see notes to Houlton v. Dunn, 30 L.R.A. 737, and Stroemer v. Van Orsdel, 4 L.R.A.(N.S.) 213.

And as to the validity of a contract as affected by the fact that its performance may involve the necessity of procuring some action by public officials—see note to Cole v. Brown-Hurley Hardware Co. 18 L.R.A.(N.S.) 1161.

On the validity of a contract as to location of a public building—see note to Edwards v. Goldsboro, 4 L.R.A.(N.S.) 589.

did not get the contract, he was to accept $1 as full payment for his services. Lorenz and Crawford then entered into a secret arrangement with one Machen, who was superintendent of the free delivery service and charged with important duties relating to the purchase of the satchels, whereby, in the event the company got the contract, Lorenz's share of the profits was to be divided among them on the basis of one half to Machen and one fourth to each of the others. After this arrangement was made a bid for the satchels was prepared and submitted in the company's name, and was accepted by the Postmaster General. The contract sued upon followed in regular course, the company agreeing therein to furnish the satchels in such quantities and at such times as the postoffice authorities might direct. The satchels were to be of three classes, those of classes A and C to have shoulder straps and those of class B to be without straps. The prices to be paid by the government were $2.19 for each satchel of class A; $3.16 for each of class B., and $3.15 for each of class C. This included the shoulder straps on those of classes A and C. The company was not a manufacturer of satchels or of the materials used in making them, and to enable it to comply with [77] the contract it arranged, through Crawford, to have the satchels made by a manufacturer at Hartford, Connecticut. But, as the manufacturer could not supply shoulder straps of the type required, the company and Lorenz entered into a further agreement to the effect that Lorenz should supply the shoulder straps, that out of what was paid by the government for the satchels the company should pay him 45 cents on each satchel of class A, $1.19 on each of class B, and 84 cents on each of class C, as his share of the profits and to reimburse him for supplying the straps. Crawford and Machen had conferred about the straps, and Machen had said that the government would get the straps, pay for them, send them to the company's manufacturer, and adjust any difference afterwards.

Thereafter and prior to March 17, 1903, the company furnished over 10,000 satchels pursuant to the terms of the contract, save that the shoulder straps on those of classes A and C, which were in excess of $5,000, were provided and paid for by the government, through Machen, at a cost of 39½ cents each. These satchels were all paid for by the government, through Machen, at the contract rates without any deduction for the straps. Out of the moneys so received the company paid Lorenz 45 cents on each satchel of class A, $1.19 on each of class B, and 84 cents on each of class C, and he in turn divided what he received with Machen and Crawford.

Between March 17 and April 30, 1903, the company furnished 6,201 more satchels, pursuant to the terms of the contract, save that the shoulder straps on those of classes A and C, of which there were 4,912, were provided and paid for by the government, through Machen, at a cost of 39½ cents each. These satchels were accepted and retained by the postoffice authorities. But when payment for them under the contract was requested, it was refused. This was because the Postmaster General had then learned of the corrupt arrangement giving [78] Machen an interest in the profits, and had rescinded the contract and stopped further payments under it.

No shoulder straps were furnished by the company, through Lorenz or otherwise, and both he and Crawford knew that the straps were purchased and supplied by the government. Before the rescission by the Postmaster General the company did not know that Machen was to share or was sharing in the profits, or that the government was supplying the shoulder straps, save as the company may have been chargeable with the knowledge of Lorenz and Crawford, who represented it in securing and executing the contract.

It was for furnishing the 6,201 satchels after March 17, 1903, that a recovery was sought in the court of claims, and the part of the claim rejected was for the 4,912 satchels of classes A and C, the rejection being put on the grounds (a) that no recovery could be had upon the contract, because it called for satchels with shoulder straps and the company did not furnish the straps, and (b) that no recovery could be had upon a quantum valebat, because the value of the satchels as furnished was not shown.

In the briefs reference is made to portions of the opinion delivered in the court of claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in Stone v. United States, 164 U. S. 380, 382, 383, 41 L. ed. 477, 478, 17 Sup. Ct. Rep. 71, that "the findings of the court of claims in an action at law determine all matters of fact precisely as the verdict of a jury," and that "we are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings." See also Collier v. United States, 173 U. S. 79, 80, 43 L. ed. 621, 622, 19 Sup. Ct. Rep. 330; United States v. New York Indians, 173 U. S. 464, 470, 43 L. ed. 769, 771, 19 Sup. Ct. Rep. 487.

We are of opinion that in the transactions out of which the claim arose there was an

obvious departure from recognized legal and moral standards. It began when the company employed Lorenz, upon a compensation contingent [79] upon success, to secure the contract for furnishing the satchels, and it persisted until its discovery by the Postmaster General led to the rescission of the contract. Because of their baneful tendency as here illustrated, agreements like that under which Lorenz was employed are deemed inconsistent with sound morals and public policy, and therefore invalid. Dealing with such an agreement this court said in Providence Tool Co. v. Norris, 2 Wall. 45, 54, 55, 17 L. ed. 868, 870, 871: "All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds. . . . Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements." Further recognition of this rule is found in Marshall v. Baltimore & O. R. Co. 16 How. 314, 334, 335, 14 L. ed. 953, 961, 962; [80] Trist v. Child (Busker v. Child) 21 Wall. 441, 22 L. ed. 623; Meguire v. Corwine, 101 U. S. 108, 25 L. ed. 899; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 273, 26 L. ed. 539, 544; Sage v. Hampe, 235 U. S. 99, 105, 59 L. ed. 147, 150, 35 Sup. Ct. Rep. 94.

The secret arrangement whereby Machen was to share in the profits was most reprehensible. Its natural effect, as also its purpose, was to secure for the company an inadmissible advantage. The satchels were wanted for the free delivery service, and Machen's relation to that service made it probable, if not certain, that his advice respecting the reasonableness of the bid, the number of satchels required from time to time, and the company's performance of the contract, would be sought and given consideration by his superiors in the Postoffice Department. The advertisement for bids, the postal regulations (1902 ed. §§ 17 and 70), and the findings leave no doubt that he was charged with important duties of that character. Public policy and sound morals forbade that he should have any personal interest in the bid or contract lest he might be tempted to advance that interest at the expense of the government. Under the secret arrangement, which was made before the bid was submitted, he had such an interest and therefore was in a position where the hope of personal gain was likely to exercise a predominant influence and prevent a faithful discharge of his public duties, as in fact it did. Referring to this arrangement, this court said in Crawford v. United States, 212 U. S. 183, 192, 53 L. ed. 465, 469, 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392: "Its almost necessary result, if carried out, would be to defraud the United States. The fraud might be perpetrated by getting the contract at a higher price than otherwise would have been obtained, or, if already obtained, then the United States might be defrauded by the general superintendent [Machen] accepting improper satchels, not made of the materials or in the manner specified in the contract, or by his requiring the delivery of more satchels than were sufficient for the wants of the Department. . . . Such a corrupt agreement, if [81] carried out, would naturally, if not necessarily, result in defrauding the United States by causing it to pay more for satchels than was necessary, or for more satchels, or possibly inferior ones, than it otherwise would, but for the corrupt agreement set forth."

Of course, the secret arrangement with Machen operated to vitiate the company's contract, and justified the Postmaster General in rescinding it on discovering the fraud. Wardell v. Union P. R. Co. 103 U. S. 651, 658, 26 L. ed. 509, 511, 7 Mor. Min. Rep. 144; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 522, 524, 27 L. ed. 1018, 1019, 3 Sup. Ct. Rep. 315; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 552, 565, 36 L. ed. 1079, 1085, 1090, 13 Sup. Ct. Rep. 170; Smith v. Sorby, L. R. 3 Q. B. Div. 552, note; Harrington v. Victoria Graving Dock Co. L. R. 3 Q. B. Div. 549, 47 L. J. Q. B. N. S. 594, 39 L. T. N. S. 120, 26 Week. Rep. 740; 2 Dill. Mun. Corp. 5th ed. § 773. And this is so, even though the com-

pany was without actual knowledge of the corrupt arrangement. It was made by Lorenz and Crawford while endeavoring to secure the contract for the company and was a means to that end. They were the company's agents and were securing the contract at its request. It accepted the fruits of their efforts and thereby sanctioned what they did, and made their knowledge its own. Krumm v. Beach, 96 N. Y. 308, 404; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; White v. Sawyer, 16 Gray, 586, 589; First Nat. Bank v. New Milford, 36 Conn. 93, 101; Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259, 265, 36 L. J. Exch. N. S. 147, 16 L. T. N. S. 461, 15 Week. Rep. 877, 12 Eng. Rul. Cas. 298; Mackay v. Commercial Bank, L. R. 5 P. C. 394, 410, et seq. 43 L. J. P. C. N. S. 31, 30 L. T. N. S. 180, 22 Week. Rep. 473; Leake, Contr. 6th ed. 255, 335, 336; Wald's Pollock, Contr. 3d ed. 392.

It results that no recovery could be had upon the contract with the Postmaster General, because it was tainted with fraud and rescinded by him on that ground. But this was not an obstacle to a recovery upon a quantum valebat. Clarke v. United States, 95 U. S. 539, 543, 24 L. ed. 518, 519; Wardell v. Union P. R. Co. 103 U. S. 659, 26 L. ed. 512, 7 Mor. Min. Rep. 144; Thomas v. Brownville, Ft. K. & P. R. Co. 109 U. S. 525, 27 L. ed. 1019, 3 Sup. Ct. Rep. 315. Whether requisite proof was made of the value of the satchels as furnished is another [82] question. The court of claims made no finding of their value, and, in explanation of this, said that there was "a complete absence" of evidence upon the subject. The burden of proof was with the claimant, and, if he failed to carry it, he is not in a position to complain,—especially as it appears that the government seasonably objected that he had not proved the value. He insists, however, that the findings show the price at which the government contracted to take the satchels with the shoulder straps, and also what it cost the government to supply the straps, and that the difference should be regarded, in the absence of other evidence, as representing the value of the satchels as furnished, —that is, without the straps. The insistence proceeds upon the theory that the contract price was in the nature of an admission by the government of the value of the satchels with the straps. However this might be in other circumstances, it is wholly inadmissible here, for the fraud with which the contract was tainted completely discredited the contract price, and prevented it from being treated as an admission of the value by the government. It therefore was incumbent upon the claimant to show the value by other evidence, and, as this was not done, no recovery could be had upon a quantum valebat.

Judgment affirmed.

Mr. Justice McKenna and Mr. Justice Holmes dissent, being of opinion that the case should be remanded for findings on the question of value.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[83] JUAN SURIS CARDONA, Appt.,

v.

FRANCISCO P. QUIÑONES and El Banco de Puerto Rico.

(See S. C. Reporter's ed. 83-90.)

Appeal — time for taking — when deemed begun.

1. An appeal to the Federal Supreme Court from the supreme court of Porto Rico, which was prayed within the statutory time, will not be dismissed because it was not allowed by the court within that time.

[For other cases, see Appeal and Error, 2591-2603, in Digest Sup. Ct. 1908.]

Appeal — from Porto Rico supreme court — review of facts.

2. The facts cannot be reviewed by the Federal Supreme Court on an appeal from the Porto Rico supreme court where the record does not contain the oral and documentary evidence upon which the court acted except so far as the same may be shown by the opinion of the court below, or may be contained in a statement of facts prepared by that court for the purposes of the appeal.

[For other cases, see Appeal and Error, VIII. l, 3, in Digest Sup. Ct. 1908.]

Appeal — from Porto Rico supreme court — following decision below — local law.

3. The action of the supreme court of Porto Rico as to matters concerning purely local law, such as the form of the pleadings, the allowance of a default judgment as to issues presented by certain amendments of the pleadings, the admissibility of documentary evidence, etc., will not be disturbed by the Federal Supreme Court on appeal unless the latter court is convinced that such action was clearly erroneous.

[For other cases, see Appeal and Error, VIII. m, in Digest Sup. Ct. 1908.]

NOTE.—On appellate jurisdiction of Federal Supreme Court over Porto Rican courts —see note to Garrozi v. Dastas, 51 L. ed. U. S. 369.

On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal— see note to Wedding v. Meyler, 66 L.R.A. 833.

Appeal — scope of review — contentions which dispute findings of fact.

4. Legal propositions which ignore or dispute the findings of fact on which the conclusion of the court below was based cannot be successfully urged in the Federal Supreme Court as grounds for the reversal on appeal of a decree of the Porto Rico supreme court in a case in which the record is not in such shape as to permit a review of the facts.

[For other cases, see Appeal and Error, VIII. e, in Digest Sup. Ct. 1908.]

[No. 185.]

Submitted January 18, 1916. Decided February 21, 1916.

APPEAL from the Supreme Court of Porto Rico to review a decree which affirmed a decree of the District Court of Mayaguez in favor of defendant in an action in the nature of ejectment. Affirmed.

See same case below, 17 P. R. R. 614.

The facts are stated in the opinion.

Mr. **José R. F. Savage** submitted the cause for appellant. Mr. Fernando Vázquez was on the brief.

Mr. **Francis H. Dexter** submitted the cause for appellees.

Mr. Chief Justice **White** delivered the opinion of the court:

Both courts below rejected the claim of title made by the appellant to a tract of land of 40 cuerdas. As the [84] appeal was prayed within the statutory time, the mere date of its allowance by the court is not controlling, and the motion to dismiss which proceeds upon a contrary assumption is therefore without foundation and is overruled. United States v. Vigil, 10 Wall. 423, 427, 19 L. ed. 954, 955.

Obviously, upon the theory that our power to review was controlled by the rule obtaining as to territorial courts of the United States, this record, as was the case in Elzaburu v. Chaves, 239 U. S. 283, ante, 290, 36 Sup. Ct. Rep. 47, contains a statement of facts prepared by the lower court for the purposes of this appeal. As there is an entire absence from the record of the oral and documentary evidence upon which the court below acted, except so far as the same may be shown by the opinion of the court, or may be contained in the statement of facts, it follows that the record does not enable us to review the facts, and we proceed to dispose of the legal propositions urged for reversal in the light of the facts as stated and as elucidated in the opinion of the court. Abbreviating and somewhat changing the order in which they are stated below, we recapitulate the essential facts as follows:

Two brothers, José Salvador Suris and Ramón María Suris, having acquired by various acts of purchase 70 cuerdas of land in the ward of Sabana Eneas of San Germán, in November, 1870, executed a mortgage on 40 cuerdas of the land thus acquired, being the 40 cuerdas here in controversy, in favor of the Charity Hospital at San Germán. In 1879 the Charity Hospital commenced proceedings to foreclose this mortgage, but such proceedings were stayed until 1882 in consequence of an appeal taken to the Territorial Audiencia. After the cessation of the stay, in that year an attachment against 100 cuerdas of land belonging to the two brothers was levied and the property thus attached was placed (sequestered) in the hands of one Pablo María Stefani. On the same day, [85] February 9, 1882, by a contract under private signature the two Suris brothers sold to Stefani the 40 cuerdas here in controversy which had been mortgaged to the hospital, the purchaser obligating himself to pay the hospital debt, and, if a surplus remained, to pay certain attorney's fees which had been incurred. The agreement also contained a conveyance to Stefani of another and distinct tract of land for another and distinct price. This agreement under private signature was never inscribed upon the public records. A few days after it was made, and presumably before the contract of sale had been carried out, the Suris brothers executed before a notary an act of consolidation of the various properties which they had acquired, which they described as "Perseguida," and this act was put upon the public records. Under the private agreement Stefani, the purchaser, went into possession and discharged the obligations of the private contract of sale.

In 1888 a commercial firm, Schulze & Company, as creditors of the Succession of Stefani, who had in the meanwhile died, brought suit against his Succession to enforce its debt, and for the purpose of getting upon the records the possessory title of Stefani to enable an attachment to be levied, instituted and carried out the necessary proceedings. When the order for record was obtained, the property was levied upon and sold at a judicial sale and was bought in by Schulze & Company. After thus becoming the purchasers of the land in controversy, the firm in 1899 executed before a notary and put of record a deed consolidating into a plantation called "Imisa" various tracts of land containing 192.30 cuerdas, the deed reciting that one of the parcels of land included in the plantation was a tract of 40 cuerdas called "Hospital" or "Perseguida." Ramón María Suris, one of the original vendors, died in

the meanwhile, and in 1900 his heirs put upon record a declaratory deed asserting their undivided ownership [86] as the successors of their father to a tract of 40 cuerdas, known as "Perseguida."

The Bank of Porto Rico, as the holder of a mortgage put upon the Imisa plantation by Schulze & Company, foreclosed the same and bought in the property in August, 1905, and in November of the following year (1906) the bank sold the plantation thus acquired to Francisco P. Quiñones, the defendant, his title as purchaser having been inscribed upon the public records.

In 1907 José Salvador Suris, one of the original vendors under the act of private sale, as well as the widow and heirs of his deceased brother, Ramón María Suris, the other original vendor, each executed deeds of sale of an undivided half interest in the property called "Perseguida" to Juan Suris Cardona, a son of José, and these acts of sale were put upon the public registry. A few days later the parties vendor to the acts above stated executed another notarial act in which they declared that the property had not been in their possession, but in the possession of the defendant Quiñones and the Bank of Porto Rico, and therefore they had not collected revenues, and they ceded to the purchaser the right to collect such revenues. Under the ownership alleged to result from these acts this suit was commenced by Cardona to recover the property.

The findings in express terms establish that "from 1882 the property sued for ceased to belong to the brothers José Salvador and Ramón María Suris by reason of the sale set out in the private contract, and since then it has been in the quiet, peaceful, and public possession, as owners, in good faith and by title of purchase of Stefani, later of Schulze & Company, then of the Banco de Puerto Rico, and finally of Quiñones, residents of Porto Rico." As to the purchase by Cardona, the plaintiff, from his father and the representatives of his deceased uncle, the findings expressly state: "When the plaintiff purchased the property sought to be recovered he knew the [87] history of it as here related and knew that his father and cousins had not possessed the same since the year 1882." And the conclusion reached as to the ultimate facts on this subject is thus expressed in the opinion of the court below: "In view of the manner in which the facts have occurred, we have no doubt whatever that the deeds of sale of the property in question executed in favor of Juan Suris Cardona have had no other purpose than that he should institute this suit to avail himself of and assert his rights as a third party and thus save his father and the heirs of his uncle from the consequences of the private document executed in favor of Stefani; and we are likewise convinced that the plaintiff knew the history of the said property before he made his purchase, and that his father and his cousins had not possessed the same since 1882, as stated in the complaint."

Applying the law to the facts stated, the court concluded: (a) "Under such conditions the plaintiff cannot claim the benefits which the law grants to third parties, because nobody can be a third party who, although he had not intervened in the first contract of sale, purchased, however, knowing that his vendors were not the owners and had no possession of the property sold. The same doctrine has already been established by this court in the case of Voight v. Ribas, 1 Decisiones de Puerto Rico, 60, decided May 10, 1900." [17 P. R. R. 642.] (b) From the possession which, as we have seen, the court found to have existed from 1882 in Stefani and his successors, Schulze & Company, the Bank of Porto Rico and Quiñones, and the various titles which were put upon the record in the transfers as made, especially the inclusion of the property in the plantation "Imisa," it was held that between the parties there was a sufficient basis laid for a just title and possession as owner in good faith, adequate to sustain a prescription of ten years, which was upheld.

The contentions for reversal are numerous and are [88] greatly multiplied by their reiteration in somewhat changed form of statement under the very many propositions and subdivisions of propositions embraced in the elaborate printed argument, but we dispose of them as follows:

First. Giving effect to the settled doctrine by which we do not disturb, but, on the contrary, uphold, the action of the court below as to matters concerning purely local law except upon conviction on our part of clear error committed (Nadal v. May, 233 U. S. 447, 454, 58 L. ed. 1040, 1041, 34 Sup. Ct. Rep. 611; Villanueva v. Villanueva, 239 U. S. 293, 299, ante, 293, 296, 36 Sup. Ct. Rep. 109), we at once dismiss from view the various contentions concerning the form of the pleadings, the question whether a default should not have been allowed as to the issues presented by certain amendments of the pleadings, the admissibility as between the parties or their successors or assigns of the act under private signature, either because of the asserted ambiguity of its terms or the inadequacy of the number of witnesses to its execution, and many other subjects of a

kindred nature too numerous to be recapitulated.

Second. We also at once put out of view the various contentions iterated and reiterated under every proposition which, while apparently accepting the findings, virtually dispute them, such as the contentions that the private instrument did not amount to a sale to Stefani because certain alleged bankruptcy proceedings referred to in the opinion of the court excluded the right of the Suris brothers at that time to sell the property, that no possession followed in Stefani from the making of the private sale because that instrument was one not importing possession in and of itself, without proof of manual tradition, and also numerous other contentions of a kindred character concerning the judicial proceedings taken by Schulze & Company to acquire title and the deed of consolidation by them recorded which we further do not stop to specifically point out.

[89] With these things disposed of, the remaining contentions come to this: That the decision of the court below was plainly violative of the local law known as the mortgage law, and the general provisions of the Code concerning the necessity of the public record of title to real estate and the protection afforded by the same, and that, moreover, an obvious disregard of the mortgage law and the provisions of the Code resulted from giving to the sale under private signature and the proceedings and subsequent transmutations of title based upon it the character of a just title sufficient on its face to be the basis of the ten years' prescription under the Code, which the court below upheld. But, when stripped of the confusion in the mode in which they are stated, and reduced to their ultimate significance, all the contentions on these subjects are exclusively based upon the assumption that the plaintiff below was entitled to the protection afforded by the mortgage law to third persons and to the assumed inadequacy of the title relied upon by the defendant to sustain the ten years' prescription as against a third person. The propositions, therefore, in their essence, when correctly understood, but ignore or dispute the findings of the court below upon which its conclusion was expressly based, that the plaintiff was not a third person, either because he was merely a person interposed as a means of enabling him apparently to assert in his own name, for the benefit of his authors in title, rights which they were incapable themselves of asserting, indeed, could not, without fraud on their part, enjoy, or because, if not in a strict sense a person interposed, he was nevertheless not a third person within the intendment of the local law, because he acquired with full knowledge of the want of title in his vendors and of the absence of possession on their part, and also with knowledge not only of an outstanding title, but of possession as owner which was then and had been enjoyed by the defendant and his predecessors in right. Thus to [90] bring the propositions to the true basis upon which they rest serves at once, without more, to establish their absolute want of foundation, and to demonstrate the correctness of the judgment below and the duty to affirm it.

Affirmed.

UNITED STATES, Appt.,
v.
LINCOLN C. ANDREWS.

(See S. C. Reporter's ed. 90-96.)

Army — pay of officer — absence on leave.

1. The right of an Army officer to half pay while on leave of absence, which is expressly conferred by U. S. Rev. Stat. § 1265, Comp. Stat. 1913, § 2104, cannot be defeated by the action of the military authorities in affixing a condition to the grant of a leave of absence, that the leave shall be without pay.

[For other cases, see Army and Navy, VI. b, in Digest Sup. Ct. 1908.]

Army — pay of officer — absence on leave — estoppel.

2. An Army officer is not bound by his acceptance of leave of absence without protest against the affixing of the condition that the leave shall be without pay, since such condition contravenes the express terms of U. S. Rev. Stat. § 1265, Comp. Stat. 1913, § 2104, by which he is entitled to half pay during the leave.

[For other cases, see Army and Navy, VI. b; Estoppel, III. b, 7, in Digest Sup. Ct. 1908.]

Army — pay of officer — absence on leave.

3. The absence of an Army officer based on leave to which was affixed a condition, contrary to U. S. Rev. Stat. § 1265, Comp. Stat. 1913, § 2104, that the leave shall be without pay, cannot be treated, because of the illegality of such condition, as an absence without leave, for which, under the statute, no pay could be allowed.

[For other cases, see Army and Navy, VI. b, in Digest Sup. Ct. 1908.]

[No. 193.]

Argued January 21 and 24, 1916. Decided February 21, 1916.

APPEAL from the Court of Claims to review an award of half pay to an Army officer while absent on leave. Affirmed.

See same case below, 49 Ct. Cl. 391.

The facts are stated in the opinion.

Assistant Attorney General Thompson argued the cause and filed a brief for appellant:

In respect to administrative matters in the Army, where it is necessary to exercise judgment or discretion, unless there is a clear abuse and a patent contravention of a statute, this court will not interfere.

Reaves v. Ainsworth, 219 U. S. 296, 304, 55 L. ed. 225, 228, 31 Sup. Ct. Rep. 230; United States v. Ross, 230 U. S. 530, ante, 422, 36 Sup. Ct. Rep. 198.

Moreover, the President's power to put appellee on leave without pay can hardly be questioned; for, although U. S. Rev. Stat. § 1265, Comp. Stat. 1913, § 1856, does not specifically grant him this power, it does not deny him such power.

Shurtleff v. United States, 189 U. S. 311–317, 47 L. ed. 828–832, 23 Sup. Ct. Rep. 535.

The President certainly has the right to suspend an officer temporarily where the exigencies or good of the service demand it, or to furlough him for a definite period for the same reason, or to remove him entirely from office.

Ex parte Hennen, 13 Pet. 259, 10 L. ed 152; Blake v. United States, 103 U. S. 227, 236, 26 L. ed. 462, 465; Mullan v. United States, 140 U. S. 240, 35 L. ed. 489, 11 Sup Ct. Rep. 788; Parson v. United States, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880; Shurtleff v. United States, 189 U. S. 317, 47 L. ed. 832, 23 Sup. Ct. Rep. 535; Hartigan v. United States, 196 U. S. 169, 49 L. ed. 434, 25 Sup. Ct. Rep. 204; United States v. Murray, 100 U. S. 536, 537, 25 L. ed. 756.

Mr. George A. King argued the cause, and, with Messrs. William B. King and William E. Harvey, filed a brief for appellee:

The judgment in the claimant's favor was clearly the only one possible under the provisions of the Revised Statutes.

United States v. Williamson, 23 Wall. 411, 23 L. ed. 89; United States v. Temple, 105 U. S. 97, 26 L. ed. 967; United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; United States v. Wilson, 144 U. S. 24, 36 L. ed. 332, 12 Sup. Ct. Rep. 539; United States v. Shields, 153 U. S. 88, 91, 38 L. ed. 645, 646, 14 Sup. Ct. Rep. 735; Glavey v. United States, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891; Goldsborough v. United States, Taney, 80, Fed. Cas. No. 5519; Adams v. United States, 20 Ct. Cl. 117; 15 Ops. Atty. Gen. 442, 443; Rush v. United States, 35 Ct. Cl. 233; Ohio Nat. Bank v. Hopkins, 8 App. D. C. 146; Willey's Case, 11 Comp. Dec. 570.

The compensation of a government official is by law attached to the office, and cannot be changed by executive officers.

Converse v. United States, 21 How. 463, 16 L. ed. 192; Dyer v. United States, 20 Ct. Cl. 166; Geddes v. United States, 38 Ct. Cl. 428; Miller v. United States, 103 Fed. 413; Sherlock v. United States, 43 Ct. Cl. 161.

An officer is entitled to his salary, not upon any theory of contract or quasi contract, not because he performs certain work or stays at a certain place, but because he holds the office.

United States v. Williamson, 23 Wall. 411, 23 L. ed. 89; United States v. Wickersham, 201 U. S. 390, 50 L. ed. 798, 26 Sup. Ct. Rep. 469; Allstaedt v. United States, 3 Ct. Cl. 284; Ware v. United States, 7 Ct. Cl. 565; Sleigh v. United States, 9 Ct. Cl. 369; Reinhard v. United States, 10 Ct. Cl. 282; Fraser v. United States, 16 Ct. Cl. 507; Palmer v. United States, 17 Ct. Cl. 230; Lellmann v. United States, 37 Ct. Cl. 128; Corcoran v. United States, 38 Ct. Cl. 341; Steele v. United States, 40 Ct. Cl. 403; Stilling v. United States, 41 Ct. Cl. 61; Collins v. United States, 45 Ct. Cl. 63; Beuhring v. United States, 45 Ct. Cl. 404; People ex rel. Satterlee v. Board of Police, 75 N. Y. 38; Kehn v. State, 93 N. Y. 291; Fitzsimmons v. Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835, 7 N. E. 787; 13 Ops. Atty. Gen. 103; 15 Ops. Atty. Gen. 175; Willey's Case, 11 Comp. Dec. 570; Clancy's Case, 20 Comp. Dec. 741.

There can be no valid waiver of official compensation fixed by statute.

Montague v. Massey, 76 Va. 313; Purdy v. Independence, 75 Iowa, 356, 39 N. W. 641; Gallaher v. Lincoln, 63 Neb. 339, 88 N. W. 505; Galpin v. Chicago, 269 Ill. 27, 109 N. E. 713.

Mr. Chief Justice White delivered the opinion of the court:

The United States appeals from a judgment awarding the appellee $325, found to be due him under Revised Statutes, § 1265, Comp. Stat. 1913, § 2104, for half pay as a captain of cavalry of fifteen years' service for a period of three months from August 1 to October 31, 1907, during which time it was found he was absent on leave. The court stated the facts as follows:

"The claimant, having accepted employment with a commercial company, was granted six months' leave of absence, to take effect January 1, 1907, by ¶ 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1,

1907, and to expire October 31, 1907, by ¶ 26, Special Orders, War Department, dated June 17, 1907.

"While the claimant was enjoying the extension of his leave of absence, the Adjutant General of the United [93] States Army, on July 31, 1907, sent him the following telegram:

" 'By direction of the President, although your leave is not revoked, your absence from this date will be without pay.'

"His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

"The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was $325." [49 Ct. Cl. 391.]

It is apparent from the authorities cited in the per curiam opinion of the court below (Glavey v. United States, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891; Whiting v. United States, 35 Ct. Cl. 291, 301; Dyer v. United States, 20 Ct. Cl. 166) that the allowed recovery was based upon the conclusion that the half pay during the leave of absence was expressly sanctioned by law (Rev. Stat. § 1265), and hence any condition conflicting with such statutory right was void, and that the officer being entitled to rely upon the statute, no estoppel against him could be implied because of his having acted upon the leave, albeit it contained a condition in conflict with the rights conferred by the statute. To test the merits of these conclusions will dispose of the entire case, since all the contentions of the government are embraced in three propositions: 1, the asserted existence of authority to grant the leave, conditioned on its being without pay, notwithstanding the statute; 2, even if such power did not exist, the binding effect of the condition upon the officer who accepted the leave which was subject to it; and 3, in any event, the impossibility of separating the grant of leave from the condition upon which the leave was based, thus, under the hypothesis of illegality, rendering the grant void, and causing the absence [94] from duty which was enjoyed under the apparent sanction of the grant to be an absence without leave, for which, under the statute, no right to pay existed. It is manifest that these contentions assume, as did the conclusions of the court below, that the telegram stated in the findings operated to grant a new leave for the three months therein specified, subject to the condition that it should be without pay, and in separately testing the propositions we shall treat the telegraphic order as having that significance.

1. As in view of the plain text of Revised Statutes, § 1265, there is no room for disputing that the right to half pay during the period of the leave in question was conferred by the statute, there is and can be no dispute that, tested by the statute alone, the court below did not err in allowing the claim for such half pay. But the contention is that error was committed because the conferring of the right to pay by the statute was not exclusive, and therefore did not deprive of the authority as an incident to the power to grant the leave to affix the condition that the leave should be without pay notwithstanding the statute. It is unnecessary, however, to stop to point out the unsoundness of this proposition, since the error upon which it rests is authoritatively demonstrated by previous decisions which substantially leave the proposition not open for discussion. United States v. Williamson, 23 Wall 411, 416, 23 L. ed. 89, 90; United States v. Wilson, 144 U. S. 24, 36 L. ed. 332, 12 Sup. Ct. Rep. 539; United States v. Shields, 153 U. S. 88, 91, 38 L. ed. 645, 646, 14 Sup. Ct. Rep. 735; Glavey v. United States, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891. Nor, in contemplation of the cases which we have just cited, and additionally, in view of the provision of Revised Statutes, § 1229, Comp. Stat. 1913, § 2001, that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," is there any necessity to point out the want of application of the authorities dealing with the power to dismiss civil [95] officers which are cited as a basis for the proposition that a like power applies to Army officers, and therefore, as there was authority to dismiss, the lesser right of granting the leave without pay necessarily obtained. So, also, it is unnecessary to enter into any detailed analysis of the decision in Hartigan v. United States, 196 U. S. 169, 49 L. ed. 434, 25 Sup. Ct. Rep. 204, since that case concerned the power to remove a cadet at the Military Academy, and the recognition of the right to exercise that authority was in express terms based upon the view that although in a sense a part of the Army, cadets at the Military Academy were not officers within the intendment of Revised Statutes, § 1229, and indeed the opinion in the Hartigan Case in substance refutes the extreme contention as to power which is now sought to be sustained.

2. The contention as to the estoppel resulting from the failure to protest against the condition affixed to the leave, and the

binding force of such condition, even if illegal, resulting from an acceptance of the leave containing it, is by necessary implication foreclosed by all the cases previously cited, and in fact was in express terms considered and held to be without merit in Glavey v. United States, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891. Because that case concerned an illegal condition attached to the performance of the duties of an office, and this involves an illegal condition attached to a grant of leave, affords no ground for distinction between that case and this. The basis of the ruling in the Glavey Case was the right of the official to rely upon the provisions of the statute, and the resulting want of power to apply a principle of estoppel. And as here there was express statutory authority for the half pay during the leave, the reason in the Glavey Case is controlling, and the distinction relied upon involves no difference justifying taking this case out of the principle settled in the Glavey case. As the statute conferred the right to the half pay during the leave, it necessarily follows that the exclusion of executive authority over that subject which resulted extended to [96] and was coterminous with the power which the statute exerted.

3. The contention that even if the condition which was attached to the leave be treated as illegal, and the acceptance of the leave containing it be decided not to have operated an estoppel, nevertheless, under such circumstances, the leave must be treated as void, and the absence based on it be held to have been one without leave, for which no pay could be allowed under the statute, is self-contradictory, and besides, in its essence, must rest upon the assumption that there was power to affix the condition, the terms of the statute to the contrary notwithstanding. The contention, therefore, is in substance foreclosed by Glavey v. United States, supra, and the decided cases to which we have previously referred. How completely this is the case will be demonstrated by observing that the decision in the Glavey Case was expressly based on the ground that public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to the pay given by the statute. And, of course, the contention now made that the absence with leave, which carried pay under the statute, was converted into an absence without leave, carrying no pay, in consequence of an unauthorized attempt to subject the granted leave to an illegal provision that it should be without pay, is absolutely in conflict with the previous cases and the rule of public policy upon which they were based. In fact, the contention but in a changed form asserts the application of estoppel, which, as we have seen, was expressly adversely disposed of in the previous cases.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[97] FRANOIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Appt.,
v.
ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY.

(See S. C. Reporter's ed. 97-102.)

Appeal — from district court — moot controversy.

1. An appeal from a Federal district court to the Supreme Court, presenting the sole question of the jurisdiction below, will not be dismissed on the ground that since the dismissal of the bill by the court below for want of jurisdiction the controversy between the parties has become a moot one by reason of a judgment of a state court dismissing, upon the merits, a suit between the same parties upon the same alleged cause of action.

[For other cases, see Appeal and Error, VII. i, 3m, in Digest Sup. Ct. 1908.]

Appeal — from district court — jurisdiction below.

2. Questions of jurisdiction of the Federal district court depending upon controversies as to the district of residence, where the statutory rights in that regard have not been waived, are, when decided below, questions of Federal jurisdiction susceptible of being brought to the Supreme Court under the provisions of the Judicial Code, § 238, by direct appeal.

[For other cases, see Appeal and Error, 895-914, in Digest Sup. Ct. 1908.]

Federal courts — proper district for suit — action under Federal law.

3. A suit to enforce the alleged liability in equity of a Kansas corporation upon the bonds of a railway company, created by an act of Congress, involves a question inherently Federal in its nature, so that, under the Judicial Code, § 51, it may not, without the consent of the Kansas corporation, be brought in any other Federal district than that of its residence.

[For other cases, see Courts, 928-978, in Digest Sup. Ct. 1908.]

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741; and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

As to proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

[No. 220.]

Argued January 24, 1916. Decided February 21, 1916.

APPEAL from the District Court of the United States for the Southern District of New York to review a decree which dismissed, for want of jurisdiction, the bill in a suit to enforce the liability in equity of a Kansas corporation upon the bonds of a railway company incorporated under an act of Congress. Affirmed.

The facts are stated in the opinion.

Mr. William G. Cooke argued the cause and filed a brief for appellant.

Mr. Walker D. Hines argued the cause and filed a brief for appellee.

Mr. Chief Justice White delivered the opinion of the court:

On this direct appeal a reversal is sought of a decree below which dismissed the bill for want of jurisdiction. There is a motion to dismiss on the ground that "the questions involved upon this appeal are moot questions . . . [99] for the reason that, subsequent to the dismissal of the bill herein by the lower court, the appellant, as plaintiff, instituted in the supreme court of the state of New York, county of New York, an action upon the same alleged cause of action against the same defendants, and that such action in the supreme court of the state of New York was heard and determined, and that a final judgment upon the merits therein was rendered, dismissing the complaint filed in said action as against this appellee." But as our power to review is limited to the question of jurisdiction alone, and as the ground of the motion obviously involves the defense of "the thing adjudged," going to the merits, the motion to dismiss is overruled, and we come to consider the question of the jurisdiction of the court below; that is, whether, as a Federal court, it had power to entertain the cause. Louisville Trust Co. v. Knott, 191 U. S. 233, 48 L. ed. 161, 24 Sup. Ct. Rep. 119; Fore River Shipbuilding Co. v. Hagg, 219 U. S. 175, 55 L. ed. 163, 31 Sup. Ct. Rep. 185; Farrugia v. Philadelphia & R. R. Co. 233 U. S. 352, 58 L. ed. 996, 34 Sup. Ct. Rep. 591.

The bill alleged that the complainant, Male, who sued as the trustee of Gilbert W. Chapin, was a citizen of the state of New York and an inhabitant and resident of the southern district thereof. The defendants were the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, the Atchison, Topeka, & Santa Fe Railroad Company, a corporation organized under an act of the legislature of the territory of Kansas, the Atchison, Topeka, & Santa Fe Railway Company, a corporation organized under the laws of the state of Kansas, and the Boston Safe Deposit & Trust Company, a corporation organized under the laws of the state of Massachusetts. We do not stop to summarize the averments of the bill in order to make clear the nature of the relief sought because we accept as adequate for the purpose of the question before us the statement made on that subject in the printed argument filed on behalf of [100] the appellant as follows: "The relief prayed for is judgment for $120,000 and interest upon certain income bonds issued by the Atlantic & Pacific Railroad Company on the 1st day of October, 1880, and maturing October 1st, 1910, and for an adjudication that the Atchison, Topeka, & Santa Fe Railway Company (the present appellee) is liable in equity for the amount of such judgment by reason of the matters set forth in the bill of complaint." As further stated in the argument for the appellant, the bill alleged that the Atlantic & Pacific Railroad Company "is practically out of existence, and has not been nor can it be, served with process," and that the Atchison, Topeka, & Santa Fe Railroad Company and the Boston Safe Deposit & Trust Company were not served with process, and are not deemed to be necessary parties to the cause, and may be put out of view. The Atchison, Topeka, & Santa Fe Railway Company, the only other defendant (the appellee) was served through one of its officers in the city of New York. It thereupon appeared specially and "for the single and sole purpose of making a motion to set aside the service of the subpœna and dismiss the bill of complaint as to it for want of jurisdiction over the person of said defendant." And subsequently it moved to dismiss on two grounds: 1. That as its residence was in Kansas, it could not be sued outside of the district of which it was a resident without its consent; and that as Male, the complainant, was only colorably joined as a complainant, the real party being Chapin, for whom Male assumed to act as trustee, and who was a citizen and resident of Connecticut, there was no jurisdiction over the cause, as the suit was brought in the district of the residence of neither of the real parties; and, 2, that as the complainant sought to enforce a liability on the bonds of the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, involving an inherently Federal question, there was no jurisdiction in the court over the [101] defendant, because, under such circumstances, it was entitled to be sued in the court of the district of its

residence, and could not without its consent be impleaded in the district of the residence of the plaintiff, even if Male was treated as the real plaintiff, and entitled otherwise to sue in the southern district of New York. As stated in the certificate of the court below, the judgment of dismissal for want of jurisdiction was based upon both of the grounds; that is, the want of authority to sue in the southern district of New York because that was the district of the residence of neither of the parties, and because, owing to the Federal question, the defendant was entitled to be sued in the district of its residence.

It is not disputable that, in so far as the contentions as to jurisdiction depended alone upon the right to sue because of the district in which the parties resided, they did not present questions of inherent Federal jurisdiction. We say this because controversies as to such subjects concern a personal privilege susceptible of being waived, which would not be the case if they involved contentions which were intrinsically and necessarily Federal. St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 Ann. Cas. 1164; Western Loan & Sav. Co. v. Butte & B. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720. But while this is the case, it is yet also true that questions of jurisdiction depending upon controversies as to the district of residence, where the statutory rights in that regard have not been waived, when decided below, are questions of Federal jurisdiction, susceptible of being brought here by direct appeal under the provisions of § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215]. Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324; United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44.

Our power to review thus being settled, the only question is, Did the court err in holding that, as a Federal court, within the meaning of the statute, it had no authority under the circumstances to entertain the cause? In [102] solving this issue, without expressing any opinion as to the want of jurisdiction based upon the contention that Male, the complainant, had no real, but only a colorable and fictitious, interest, and hence that the suit was brought neither in the district of the residence of the complainant, nor that of the defendant, and confining our attention to the ruling that there was a want of power to entertain the cause in any other than the district of the residence of the defendant, because of the inherently Federal question presented, we think that the refusal to take jurisdiction was clearly right and should be affirmed. Undoubtedly the asserted right to a judgment on the bonds of the Atlantic & Pacific Railroad Company, a corporation created by an act of Congress, involved an inherently Federal question. Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Washington & I. R. Co. v. Cœur d'Alene R. & Nav. Co. 160 U. S. 77, 40 L. ed. 346, 10 Sup. Ct. Rep. 231; Re Dunn, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; Texas & P. R. Co. v. Hill, 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575. This being true, it is also indisputable that the defendant was entitled to be sued in the district of its residence, and was not, without its consent, liable to be sued within the district of the residence of the complainant. Macon Grocery Co. v. Atlantic Coast Line R. Co. 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; § 51, Judicial Code [36 Stat. at L. 1101, chap. 231, Comp. Stat. 1913, § 1033].

As it follows that no error was committed by the court below in holding that it was without power to exercise jurisdiction of the cause, its decree must be and it is affirmed.

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[103] JOHN R. STANTON, Appt.,
v.
BALTIC MINING COMPANY et al.

(See S. C. Reporter's ed. 103-114.)

Injunction — against illegal tax — stockholder's suit.

1. The maintenance by a stockholder of

Note.—On injunction to restrain the collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

On the constitutionality of income taxes—see notes to Alderman v. Wells, 27 L.R.A. (N.S.) 864; State ex rel. Bolens v. Frear, L.R.A.1915B, 569.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

a suit to restrain a corporation from voluntarily complying with the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, §§ 6319–6336), upon the grounds of the repugnancy of the statute to the Federal Constitution, of the peculiar relation of the corporation to the stockholders, and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong, and multiplicity of suits, and the absence of all means of redress which will result if the corporation pays the tax and complies with the act in other respects without protest, as it is alleged it is its intention to do, is not forbidden by the prohibition of U. S. Rev. Stat. § 3224, Comp. Stat. 1913, § 5947, against enjoining the enforcement of taxes.

[For other cases, see Injunction, I. k, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — discrimination — income tax on mining companies.

2. Mining companies and their stockholders are not denied the equal protection of the laws nor deprived of their property without due process of law, contrary to U. S. Const., 5th Amend., by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), under which the deduction permitted for depreciation arising from depletion of ore deposits is limited to 5 per cent of the gross value at the mine of the output during the year, while other individuals and corporations have the right to deduct a fair and reasonable percentage for losses and depreciation.

[For other cases, see Constitutional Law, IV. b, 6; IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

3. Allowing individuals to deduct from their gross income dividends paid them by corporations whose incomes are taxed, and not giving such right of deduction to corporations, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), does not render the tax wanting in due process of law.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — due process of law — income tax.

4. No unconstitutional discrimination results from the progressive rate feature of the income tax imposed by the act of October 3, 1913 (38 Stat. at L. 166, chap. 16), because the surtax applies to individual incomes only, not to corporate ones.

[For other cases, see Constitutional Law, IV. b, 6; IV. b, 4, in Digest Sup. Ct. 1908.]

Constitutional law — discrimination — due process of law — income tax — exemptions.

5. Corporations are not unconstitutionally discriminated against because of the exemption which the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), make of individual incomes below $4,000.

[For other cases, see Constitutional Law, IV. b, 6; IV. b, 4, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — exemptions.

6. Labor, agricultural, or horticultural organizations, mutual savings banks, etc., could be excepted from the operation of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), without rendering the tax repugnant to the Federal Constitution.

[For other cases, see Internal Revenue, I. b; III. b, in Digest Sup. Ct. 1908.]

Internal revenue — power of Congress — income tax.

7. The whole purpose of U. S. Const., 16th Amend., giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," was to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — mining corporations — direct tax.

8. The taxation of mining companies cannot be taken out of the rule established by U. S. Const., 16th Amend., excluding the source from which a taxed income is derived as the criterion by which to determine the applicability of the constitutional requirement as to apportionment of direct taxes, because an inadequate allowance by way of deduction is made by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), for the exhaustion of the ore body.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Internal revenue — income tax — mining corporations — direct tax.

9. Independently of the operation of U. S. Const., 16th Amend., the tax imposed by the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), upon the product of the working of a corporate mine, is not a direct tax on property by reason of its ownership because adequate allowance may not be made for the exhaustion of the ore body to result from working the mine.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

[No. 359.]

Argued October 14 and 15, 1915. Decided February 21, 1916.

APPEAL from the District Court of the United States for the District of Massachusetts to review a decree dismissing the bill in a suit by a stockholder to restrain the corporation from voluntarily

complying with the Federal income tax. Affirmed.

The facts are stated in the opinion.

Mr. Charles A. Snow argued the cause and filed a brief for appellant:

Nothing can be income unless it represents a gain or profit. If it represents a loss of capital assets, that must first be restored or allowed for, before any income can result.

Stratton's Independence v. Howbert, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; Seligman, Income Tax, § 5; Black, Income Tax, §§ 32, 34; Spooner v. Phillips, 62 Conn. 62, 16 L.R.A. 461, 24 Atl. 524; United States v. Nipissing Mines Co. 202 Fed. 803; Sargent Land Co. v. Von Baumbach, 207 Fed. 423, L.R.A.—, —, 134 C. C. A. 649, 219 Fed. 31; Stevens v. Hudson's Bay Co. 101 L. T. N. S. 96, 25 Times L. R. 709; Secretary of State v. Scoble [1903] A. C. 299, 72 L. J. K. B. N. S. 617, 51 Week. Rep. 675, 19 Times L. R. 550, 89 L. T. N. S. 1; Foley v. Fletcher, 3 Hurlst. & N. 769, 28 L. J. Exch. N. S. 100, 5 Jur. N. S. 342, 7 Week. Rep. 141, 4 Mor. Min. Rep. 130; Merchants' Ins. Co. v. McCartney, 1 Low. Dec. 447, Fed. Cas. No. 9,443; Com v. Central Transp. Co. 145 Pa. 89, 22 Atl. 209; Gibson v. Cooke, 1 Met. 75.

Classification, for purposes of taxation, must rest on some reasonable and sufficient basis of distinction.

Ohio Tax Cases, 232 U. S. 576, 590, 58 L. ed. 737, 744, 34 Sup. Ct. Rep. 372; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 572, 54 L. ed. 883, 886, 30 Sup. Ct. Rep. 578; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 79, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Toyota v. Hawaii, 226 U. S. 184, 187, 57 L. ed. 180, 33 Sup. Ct. Rep. 47; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Bradley v. Richmond, 227 U. S. 477, 484, 57 L. ed. 603, 606, 33 Sup. Ct. Rep. 318; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 54 L. ed. 688, 692, 30 Sup. Ct. Rep. 496; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Southern R Co. v. Greene, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 318, 55 L. ed. 229, 236, 31 Sup. Ct. Rep. 246; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 473, 54 L. ed. 839, 845, 30 Sup. Ct. Rep. 606; Quong Wing v. Kirkendall, 223 U. S. 59, 64, 65, 56 L. ed. 350, 352, 353, 32 Sup. Ct. Rep. 192; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 157, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255.

Subject to these qualifications, undoubtedly the legislature has a wide discretion, especially in taxation, which should not be abridged by the courts.

Flint v. Stone Tracy Co. 220 U. S. 107, 158, 159, 55 L. ed. 389, 416, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 127, 54 L. ed. 688, 692, 694, 30 Sup. Ct. Rep. 496; Beers v. Glynn, 211 U. S. 477, 53 L. ed. 290, 29 Sup. Ct. Rep. 186; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736; Armour Packing Co. v. Lacy, 200 U. S. 226, 50 L. ed. 451, 26 Sup. Ct. Rep. 232; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

A classification is unconstitutional if there is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched.

Barrett v. Indiana, 229 U. S. 26, 29, 30, 57 L. ed. 1050, 1052, 1053, 33 Sup. Ct. Rep. 692; Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644; Williams v. Arkansas, 217 U. S. 79, 90, 54 L. ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; International Harvester Co. v. Missouri, 234 U. S. 199, 213, 58 L. ed. 1276, 1283, 34 Sup. Ct. Rep. 859.

A classification does not offend because not made with mathematical nicety, or because, in practice, it results in some inequality.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

Graduated inheritance taxes are based on reasonable classification.

Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594.

It is competent for a legislature to determine upon what differences a distinction may be made, for the purpose of statutory classification, between objects otherwise

having resemblances. Such power, of course, cannot be arbitrarily exercised. The distinction must have a reasonable basis.

International Harvester Co. v. Missouri, 234 U. S. 199, 214, 215, 58 L. ed. 1276, 1283, 1284, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Griffith v. Connecticut, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 466, 55 L. ed. 290, 296, 31 Sup. Ct. Rep. 275; 5th Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Rosenthal v. New York, 226 U. S. 260, 269, 270, 57 L. ed. 212, 216, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Denver v. New York Trust Co. 229 U. S. 123, 143, 57 L. ed. 1101, 1124, 33 Sup. Ct. Rep. 657; Patsone v. Pennsylvania, 232 U. S. 138, 144, 58 L. ed. 539, 543, 34 Sup. Ct. Rep. 281; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856.

Assuming, however, the adoption of a proper classification, upon a reasonable basis, all within the class selected, and subject to like conditions, must be treated alike.

Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 681, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715; Southwestern Oil Co. v. Texas, 217 U. S. 114, 121, 127, 54 L. ed. 688, 692, 694, 30 Sup. Ct. Rep. 496; Selover, B. & Co. v. Walsh, 226 U. S. 112, 57 L. ed. 146, 33 Sup. Ct. Rep. 69; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; Home Ins. Co. v. New York, 134 U. S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593.

The equal protection of the laws is a pledge of the protection of equal laws to all under like circumstances.

German Alliance Ins. Co. v. Hale, 219 U. S. 307, 318, 55 L. ed. 229, 236, 31 Sup. Ct. Rep. 246; Yick Wo v. Hopkins, 118 U. S. 356, 367, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

Classifications have been held to be unconstitutional, which were no more arbitrary and unequal than the present classification.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Cotting v. Kansas City Stockyards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; San Francisco Nat. Bank v. Dodge, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep. 384; Covington v. First Nat. Bank, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

The attempted classification must rest on some reasonable basis for distinction. It must also rest upon some difference indicating a reasonable and just relation to the act in respect of which the classification is proposed.

German Alliance Ins. Co. v. Hale, 219 U. S. 307, 318, 55 L. ed. 229, 236, 31 Sup. Ct. Rep. 246; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 472, 54 L. ed. 839, 845, 30 Sup. Ct. Rep. 606; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 165, 41 L. ed. 666, 671, 17 Sup. Ct. Rep. 255; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 92, 45 L. ed. 102, 103, 21 Sup. Ct. Rep. 43; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 294, 42 L. ed. 1037, 1042, 1043, 18 Sup. Ct. Rep. 594.

Conceding that the legislative body may arbitrarily impose varying excises upon different kinds of corporations, it by no means follows that direct taxes may be thus exacted.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 302, 42 L. ed. 1037, 1045, 18 Sup. Ct. Rep. 594.

When the ore has been detached from the soil in which it is imbedded, it becomes personal property.

Forbes v. Gracey, 94 U. S. 762, 765, 766, 24 L. ed. 313, 314, 14 Mor. Min. Rep. 183; Buford v. Houtz, 133 U. S. 320, 332, 33 L. ed. 618, 622, 10 Sup. Ct. Rep. 305.

The fruits and products of land, whether vegetable or mineral, until severed, are as much realty as the land itself, or the rentals thereof.

Caldwell v. Fulton, 31 Pa. 483, 72 Am. Dec. 760, 3 Mor. Min. Rep. 238; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 692, 39 L. ed. 1108, 1144, 15 Sup. Ct. Rep. 912; Co. Litt. 4 (a) (b); 2 Bl. Com. 18.

Ore, in place, is capital, and is part of

the real estate. It is just as much a part of the real estate as trees standing on the land.

Sargent Land Co. v. Von Baumbach, 207 Fed. 423.

The timber, when cut, is still part of the principal, and the produce of it is invested, and the interest only is paid to the tenant for life.

Daly v. Beckett, 24 Beav. 114, 3 Jur. N. S. 754, 5 Week. Rep. 514.

There is no fair reason for the law that would not require, with equal force, its extension to others whom it leaves untouched.

Barrett v. Indiana, 229 U. S. 26, 30, 57 L. ed. 1050, 1052, 33 Sup. Ct. Rep. 692; International Harvester Co. v. Missouri, 234 U. S. 199, 214, 58 L. ed. 1276, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Watson v. Maryland, 218 U. S. 173, 179, 54 L. ed. 987, 990, 30 Sup. Ct. Rep. 644.

The discrimination against mines is of an "unusual character," wholly "unknown to the practice of our governments," and is pure favoritism, class legislation, and palpably arbitrary classification, resting upon no reasonable basis for distinction.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all; and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person.

Tennessee v. Whitworth, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 649.

Even the taxing power of Congress is subject to some limitations, under the 5th Amendment, and legislation is condemned thereby which selects objects and rules of valuation arbitrarily and without any reasonable basis.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 52, 53, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; United States v. Heinze, 218 U. S. 532, 54 L. ed. 1139, 31 Sup. Ct. Rep. 98, 21 Ann. Cas. 884; District of Columbia v. Brooke, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560.

Both the 5th and the 14th Amendments presuppose equality before the law, which is a fundamental necessity, inhering in our form of government, and not requiring express statement in the Constitution.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 370, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 160, 41 L. ed. 666, 669, 670, 17 Sup. Ct. Rep. 255; Vanzant v. Waddel, 2 Yerg. 270; State v. Loomis, 115 Mo. 307, 314, 21 L.R.A. 789, 22 S. W. 350.

Palpably arbitrary classification, for purposes of taxation, without any reasonable basis, violates due process of law, as guaranteed by the 5th Amendment.

Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Scott v. McNeal, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

The phrase cannot be so construed as to leave Congress free to make any process "due process of law" by its mere will.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 276, 15 L. ed. 372, 374.

Due process is secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Leeper v. Texas, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 577; Hurtado v. California, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; Twining v. New Jersey, 211 U. S. 78, 101, 102, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14.

The principle of classification is not different in tax laws than in other laws.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 570, 46 L. ed. 679, 694, 22 Sup. Ct. Rep. 431; Cox v. Texas, 202 U. S. 446, 450, 451, 50 L. ed. 1099, 1101, 26 Sup. Ct. Rep. 671.

There is no such thing as unlimited power of taxation in Congress. Equality and unformity are an inherent necessity in all taxation.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Parkersburg v. Brown, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442.

Gross discriminations in former income tax would probably have rendered it unconstitutional, if it had not been held so on other grounds.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 600, 39 L. ed. 759, 825, 826, 15 Sup. Ct. Rep. 673; Ballard v. Hunter, 204 U. S. 241, 255, 256, 51 L. ed. 461, 471, 472, 27 Sup. Ct. Rep. 261; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283,

294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533.

Mr. John R. Van Derlip filed a brief as *amicus curiæ* for appellant:

No tax can be imposed without express legislation authorizing it; and, unless the intention of the legislature to lay the tax be explicitly and distinctly shown by unambiguous words, the public cannot be charged with its burden; for, if there be reasonable doubt of the intent, it will be denied.

Cooley, Taxn. 267, 268; Eidman v. Martinez, 184 U. S. 578, 583, 46 L. ed. 697, 701, 22 Sup. Ct. Rep. 515.

A legislative body cannot, by giving a tax a certain name, change its nature or effect.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 580–583, 39 L. ed. 818–820, 15 Sup. Ct. Rep. 673; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed 1031, 1037, 28 Sup. Ct. Rep. 638; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 298, 59 L. ed. 234, 237, 35 Sup. Ct. Rep. 27.

In determining the character of an alleged tax, its actual and practical result will be considered, rather than the correctness of the theoretical or abstract ideas upon which it purports to be based.

Nicol v. Ames, 173 U. S. 509, 515, 43 L. ed. 786, 791, 19 Sup. Ct. Rep. 522.

Things which are not in fact income cannot be made such by mere legislative fiat; it is beyond the power of a legislature, state or national, to include in income the capital, or principal, from which the income is derived.

State ex rel. Bolens v. Frear, 148 Wis. 512, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Stevens v. Hudson's Bay Co. 101 L. T. N. S. 96, 25 Times L. R. 709; Secretary of State v. Scoble [1903] A. C. 299, 72 L. J. K. B. N. S. 617, 51 Week. Rep. 675, 19 Times L. R. 550, 89 L. T. N. S. 3.

As respects pecuniary returns from investments in any kind of property, it may be accurately asserted that income is that part of the net receipts of a taxpayer which represents gains or profits after returning to him the full value of his principal investment from the use, disposition, or transmutation of which the gain or profit results.

Black, Income Tax, §§ 32, 34; Waring v. Savannah, 60 Ga. 93; Mundy v. Van Hoose, 104 Ga. 292, 30 S. E. 783; Seligman, Income Tax, § 5; Wilcox v. Middlesex County, 103 Mass. 544; Sargent Land Co. v. Von Baumbach, 207 Fed. 423; Mitchell Bros. Co. v. Doyle, 225 Fed. 437; Stratton's Independence v. Howbert, 231 U. S. 415, 58 L. ed. 292, 34 Sup. Ct. Rep. 136; Stevens v. Hudson's Bay Co. 101 L. T. N. S. 96, 25 Times L. R. 709; Secretary of State v. Scoble, [1903] A. C. 299, 72 L. J. K. B. N. S. 617, 51 Week. Rep. 675, 19 Times L. R. 550, 89 L. T. N. S. 1; Com. v. Central Transp. Co. 145 Pa. 89, 22 Atl. 209.

Only so much of the receipts or royalties (as the case may be) as are in excess of the capital investment included in them is income which can be considered in assessing an income tax.

Stratton's Independence v. Howbert, 23 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136; Foley v. Fletcher, 3 Hurlst. & N. 769, 28 L. J. Exch. N. S. 100, 5 Jur. N. S. 342, 7 Week. Rep. 141, 4 Mor. Min. Rep. 130; Von Baumbach v. Sargent Land Co. L.R.A. —, —, 134 C. C. A. 649, 219 Fed. 31; United States v. Nipissing Mines Co. 202 Fed. 803.

It is incompetent for Congress, in evaluating the net income of a taxpayer for the purpose of taxation, to include therein property which is not income, and which is exempt by constitutional provision from such taxation.

Gordon v. Cornes, 47 N. Y. 612; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 40 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463.

The allowance for depreciation must be based upon the value, and not the cost, of the property.

Von Baumbach v. Sargent Land Co. L.R.A. —, —, 134 C. C. A. 649, 219 Fed. 37; Mitchell Bros. Co. v. Doyle, 225 Fed. 437.

The 16th Amendment is prospective only in its operation (Shreveport v. Cole, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210), and Congress acquired no power thereunder to tax income previously accrued Its authority affected only incomes derived in the future.

Mercur Gold Min. & Mill. Co. v. Spry, 16 Utah, 222, 52 Pac. 382; Centennial Eureka Min. Co. v. Juab County, 22 Utah, 395, 62 Pac. 1024; Mitchell Bros. Co. v. Doyle, supra.

Those properietors of mining properties who, prior to March 1, 1913, had already disposed of their ores, to be mined by their vendees, are manifestly exempt from the payment of any income tax upon the moneys received by them for such ores, because the fact of the disposition at a specified price of itself demonstrates the value attaching to the ore at the time of its disposal. All possible gains over original cost had then

been realized and had become capitalized. The owners had sold their property for so much.

Mitchell Bros. Co. v. Doyle and Von Baumbach v. Sargent Land Co., supra.

The sale outright of a mining property may be fairly described as a mere conversion of the capital from land into money; a sale which gives the vendee the absolute right of possession and removal of ore is "outright," regardless of the time of payment.

Von Baumbach v. Sargent Land Co. L.R.A.—, —, 134 C. C. A. 649, 219 Fed. 39; Stevens v. Hudson's Bay Co. 101 L. T. N. S. 96, 25 Times L. R. 709; Secretary of State v. Scoble [1903] A. C. 299, 72 L. J. K. B. N. S. 617, 51 Week. Rep. 675, 19 Times L. R. 550, 89 L. T. N. S. 1; Foley v. Fletcher, 3 Hurlst. & N. 769, 28 L. J. Exch. N. S. 100, 5 Jur. N. S. 342, 7 Week. Rep. 141, 4 Mor. Min. Rep. 130.

No brief was filed for appellees.

Mr. Chief Justice White delivered the opinion of the court:

As in Brushaber v. Union P. R. Co. 240 U. S. 1, ante, 236, 36 Sup. Ct. Rep. 236, this case was commenced by the appellant as a stockholder of the Baltic Mining Company, the appellee, to enjoin the voluntary payment by the corporation and its officers of the tax assessed against it under the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, 181, chap. 16). As the grounds for the equitable relief [108] sought in this case so far as the question of jurisdiction is concerned are substantially the same as those which were relied upon in the Brushaber Case, it follows that the ruling in that case upholding the power to dispose of that controversy is controlling here, and we put that subject out of view.

Further, also, like the Brushaber Case, this is before us on a direct appeal prosecuted for the purpose of reviewing the action of the court below in dismissing on motion the bill for want of equity.

The bill averred: "That, under and by virtue of the alleged authority contained in said income tax law, if valid and constitutional, the respondent company is taxable at the rate of 1 per cent upon its gross receipts from all sources, during the calendar year ending December 31, 1914, after deducting (1) its ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, and (2) all losses actually sustained within the year, and not compensated by insurance or otherwise, including depreciation arising from depletion of its ore deposits to the limited extent of 5 per cent of the 'gross value at the mine of the output' during said year." It was further alleged that the company would, if not restrained, make a return for taxation conformably to the statute, and would pay the tax upon the basis stated without protest, and that to do so would result in depriving the complainant as a stockholder of rights secured by the Constitution of the United States, as the tax which it was proposed to pay without protest was void for repugnancy to that Constitution. The bill contained many averments on the following subjects, which may be divided into two generic classes: (A) Those concerning the operation of the law in question upon individuals generally and upon other than mining corporations, and the discrimination against mining corporations which arose in favor of such other corporations and individuals [109] by the legislation, as well as discrimination which the provisions of the act operated against mining corporations because of the separate and more unfavorable burden cast upon them by the statute than was placed upon other corporations and individuals,—averments all of which were obviously made to support the subsequent charges which the bill contained as to the repugnancy of the law imposing the tax to the equal protection, due process, and uniformity clauses of the Constitution. And (B) those dealing with the practical results on the company of the operation of the tax in question, evidently alleged for the purpose of sustaining the charge which the bill made that the tax levied was not what was deemed to be the peculiar direct tax which the 16th Amendment exceptionally authorized to be levied without apportionment, and of the resulting repugnancy of the tax to the Constitution as a direct tax on property because of its ownership, levied without conforming to the regulation of apportionment generally required by the Constitution as to such taxation.

We need not more particularly state the averments as to the various contentions in class (A), as their character will necessarily be made manifest by the statement of the legal propositions based on them which we shall hereafter have occasion to make. As to the averments concerning class (B), it suffices to say that it resulted from copious allegations in the bill as to the value of the ore body contained in the mine which the company worked, and the total output for the year of the product of the mine after deducting the expenses as previously stated; that the 5 per cent deduction permitted by the statute was inadequate to allow for the depletion of the ore body, and therefore the law to a large

extent taxed not the mere profit arising from the operation of the mine, but taxed as income the yearly product which represented to a large extent the yearly depletion or exhaustion of [110] the ore body from which, during the year, ore was taken. Indeed, the following alleged facts concerning the relation which the annual production bore to the exhaustion or diminution of the property in the ore bed must be taken as true for the purpose of reviewing the judgment sustaining the motion to dismiss the bill:

"That the real or actual yearly income derived by the respondent company from its business or property does not exceed $550,000. That, under the income tax, the said company is held taxable, in an average year, to the amount of approximately $1,150,000, the same being ascertained by deducting from its net receipts of $1,400,000 only a depreciation of $100,000 on its plant and a depletion of its ore supply limited by law to 5 per cent of the value of its annual gross receipts, and amounting to $150,000; whereas, in order properly to ascertain its actual income, $750,000 per annum should be allowed to be deducted for such depletion, or five times the amount actually allowed."

Without attempting minutely to state every possible ground of attack which might be deduced from the averments of the bill, but in substance embracing every material grievance therein asserted and pressed in argument upon our attention in the elaborate briefs which have been submitted, we come to separately dispose of the legal propositions advanced in the bill and arguments concerning the two classes.

Class A. Under this the bill charged that the provisions of the statute "are unconstitutional and void under the 5th Amendment, in that they deny to mining companies and their stockholders equal protection of the laws and deprive them of their property without due process of law," for the following reasons:

(1) Because all other individuals or corporations were given a right to deduct a fair and reasonable percentage for losses and depreciation of their capital, and they were [111] therefore not confined to the arbitrary 5 per cent fixed as the basis for deductions by mining corporations.

(2) Because by reason of the differences in the allowances which the statute permitted, the tax levied was virtually a net income tax on other corporations and individuals, and a gross income tax on mining corporations.

(3) Because the statute established a discriminating rule as to individuals and other corporations as against mining corporations on the subject of the method of the allowance for depreciations.

(4) Because the law permitted all individuals to deduct from their net income dividends received from corporations which had paid the tax on their incomes, and did not give the right to corporations to make such deductions from their income of dividends received from other corporations which had paid their income tax. This was illustrated by the averment that 99 per cent of the stock of the defendant company was owned by a holding company, and that under the statute not only was the corporation obliged to pay the tax on its income, but so also was the holding company obliged to pay on the dividends paid it by the defendant company.

(5) Because of the discrimination resulting from the provision of the statute providing for a progressive increase of taxation or surtax as to individuals, and not as to corporations.

(6) Because of the exemptions which the statute made of individual incomes below $4,000, and of incomes of labor organizations and various other exemptions which were set forth.

But it is apparent from the mere statement of these contentions that each and all of them were adversely disposed of by the decision in the Brushaber Case, and they all therefore may be put out of view.

Class B. Under this class these propositions are relied upon:

[112] (1) That as the 16th Amendment authorizes only an exceptional direct income tax without apportionment, to which the tax in question does not conform, it is therefore not within the authority of that Amendment.

(2) Not being within the authority of the 16th Amendment, the tax is therefore, within the ruling of Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912, a direct tax and void for want of compliance with the regulation of apportionment.

As the first proposition is plainly in conflict with the meaning of the 16th Amendment as interpreted in the Brushaber Case, it may also be put out of view. As to the second, while indeed it is distinct from the subjects considered in the Brushaber Case to the extent that the particular tax which the statute levies on mining corporations here under consideration is distinct from the tax on corporations other than mining and on individuals, which was disposed of in the Brushaber Case, a brief analysis will serve to demonstrate that the distinction is one without a difference, and therefore that the proposition is also foreclosed by

the previous ruling. The contention is that as the tax here imposed is not on the net product, but in a sense somewhat equivalent to a tax on the gross product of the working of the mine by the corporation, therefore the tax is not within the purview of the 16th Amendment, and consequently it must be treated as a direct tax on property because of its ownership, and as such void for want of apportionment. But, aside from the obvious error of the proposition, intrinsically considered, it manifestly disregards the fact that by the previous ruling it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed [113] in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, —that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed. Mark, of course, in saying this we are not here considering a tax not within the provisions of the 16th Amendment, that is, one in which the regulation of apportionment or the rule of uniformity is wholly negligible because the tax is one entirely beyond the scope of the taxing power of Congress, and where consequently no authority to impose a burden, either direct or indirect, exists. In other words, we are here dealing solely with the restriction imposed by the 16th Amendment on the right to resort to the source whence an income is derived in a case where there is power to tax for the purpose of taking the income tax out of the class of indirect, to which it generically belongs, and putting it in the class of direct, to which it would not otherwise belong, in order to subject it to the regulation of apportionment. But it is said that although this be undoubtedly true as a general rule, the peculiarity of mining property and the exhaustion of the ore body which must result from working the mine cause the tax in a case like this, where an inadequate allowance by way of deduction is made for the exhaustion of the ore body, to be in the nature of things a tax on property because of its ownership, and therefore subject to apportionment. Not to so hold, it is urged, is as to mining property but to say that mere form controls, thus rendering in substance the command of the Constitution that taxation directly on property because of its ownership be apportioned, wholly illusory or futile. But this merely asserts a right to take the taxation of mining corporations out of the rule established by the 16th Amendment when there is no authority for so doing. It moreover rests upon the wholly fallacious [114] assumption that, looked at from the point of view of substance, a tax on the product of a mine is necessarily in its essence and nature in every case a direct tax on property because of its ownership, unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because, independently of the effect of the operation of the 16th Amendment, it was settled in Stratton's Independence v. Howbert, 231 U. S. 399, 58 L. ed. 285, 34 Sup. Ct. Rep. 136, that such tax is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations. (pp. 413 et seq.)

As it follows from what we have said that the contentions are in substance and effect controlled by the Brushaber Case, and, in so far as this may not be the case, are without merit, it results that, for the reasons stated in the opinion in that case and those expressed in this, the judgment must be and it is affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[115] TYEE REALTY COMPANY, Plff. in Err.,
v.
CHARLES W. ANDERSON, Collector of Internal Revenue.

EDWIN THORNE, Plff. in Err.,
v.
CHARLES W. ANDERSON, Collector of Internal Revenue.

(See S. C. Reporter's ed. 115-118.)

Internal revenue — power of Congress — income tax.

1. The whole purpose of U. S. Const., 16th Amend., giving Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," was to exclude the source from which a taxed income was derived as the criterion by which to determine the applicability of

Note.—On the constitutionality of income taxes—see notes to Alderman v. Wells, 27 L.R.A.(N.S.) 864; and State ex rel. Bolens v. Frear, L.R.A.1915B, 569.

As to what constitutes due process of law, generally—see notes to People v. O'Brien,

the constitutional requirement as to apportionment of direct taxes.

[For other cases, see Internal Revenue, I. b, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — retroactive effect.

2. The retroactive effect of the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, § 6319), which fix the preceding March 1st as the time from which the taxed income for the first ten months is to be computed, does not render the tax repugnant to the due process of law clause of U. S. Const., 5th Amend., nor inconsistent with the 16th Amendment itself, since the date of retroactivity did not extend beyond the time when the latter Amendment became operative.

[For other cases, see Constitutional Law, IV. b, 6; IV. f, 2, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax.

3. The progressive rate feature of the income tax imposed by the act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, § 6319), does not cause such tax to transcend the conception of all taxation, and to be a mere arbitrary abuse of power which must be treated as wanting in due process of law.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — income tax — discrimination.

4. Limiting the amount of interest which may be deducted from gross income of a corporation for the purpose of fixing the taxable income to interest on indebtedness not exceeding one half the sum of bonded indebtedness and paid-up capital stock, as is done by the income tax provisions of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, § 6319), is not wanting in due process of law because discriminating between different classes of corporations and individuals.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

[Nos. 393 and 394.]

Argued October 14 and 15, 1915. Decided February 21, 1916.

TWO WRITS of Error to the District Court of the United States for the Southern District of New York to review judgments sustaining demurrers to the complaints in actions to recover back income taxes paid under protest. Affirmed.

The facts are stated in the opinion.

Mr. Julien T. Davies argued the cause, and, with Messrs. Brainard Tolles, Garrard Glenn, and Martin A. Schenck, filed a brief for plaintiffs in error:

Any statute providing for an income tax, of necessity means a tax upon net incomes.

Thompson v. Redding [1897] 1 Ch. 879, 66 L. J. Ch. N. S. 460, 76 L. T. N. S. 339, 45 Week. Rep. 457; Peck v. Kinney, 74 C. C. A. 270, 143 Fed. 76; Opinions of Justices, 5 Met. 598; Poland v. Lamoille Valley R. Co. 52 Vt. 177; Andrews v. Boyd, 5 Me. 199; Lawless v. Sullivan, L. R. 6 App. Cas. 373, 50 L. J. P. C. N. S. 33, 44 L. T. N. S. 897, 29 Week. Rep. 917; Kingston v. Canada Life Assur. Co. 19 Ont. Rep. 453; Taxation Comrs. v. Antill [1902] A. C. 422, 71 L. J. P. C. N. S. 81, 86 L. T. N. S. 783, 18 Times L. R. 644; Colquhoun v. Brooks, L. R. 14 App. Cas. 493, 59 L. J. Q. B. N. S. 53, 61 L. T. N. S. 518, 38 Week. Rep. 289, 54 J. P. 277.

Instances of taxes on gross receipts are common, but they are not and never have been called income taxes. Examples of such taxes have been before this court many times in cases ranging from State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. ed. 164, through Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, to Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807. But such a tax as that is not an income tax, and belongs in quite a different category. The so-called income tax laws imposed by Congress during the Civil War, it is true, allowed only certain deductions, much in the manner of the present statute. But these statutes are not instructive from the present viewpoint. This court solemnly determined that they did not impose an income tax on a holder of stocks or bonds of the corporation upon which the tax was laid, "but on the earnings of the corporations which pay the interest" (Michigan C. R. Co. v. Collector, (Michigan C. R. Co. v. Slack) 100 U. S. 595, 25 L. ed. 647). In Little Miami & C. & X. R. Co. v. United States, 108 U. S. 277, 27 L. ed. 724, 2 Sup. Ct. Rep. 627, this court determined that the tax was imposed upon the profits of companies, and that these profits meant profits of the company in its business as a whole; that is to say,

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2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

the excess of the aggregate of gains from all sources, over the aggregate of losses. Later this court held that the tax thus laid was an excise tax upon the business conducted by the corporation, and not a tax upon the bondholder or stockholder.

United States v. Erie R. Co. 106 U. S. 327, 27 L. ed. 151, 1 Sup. Ct. Rep. 223.

The classification is arbitrary and unreasonable.

1 Cooley, Taxn. 3d ed. p. 1; Gray, Limitations of Taxing Power, p. 353; Cooley, Const. Lim. pp. 607, 615; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 663, 22 L. ed. 455, 461; United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 49, 51; Scholey v. Rew, 23 Wall. 331, 348, 23 L. ed. 99, 102; Ward v. Maryland, 12 Wall. 418, 431, 20 L. ed. 449, 453; Loughborough v. Blake, 5 Wheat. 317, 5 L. ed. 98; Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287; Pembina Consol. Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; San Bernardino County v. Southern P. R. Co. 118 U. S. 417, 30 L. ed. 125, 6 Sup. Ct. Rep. 1144; San Mateo County v. Southern P. R. Co. 7 Sawy. 517, 13 Fed. 145; Northern P. R. Co. v. Walker, 47 Fed. 685.

A constitutional provision, like a statute, must be interpreted in the light of history.

Briscoe v. Bank of Kentucky, 11 Pet. 332, 9 L. ed. 738; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287.

The discrimination effected by the present statute violates the express provisions of the Constitution.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 559, 39 L. ed. 759, 811, 15 Sup. Ct. Rep. 673; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 722; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; State ex rel. White House School Dist. v. Readington, 36 N. J. L. 70; Lexington v. McQuillan, 9 Dana, 516, 35 Am. Dec. 159; Cope's Estate, 191 Pa. 22, 45 L.R.A. 516, 71 Am. St. Rep. 749, 43 Atl. 79; Gray, Limitations of Taxing Power, p. 353; Cooley, Const. Lim. pp. 607, 615; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; United States v. Singer, 15 Wall. 111, 121, 21 L. ed. 51; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; M'Culloch v. Maryland, 4 Wheat. 316, 435, 4 L. ed. 579, 608; Loughborough v. Blake, 5 Wheat. 317, 325, 5 L. ed. 98, 100; Ward v. Maryland, 12 Wall. 418, 431, 20 L. ed. 449, 453; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Pembina Consol. Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 188, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Progressive taxation on inheritances does not constitute a precedent for the case at bar, for such taxation is not upon property, but upon the right to succession, and the property taxed is not held by the owner as a matter of right, but goes to the recipient as a matter of privilege from the state.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 47, 44 L. ed. 969, 972, 20 Sup. Ct. Rep. 747; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99.

There are limitations upon the powers of all governments, without any express designation of them in their organic law, —limitations which inhere in their very nature and structure.

United States v. Erie R. Co. 106 U. S. 327, 334, 27 L. ed. 151, 155, 1 Sup. Ct. Rep. 223.

Such limitations bind Congress in the exercise of its taxing power.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 662, 22 L. ed. 455, 461.

The 5th Amendment imposes a curb on the Federal government (French v. Barber Asphalt Paving Co. 181 U. S. 324, 329, 45 L. ed. 879, 884, 21 Sup. Ct. Rep. 625). The very words used in the amendment, "by due process of law," have their equivalent, as expressed by Lord Coke, in the words, "law of the land," and prohibit, among other things, taking private property for public use without just compensation (Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. ed. 616, 618). This limitation is as old as the principle of civilized government, and was by the 5th Amendment introduced into the Constitution of the United States as a limitation upon the powers of the national government (Munn v. Illinois, 94 U. S. 113, 123, 24 L. ed. 77, 83). The due process of law, as thus described, protects the citizen against the arbitrary exercise of the powers of government, unrestrained by the established principle of private right and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 237, 244, 4 L. ed. 559, 561; Caldwell v.

Texas, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224.

Solicitor General Davis and Assistant Attorney General Wallace argued the cause, and, with Attorney General Gregory, filed a brief for defendant in error.

For their contentions, see their brief as reported in Brushaber v. Union P. R. Co. ante, 493.

Mr. Chief Justice White delivered the opinion of the court:

Both the plaintiffs in error, the one in 393 a corporation and the other in 394 an individual, paid under protest [117] to the collector of internal revenue, taxes assessed under the income tax section of the tariff act of October 3, 1913 (sec. II., chap. 16, 38 Stat. at L. 166, Comp. Stat. 1913, § 6319). After an adverse ruling by the Commissioner of Internal Revenue on appeals which were prosecuted conformably to the statute (Rev. Stat. §§ 3220, 3226, Comp. Stat. 1913, §§ 5944, 5949) by both the parties for a refunding to them of the taxes paid, these suits were commenced to recover the amounts paid on the ground of the repugnancy to the Constitution of the section of the statute under which the taxes had been collected, and the cases are here on direct writs of error to the judgments of the court below, sustaining demurrers to both complaints on the ground that they stated no cause of action.

Every contention relied upon for reversal in the two cases is embraced within the following propositions: (a) that the tax imposed by the statute was not sanctioned by the 16th Amendment because the statute exceeded the exceptional and limited power of direct income taxation for the first time conferred upon Congress by that Amendment, and, being outside of the Amendment, and governed solely, therefore, by the general taxing authority conferred upon Congress by the Constitution, the tax was void as an attempt to levy a direct tax without apportionment under the rule established by Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; (b) that the statute is, moreover, repugnant to the Constitution because of the provision therein contained for its retroactive operation for a designated time, and because of the illegal discriminations and inequalities which it creates, including the provision for a progressive tax on the income of individuals and the method provided in the statute for computing the taxable income of corporations.

But we need not now enter into an original consideration of the merits of these contentions because each and all of them were considered and adversely disposed of in Brushaber v. Union P. R. Co. 240 U. S. 1, ante, 493, 36 Sup. Ct. Rep. 236. That case [118] therefore, is here absolutely controlling and decisive. It follows that for the reasons stated in the opinion in the Brushaber Case, the judgments in these cases must be and they are affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of these cases.

JOHN F. DODGE and Horace E. Dodge, Appts.,
v.
WILLIAM H. OSBORN, Commissioner of Internal Revenue.

(See S. C. Reporter's ed. 116–122.)

Injunction — against income tax — recovery back of taxes paid.

1. The inhibition of U. S. Rev. Stat. § 3224 (Comp. Stat. 1913, § 5947), against suits to restrain the assessment or collection of a tax, and the provisions of §§ 3220, 3226, 3227 (Comp. Stat. 1913, §§ 5944, 5949, 5950), making an appeal to the Commissioner of Internal Revenue after payment and his refusal to refund prerequisites to a suit to recover taxes erroneously or illegally assessed and collected, are made applicable to taxes imposed under the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), by ¶ L of that act, which provides that all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal revenue taxes not heretofore specifically repealed, and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed.

[For other cases, see Injunction, I. k; Taxes, III. g. 2, in Digest Sup. Ct. 1908.]

Injunction — against tax — income taxes.

2. The courts are precluded, by the inhibition of U. S. Rev. Stat. § 3224, Comp. Stat. 1913, § 5947, against suits to restrain the assessment or collection of any tax, from taking jurisdiction of a bill filed

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NOTE.—On injunction to restrain the collection of illegal taxes—see notes to Odlin v. Woodruff, 22 L.R.A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

against the Commissioner of Internal Revenue to enjoin the assessment and collection of the taxes imposed by the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), on the ground that that statute is void for repugnancy to the Constitution of the United States.

[For other cases, see Injunction, I. k, in Digest Sup. Ct. 1908.]

Injunction — against tax — income taxes.

3. Allegations in a bill filed against the Commissioner of Internal Revenue to enjoin the assessment and collection of the taxes imposed by the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16), that unless the taxes are enjoined many suits by other persons will be brought for the recovery of the taxes paid by them, and that by reason of U. S. Rev. Stat. § 3187, Comp. Stat. 1913, § 5909, making the tax a lien on plaintiff's property, the assessment of the taxes would constitute a cloud on plaintiff's title, do not take the case out of the rule that under § 3224, Comp. Stat. 1913, § 5947, a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it, even assuming that this doctrine has no application to a case where, wholly independent of any claim of the unconstitutionality of the tax sought to be enjoined, additional equities sufficient to sustain jurisdiction are alleged.

[For other cases, see Injunction, I. k, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — relief against illegal tax.

4. There is no want of due process of law in the provisions of U. S. Rev. Stat. §§ 3220, 3226, 3227, Comp. Stat. 1913, §§ 5944, 5949, 5950, making an appeal to the Commissioner of Internal Revenue after payment and his refusal to refund prerequisites to a suit to recover taxes erroneously or illegally assessed and collected.

[For other cases, see Constitutional Law, 629–678, in Digest Sup. Ct. 1908.]

[No. 396.]

Submitted October 12, 1915. Decided February 21, 1916.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing, for want of jurisdiction, the bill in a suit to enjoin the assessment and collection of income taxes. Affirmed.

See same case below, 43 App. D. C. 144.

The facts are stated in the opinion.

Mr. Fred A. Baker submitted the cause for appellants:

A distinction exists between official action which is an unlawful assumption of authority that has not been conferred, and a mistaken, erroneous, or irregular exercise of authority.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Ogden City v. Armstrong, 168 U. S. 224, 240, 42 L. ed. 444, 452, 18 Sup. Ct. Rep. 98; 2 Gneist, History of Eng. Const., p. 369; Colonial Bank v. Willan, L. R. 5 P. C. 417, 43 L. J. P. C. N. S. 39, 30 L. T. N. S. 237, 22 Week. Rep. 516; Reg. v. Cheltenham, 1 Q. B. 474, 1 Gale & D. 167, 10 L. J. Mag. Cas. N. S. 99.

An unconstitutional act of Congress or of a state legislature confers no jurisdiction or authority.

Osborn v. Bank of United States, 9 Wheat. 738, 868, 6 L. ed. 204, 235; Piper v. Pearson, 2 Gray, 120, 61 Am. Dec. 438; Kelly v. Bemis, 4 Gray, 83, 64 Am. Dec. 50; Lynn v. Polk, 8 Lea, 129.

The right to an injunction in cases within the jurisdiction of a court of equity is a constitutional right, which cannot be destroyed or seriously impaired by any act of Congress.

Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547; Park v. Detroit Free Press Co. 72 Mich. 566, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731.

The case of the plaintiffs is within recognized grounds of equitable jurisdiction.

Ogden City v. Armstrong, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98; Wilson v. Lambert, 168 U. S. 611, 42 L. ed. 590, 18 Sup. Ct. Rep. 217; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Hills v. National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; Journal of Commerce & C. Bulletin v. Burleson, 220 U. S. 600, 57 L. ed. 1347, 33 Sup. Ct. Rep. 464; Vesta Mills v. Charleston, 60 S. C. 1, 38 S. E. 226; Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 737, 743, 34 Sup. Ct. Rep. 372; Rogers v. Nichols, 186 Mass. 440, 71 N. E. 950; Stevens v. Mulligan, 167 Mass. 84, 44 N. E. 1086; Loring v. Hildreth, 170 Mass. 328, 40 L.R.A. 127, 64 Am. St. Rep. 301, 49 N. E.

652; White v. Gove, 183 Mass. 333, 67 N. E. 359.

The revenue officers of the United States are personally liable in common-law and equitable actions for acts not within their authority or jurisdiction.

2 Anson, Law & Custom of the Const. pp. 231, 477; Dicey, Law of the Const. pp. 320, 321; Leach v. Money, 19 How. St. Tr. 1001; Wilkes v. Wood, 19 How. St. Tr. 1153; Wilkes v. Lord Halifax, 19 How. St. Tr. 1406; 2 Stephen, History of Crim. Law, 61; 1 Bryce, Am. Com. p. 239; United States v. Peters, 5 Cranch, 115, 3 L. ed. 53; Meigs v. M'Clung, 9 Cranch, 11, 3 L. ed. 639; Osborn v. Bank of United States, 9 Wheat. 738, 868, 6 L. ed. 204, 235; United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

Solicitor General Davis and Assistant Attorney General Wallace submitted the cause for appellee. Attorney General Gregory was on the brief.

For their contentions, see their brief as reported in Brushaber v. Union P. R. Co. ante, 493.

Mr. Chief Justice White delivered the opinion of the court:

The appellants filed their bill in the supreme court of the District of Columbia against the Commissioner of Internal Revenue to enjoin the assessment and collection of the taxes imposed by the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, 181, chap. 16), and especially the surtaxes therein provided for, on the ground that the statute was void for repugnancy to the Constitution of the United States. The case is here on appeal from the judgment of the court below, affirming the action of the trial court in sustaining a motion to dismiss the complaint for want of jurisdiction because the complainants had an adequate remedy at law, and because of the provision of § 3224, Revised Statutes (Comp. Stat. 1913, § 5947), that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

We at once put out of view a contention that § 3224 is not applicable to taxes imposed by the income tax law since we are clearly of the opinion that [120] it is within the contemplation of paragraph L of the act which provides:

"That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed." And for the same reason we do not further notice a contention as to the inapplicability of §§ 3220, 3226, and 3227 (Comp. Stat. 1913, §§ 5944, 5949, 5950), to which effect was given by the court below, requiring an appeal to the Commissioner of Internal Revenue after payment of a tax claimed to have been erroneously or illegally assessed and collected, and, upon his refusal to return the sum paid, giving a right to sue for its recovery.

The question for decision, therefore, is whether the sections of the Revised Statutes referred to are controlling as to the case in hand. The plain purpose and scope of the sections are thus stated in Snyder v. Marks, 109 U. S. 189, 193, 194, 27 L. ed. 901, 903, 3 Sup. Ct. Rep. 157, a suit brought to enjoin the collection of a revenue tax on tobacco:

"The inhibition of § 3224 (Comp. Stat. 1913, § 5947), applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. . . . Cheatham v. United States (Cheatham v. Norvell) 92 U. S. 85, 88, 23 L. ed. 561, 562, and again in State R. Tax Cases, 92 U. S. 575, 613, 23 L. ed. 663, 673, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, [121] not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment [assessment] and claim that it is valid."

And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the stat-

ute imposing it. Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; Pacific Steam Whaling Co. v. United States, 187 U. S. 447, 451, 452, 47 L. ed. 253, 255, 256, 23 Sup. Ct. Rep. 154.

But it is contended that this doctrine has no application to a case where, wholly independent of any claim of the unconstitutionality of the tax sought to be enjoined, additional equities sufficient to sustain jurisdiction are alleged, and this, it is asserted, being such a case, falls within the exception to the general rule. But, conceding for argument's sake only the legal premise upon which the contention rests, we think the conclusion that this case falls within such exception is wholly without merit, since, after an examination of the complaint, we are of the opinion that no ground for equitable jurisdiction is alleged. It is true the complaint contains averments that unless the taxes are enjoined many suits by other persons will be brought for the recovery of the taxes paid by them, and also that by reason of § 3187, Rev. Stat. (Comp. Stat. 1913, § 5909), making the tax a lien on plaintiffs' property, the assessment of the taxes would constitute a cloud on plaintiffs' [122] title. But these allegations are wholly inadequate under the hypothesis which we have assumed solely for the sake of the argument, to sustain jurisdiction, since it is apparent on their face they allege no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced,—allegations which, if recognized as a basis for equitable jurisdiction, would take every case where a tax was assailed because of its unconstitutionality out of the provisions of the statute, and thus render it nugatory, while it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.

There is a contention that the provisions requiring an appeal to the Commissioner of Internal Revenue after payment of the taxes, and giving a right to sue in case of his refusal to refund, are wanting in due process, and therefore there is jurisdiction. But we think it suffices to state that contention to demonstrate its entire want of merit.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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JOHN F. DODGE and Horace E. Dodge, Appts.,
v.
JAMES J. BRADY, Collector of Internal Revenue.

(See S. C. Reporter's ed. 122–126.)

Appeal — reversible error — lack of jurisdiction — suit to recover taxes wrongfully collected.

A Federal district court cannot be said to have committed reversible error in assuming to pass upon the merits of a controversy presented by a supplemental bill alleging that, since the filing of the original bill to enjoin the collector of internal revenue from collecting the surtaxes assessed under the income tax section of the tariff act of October 3, 1913 (38 Stat. at L. 166, chap. 16, Comp. Stat. 1913, §§ 6319–6336), on the ground of its unconstitutionality, the Commissioner of Internal Revenue had ruled adversely upon plaintiffs' protest, and that they had thereupon paid the taxes under protest, and praying a recovery of the amount paid to the collector, and the other relief asked in the original bill, notwithstanding the failure of such supplemental bill to allege a compliance with the conditions imposed by U. S. Rev. Stat. §§ 3220, 3226, Comp. Stat. 1913, §§ 5944, 5949, as prerequisites to a suit to recover taxes wrongfully collected, *viz.*, an appeal to the Commissioner of Internal Revenue after payment, and his refusal to refund.

[For other cases, see Appeal and Error, 5189–5196, in Digest Sup. Ct. 1908.]

[No. 213.]

Argued October 14 and 15, 1915. Decided February 21, 1916.

APPEAL from the District Court of the United States for the Eastern District of Michigan to review a decree dismissing a suit to enjoin the collection of an income tax, and to recover the amount of the tax paid under protest. Affirmed.

The facts are stated in the opinion.

Mr. William D. Guthrie argued the cause, and, with Mr. Fred A. Baker, filed a brief for appellants:

Even if it could be shown affirmatively that the abuse of the taxing power was not in the minds of the people of the United States at the time the 5th Amendment was adopted, and that the framers apprehended no danger from abuse and discriminations in the exercise of that power, this would not limit the scope of the Amendment if the case now presented came fairly within its general spirit and letter.

Dartmouth College v. Woodward, 4 Wheat. 518, 644, 4 L. ed. 629, 661.

Had the first Congress deliberated at

length upon the choice of a provision which would be more effective than any other to prevent an abuse of the taxing power, it could not have selected one more appropriate than "due process of law." The phrase "due process of law," or its equivalent, "the law of the land," long antedated the establishment of our political institutions. It embodied then, as now, the most fundamental and far-reaching maxim of constitutional law and political justice, and it represented the broadest and most comprehensive guaranty of personal and property rights. In fact, there are no words in our language which signify or mean more in respect of the rights and liberties of the individual.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 324, 336, 37 L. ed. 463, 467, 471, 13 Sup. Ct. Rep. 622.

The prohibition against the deprivation of property without due process of law cannot mean one thing under the 5th Amendment and another thing under the 14th Amendment.

Wight v. Davidson, 181 U. S. 371, 377, 45 L. ed. 900, 903, 21 Sup. Ct. Rep. 616; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; French v. Barber Asphalt Paving Co. 181 U. S. 324, 329, 45 L. ed. 879, 884, 21 Sup. Ct. Rep. 625.

Any provision of an act of Congress imposing an unequal and discriminatory tax by means of unreasonable and arbitrary selection among those of the class taxed would conflict with the provisions of U. S. Const. 5th Amendment, by depriving the individual of property without due process of law, or taking private property for public use without just compensation.

Southwestern Oil Co. v. Texas, 217 U. S. 114, 119, 54 L. ed. 688, 691, 30 Sup. Ct. Rep. 496; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 399, affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

The grant of power to tax in and of itself implies the limitation that a tax must necessarily be a common burden, equally imposed upon all of the same class, owning the same kinds of property, having the same kind of income, doing the same acts, or exercising the same privileges.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 599, 39 L. ed. 759, 825, 15 Sup. Ct. Rep. 673; State v. United States & C. Exp. Co. 60 N. H. 236; State ex rel. White House School Dist. v. Readington Twp. 36 N. J. L. 70; Cooley, Taxn. 3d ed. pp. 4, 260; Cooley, Const. Law, 3d ed. p. 356.

Mr. Fred A. Baker filed a separate brief for appellants:

The Secretary of the Treasury cannot be authorized to determine without notice or a hearing whether a corporation has accumulated a surplus in excess of the needs and purposes of the business.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625; Stuart v. Palmer, 74 N. Y. 188, 30 Am. Rep. 289; Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Louisville & N. R. Co. v. Central Stock Yards Co. 212 U. S. 132, 144, 53 L. ed. 441, 446, 29 Sup. Ct. Rep. 246.

There are some limitations on the power to tax which are inherent in the forms of constitutional government which prevail in the United States, and in the nature of our institutions.

Miller, Const. p. 241; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

Some rule of uniformity and equality is absolutely essential to any valid taxation.

Sutton v. Louisville, 5 Dana, 31; Lexington v. McQuillan, 9 Dana, 513, 35 Am. Dec. 159; Howell v. Bristol, 8 Bush, 493; State ex rel. White House School Dist. v. Readington Twp. 36 N. J. L. 66; People ex rel. Griffin v. Brooklyn, 4 N. Y. 420, 55 Am. Dec. 266; State v. Travelers' Ins. Co. 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299.

Taxes cannot be levied, or money in the treasury be appropriated, for the relief of taxpayers.

Cooley v. Granville, 10 Cush. 56; Hooper v. Emery, 14 Me. 375; Weeks v. Milwaukee, 10 Wis. 243; Brewer Brick Co. v. Brewer, 62 Me. 62, 16 Am. Rep. 395.

Solicitor General Davis and Assistant Attorney General Wallace argued the cause, and, with Attorney General Gregory, filed a brief for appellee.

For their contentions, see their brief as reported in Brushaber v. Union P. R. Co. ante, 493.

Mr. Chief Justice White delivered the opinion of the court:

The appellants are the same persons who sued in Dodge v. Osborn, just decided [240 U. S. 118, ante, 557, 36 Sup. Ct. Rep. 275]. After the dismissal of that suit by the supreme court of the District of Columbia for want of jurisdiction, the parties, on June 10, 1914, filed their bill in the court below against the collector [125] of internal rev-

enue, to enjoin the collection of the surtaxes assessed against them, which were disputed in the previous case on substantially the same grounds alleged in the complaint in that case. The bill alleged, however, that plaintiffs had filed with the collector "an appeal or claim for the remission and abatement of the surtaxes" because of the unconstitutionality of the statute imposing them, and that the Commissioner of Internal Revenue to whom the claim had been forwarded by the collector had such protest under advisement. Upon the filing of the bill the plaintiffs moved for a preliminary injunction which was denied July 29, 1914. On the same day, by leave of court, a supplemental bill was filed which alleged that since the filing of the original bill the Commissioner of Internal Revenue had ruled adversely upon plaintiffs' protest, and that thereupon they had paid the surtaxes to the collector under protest, and they prayed a recovery of the amount paid to the collector and for the other relief asked in the original bill. The defendant moved to dismiss the bill for want of jurisdiction because the suit was brought to enjoin the collection of a tax, contrary to the provisions of § 3224, Revised Statutes (Comp. Stat. 1913, § 5947), and for want of equity because the income tax law was constitutional and valid. The court sustained the motion on the latter ground and dismissed the bill on the merits, and the case is here on direct appeal because of the constitutional questions.

The government insists that the court below was without jurisdiction to decide the merits, and we come first to that question. It is apparent if the original bill alone is taken into view that the suit was brought to enjoin the collection of a tax, and the court was without jurisdiction for the reasons stated in the previous case. And it is argued by the government that there was no jurisdiction under the supplemental bill, since it fails to allege that an appeal was taken to the Commissioner of Internal Revenue after the payment of the taxes, and that he refused [126] to refund them, and therefore fails to allege a compliance with the conditions imposed by §§ 3220 and 3226 of the Revised Statutes (Comp. Stat. 1913, §§ 5944, 5949), as prerequisites to a suit to recover taxes wrongfully collected. But, broadly considering the whole situation, and taking into view the peculiar facts of the case, the protest to the Commissioner, and his exertion of authority over it, and his adverse ruling upon the merits of the tax, thereby passing upon every question which he would be called upon to decide on an appeal for a refunding of the taxes paid, we think that this case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits, thus putting an end to further absolutely useless and unnecessary controversy. We say useless and unnecessary because on the merits all the contentions urged by the appellants concerning the unconstitutionality of the law and of the surtaxes which it imposes have been considered and adversely disposed of in Brushaber v. Union P. R. Co. 240 U. S. 1, ante, 493, 36 Sup. Ct. Rep. 236.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[127] IDA MAY INNES, Plff. in Err.,
v.
JOHN W. TOBIN, Sheriff of Bexar County, Texas.

(See S. C. Reporter's ed. 127–135.)

Interstate extradition — fugitive from justice.

1. The surrender of a person in one state for removal to another as a fugitive is expressly or by necessary implication prohibited by U. S. Rev. Stat. § 5278, Comp. Stat. 1913, § 10,126, where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding state.

[For other cases, see Extradition, I., in Digest Sup. Ct. 1908.]

Appeal — presumptions — extradition — fugitive from justice.

2. The Federal Supreme Court, when reviewing the refusal of a state court to discharge on habeas corpus a person whose extradition is sought by another state, will assume that the accused was a fugitive from the justice of the demanding state, where there was no question of such fact made in the application for habeas corpus, the relief relied upon being solely that there was and could have been no flight into the state, since the coming therein was involuntary, and resulted solely from other extradition proceedings, and that view of the subject was assumed by the court below to be unquestioned, and neither in the assignments of error in the Federal Supreme Court nor in the arguments is the contrary view insisted upon or even suggested.

[For other cases, see Appeal and Error, VIII. d, in Digest Sup. Ct. 1908.]

NOTE.—As to who are fugitives from justice for purposes of extradition—see notes to Cook v. Hart, 36 L. ed. U. S. 934; and Bassing v. Cady, 52 L. ed. U. S. 540.

As to whether a state which has extradited a person from another state or country may surrender him to a third state or country—see note to this case in the state court as reported in L.R.A.1916C, 1251.

Interstate extradition — proceedings after surrender — release or return.

3. Nothing in the interstate extradition provisions of U. S. Rev. Stat. § 5278, Comp. Stat. 1913, § 10,126, gives the extradited person any immunity after trial and acquittal in the demanding state from her subsequent surrender to another state upon an extradition warrant instead of releasing her from custody or returning her to the state whence she was originally brought.

[For other cases, see Extradition, V., in Digest Sup. Ct. 1908.]

Interstate extradition — exclusiveness of Federal power — congressional inaction — involuntary presence of accused.

4. The failure of Congress when enacting the interstate extradition provisions of U. S. Rev. Stat. § 5278, Comp. Stat. 1913, § 10,126, to provide for the case of a fugitive from justice who has not fled into the state where he is found, but was brought into it involuntarily by a requisition from another state, does not take the matters within the unprovided area out of possible state action, but leaves the state free to deliver the accused to any state from whose justice he has fled.

[For other cases, see Extradition, II., in Digest Sup. Ct. 1908.]

[No. 532.]

Argued January 6, 1916. Decided February 21, 1916.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a judgment of the District Court of Bexar County, in that state, refusing to discharge on habeas corpus a person whose extradition is sought by another state. Affirmed.

See same case below, — Tex. Crim. Rep. —, L.R.A.1916C, 1251, 173 S. W. 291.

The facts are stated in the opinion.

Mr. **Joseph W. Bailey** argued the cause, and, with Mr. R. H. Ward, filed a brief for plaintiff in error:

The extradition clause of the Constitution is not self-executing.

Hyatt v. New York, 188 U. S. 691, 708, 47 L. ed. 657, 660, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; Kentucky v. Dennison, 24 How. 66, 16 L. ed. 717; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291.

This clause not being self-executing, Congress passed a law putting it into force, which law clearly contemplates that, in order to be a fugitive from justice, there must have been a voluntary flight, because the statute speaks of a demand of the executive authority of a state for the surrender of a person as a fugitive from justice by the executive authority of the state to which such person has fled, and it provides that the indictment or affidavit must be certified as authentic by the governor of the state from whence the person, so charged, has fled, etc., and it makes it the duty of the executive authority of the state to which such person has fled, to cause him to be arrested and secured.

Hyatt v. New York, 188 U. S. 691, 715, 47 L. ed. 657, 662, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; 2 Moore, Extradition, p. 900, § 569; Rorer, Interstate Law, p. 308; State v. Hall, 115 N. C. 811, 28 L. R. A. 292, 44 Am. St. Rep. 501, 20 S. E. 729, 10 Am. Crim. Rep. 297; Tennessee v. Jackson, 1 L.R.A. 370, 36 Fed. 258; Ex parte Thaw, 214 Fed. 423; Spear, Extradition, pp. 558–571; Re Robinson, 29 Neb. 135, 8 L.R.A. 398, 26 Am. St. Rep. 378, 45 N. W. 267; State v. Simmons, 39 Kan. 262, 18 Pac. 177; State v. Hall, 40 Kan. 338, 10 Am. St. Rep. 200, 19 Pac. 918; Re Cannon, 47 Mich. 481, 11 N. W. 280; Ex parte McKnight, 48 Ohio St. 588, 14 L.R.A. 128, 28 N. E. 1034; Re Tod, 12 S. D. 386, 47 L.R.A. 566, 76 Am. St. Rep. 616, 81 N. W. 637, 12 Am. Crim. Rep. 303.

Mr. **Hugh M. Dorsey** argued the cause, and, with Mr. C. C. McDonald filed a brief for defendant in error:

Plaintiff in error was a fugitive from justice.

Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073; Hibler v. State, 43 Tex. 197; Ex parte Brown, 28 Fed. 653; Re White, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54; Re Bloch, 87 Fed. 981; State ex rel. Burner v. Richter, 37 Minn. 436, 35 N. W. 9; Taylor v. Wise, — Iowa, —, 126 N. W. 1126; Ex parte Dickson, 4 Ind. Terr. 481, 69 S. W. 943; Coleman v. State, 53 Tex. Crim. Rep. 93, 113 S. W. 17; Com. v. Hare, 36 Pa. Super. Ct. 125; People ex rel. American Surety Co. v. Benham, 71 Misc. 345, 128 N. Y. Supp. 610; Ex parte Williams, 10 Okla. Crim. Rep. 344, 51 L.R.A.(N.S.) 668, 136 Pac. 597; Re Galbreath, 24 N. D. 582, 139 N. W. 1050; People ex rel. Suydam v. Sennott, 20 Alb. L. J. 230.

No irregularity in the extradition of a fugitive criminal, when brought within the jurisdiction of the court having cognizance of his crime, can be available to him as a means of escaping trial and punishment.

Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204.

The Constitution of the United States and the act of Congress apply only to fugitives from justice; but a state may, nevertheless, in the exercise of its reserved sovereign power, provide for the surrender of

persons indicted for crime in another state, but who have never fled from it.

State v. Hall, 115 N. C. 811, 28 L.R.A. 289, 44 Am. St. Rep. 501, 20 S. E. 729, 10 Am. Crim. Rep. 297; Re Roberts, 24 Fed. 132; Kurtz v. State, 22 Fla. 36, 1 Am. St. Rep. 173; Com. v. Hall, 9 Gray, 262, 69 Am. Dec. 285; Ex parte Ammons, 34 Ohio St. 518; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217.

Mr. Chief Justice White delivered the opinion of the court:

The governor of Oregon honored a requisition made by the governor of Texas for the delivery of the plaintiff in error for removal to Texas as a fugitive from the justice of that state. The accused was taken to Texas, tried for murder and a conspiracy to commit murder, and acquitted. She was, however, not released from custody because she was ordered by the governor of Texas, under a requisition of the governor of Georgia, to be held for delivery to an agent of the state of Georgia for removal to that state as a fugitive from justice.

Alleging these facts, an application for release by habeas corpus was then presented to a state court upon the charge that the extradition proceedings and the warrant of removal thereunder were "wholly null and void" because "your petitioner was never a fugitive from justice from the state of Georgia to the state of Texas within the meaning and intent of the laws of the United States regulating extradition proceedings." On the return to the writ, the court, finding the facts to be as above stated, refused to discharge the petitioner, and the case is [130] before us to review a judgment of the court of criminal appeals, which adopted the findings of the trial court and affirmed its action. — Tex. Crim. Rep. —, L.R.A.1916C, 1251, 173 S. W. 291.

All the Federal questions involve the meaning of § 2 of article 4 of the Constitution, which is as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." They also depend on § 5278 of the Revised Statutes, which is but a reproduction of § 1 of the act of February 12, 1793 (chap. 7, 1 Stat. at L. 302, Comp. Stat. 1913, § 10,126), giving effect to and establishing the methods of procedure to be resorted to for the purpose of enforcing the provisions of the Constitution on the subject to the extent that their execution was by the statute provided for.

Broadly, there is but a single question for consideration: Was the order for rendition repugnant to the Constitution and the provisions of the statute? But two inquiries are involved in its solution: First, was the rendition order void because, under the facts, there was no power to award it except by disregarding express prohibitions or requirements of the Constitution or statute, or by necessary implication adversely affecting rights thereby created? and second, even although this was not the case, was the order nevertheless void because, under the circumstances, it dealt with a situation which, by the effect of the statute, was taken out of the reach of state authority, even although no express provision was made in the statute for dealing with such condition by any authority, state or Federal? We consider the two inquiries under separate headings.

First. For the purpose of the solution of the inquiry under this heading we treat the following propositions as beyond question: (a) That prior to the adoption of the [131] Constitution fugitives from justice were surrendered between the states conformably to what were deemed to be the controlling principles of comity. Kentucky v. Dennison, 24 How. 66, 101, 102, 16 L. ed. 717, 727; 2 Moore, Extradition & Interstate Rendition, pp. 820 et seq. (b) That it was intended by the provision of the Constitution to fully embrace or rather to confer authority upon Congress to deal with such subject. Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Kentucky v. Dennison, supra; Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; Appleyard v. Massachusetts, 203 U. S. 222, 51 L. ed. 161, 27 Sup. Ct. Rep. 122, 7 Ann. Cas. 1073; (c) That the act of 1793 (now Revised Statutes, § 5278, Comp. Stat. 1913, § 10,126) was enacted for the purpose of controlling the subject in so far as it was deemed wise to do so, and that its provisions were intended to be dominant, and, so far as they operated, controlling and exclusive of state power. Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060; Kentucky v. Dennison, 24 How. 104, 105, 16 L. ed. 728; Mahon v. Justice, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687.

Coming in the light of these principles to apply the statute, it is not open to question that its provisions expressly or by necessary implication prohibited the surrender of a person in one state for removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding state. Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148,

5 Am. Crim. Rep. 218; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; Bassing v. Cady, 208 U. S. 386, 392, 52 L. ed. 540, 543, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905.

From this it results that the first inquiry here is, did it appear that the accused was a fugitive from the justice of the state of Georgia? While the facts which we have stated do not disclose affirmatively that she was ever in Georgia, and the date, if at all, of her flight from that state, we think that she was such a fugitive is to be assumed for three obvious reasons: because there was no question of such fact made in the application for habeas corpus, since it is apparent on the face of the application that the ground of relief relied upon was not that there had [132] been no flight from Georgia, but that there was and could have been no flight into Texas, since the coming into that state was involuntary and resulted solely from the extradition proceedings; because that view of the subject was assumed, both in the elaborate opinion of the court below and that of the dissenting judge, to be unquestioned; and finally, because neither in the assignments of error in this court nor in the arguments pressed upon our attention is the contrary view insisted upon or even suggested. From that aspect, therefore, there is no ground for saying that the extradition order conflicted with the express provision of the statute.

Was there a conflict between the statute and the order for removal to Georgia, arising by necessary implication from the fact that the accused had been brought into the state of Texas on a requisition upon the state of Oregon, and had not been released from custody or been returned to Oregon, is the only remaining question under this heading. While it is quite true, as pointed out in the opinion of the court below, and in that of the judge who dissented, that there are some decided cases and opinions expressed by text writers which sustain the affirmative view of this inquiry, the subject is here not an open one since it has been expressly foreclosed by the decision in Lascelles v. Georgia, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687. In that case the issue for decision was whether a person accused, who had been removed to the state of Georgia from another state on extradition proceedings for trial for a specified crime, was liable in Georgia to be tried for another and different crime. Reviewing the whole subject and calling attention to the broad lines of distinction between international extradition of fugitives from justice and interstate rendition of such fugitives under the Constitution and the provisions of the act of Congress, and the error of assuming that the doctrine of asylum applicable under international law to the one case was applicable to the other, it was [133] held that the right to prosecute for such other offense existed. The court said: "Neither the Constitution nor the act of Congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the state to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the Constitution and the statutes extends to *all* crimes and offenses punishable by the laws of the state where the act is done. Kentucky v. Dennison, 24 How. 66, 101, 102, 16 L. ed. 717, 727; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218."

We are thus brought to the remaining heading, which is:

Second. Although the order for rendition was not in conflict, either expressly or by necessary implication, with any of the provisions of the Constitution or statute, was it nevertheless void under the circumstances because it dealt with a subject with which it was beyond the power of the state to deal, and which was therefore brought, as the result of the adoption of the statute, within exclusive Federal control, although no provision dealing with such subject is found in the statute? To appreciate this question, the proposition relied upon needs to be accurately stated. It is this: The Constitution provides for the rendition to a state of a person who shall have fled from justice and be found in another state; that is, for the surrender by the state in which the fugitive is found. This, it is conceded, would cover the case and sustain the authority exercised, as the accused was a fugitive from the justice of Georgia and was found in Texas. But the proposition insists that the statute is not as broad as the Constitution, since it provides not for the surrender of the fugitive [134] by the state in which he is found, but only for his surrender by the state into which he has fled, thus leaving unprovided for the case of a fugitive from justice who is found in a state, but who has not fled into such state, because brought into such state involuntarily by a requisition from another. And the argument is supported by the contention

that, as the statute exercises the power conferred by the Constitution and is exclusive, it occupies the whole field and prohibits all state action even upon a subject for which the statute has not provided, and which therefore in no manner comes within its express terms. But we are of the opinion that the contention rests upon a mistaken premise and unwarrantedly extends the scope of the decided cases upon which it relies. The first, because it erroneously assumes that although the statute leaves a subject with which there was power to deal under the Constitution unprovided for, it therefore took all matters within such unprovided area out of any possible state action. And the second, because, while it is undoubtedly true that in the decided cases relied upon (Kentucky v. Dennison, supra; Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Hyatt v. New York, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311) the exclusive character of the legislation embodied in the statute was recognized, those cases, when rightly considered, go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly or by necessary implication provided.

No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to [135] extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them,—state authority until it was deemed essential by further legislation to govern them exclusively by national authority. In fact, such conclusion is essential to give effect to the act of Congress, since to hold to the contrary would render inefficacious the regulations provided concerning the subjects with which it dealt. This becomes manifest when it is considered that, if the proposition now insisted upon were accepted, it would follow that the delivery of a criminal who was a fugitive from justice by one state on a requisition by another would exhaust the power, and the criminal, therefore, whatever might be the extent and character of the crimes committed in other states, would remain in the state into which he had been removed without any authority to deliver him to other states from whose justice he had fled. And this, while paralyzing the authority of all the states, it must be moreover apparent, would cause them all to become involuntary asylums for criminals; for no method is suggested by which a criminal brought into a state by requisition, if acquitted, could be against his will deported, since to admit such power would be virtually to concede the right to surrender him to another state as a fugitive from justice for a crime committed within its borders.

It follows from what we have said that the court below was right in refusing to discharge the accused, and its judgment, therefore, must be and it is affirmed.

By stipulation of counsel a similar judgment will be entered in case of VICTOR E. INNES v. TOBIN, Sheriff, No. 533.

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[136] TITLE GUARANTY & SURETY COMPANY OF SCRANTON, Pennsylvania, a Corporation, and Vernon W. Platt, Plffs. in Err.,

v.

STATE OF IDAHO to and for the Use and Benefit of O. W. ALLEN et al.

(See S. C. Reporter's ed. 136–142.)

Removal of causes — diverse citizenship — state as party — amount in controversy.

1. A suit by a state for the use and benefit of certain named depositors in a state bank, citizens of such state, against a former state bank commissioner, now a nonresident, and the nonresident surety on his bond, to recover the losses separately claimed by each of such depositors because of the bank commissioner's neglect of his official duties, may not be removed from a state to a Federal court for diverse citizenship, whether the state be treated as the real party plaintiff or merely as a nominal party, where none of the individual claims equals $3,000.

[For other cases, see Removal of Causes, 76–78, 247–255, in Digest Sup. Ct. 1908.]

NOTE.—On removal of causes in cases of diverse citizenship—see notes to Whelan v. New York, L. E. & W. R. Co. 1 L.R.A. 65; Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Huskins v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545; Bierbower v. Miller, 9 L.R.A. 228; Brodhead v. Shoemaker, 11 L.R.A. 567; Delaware R. Constr. Co. v. Meyer, 25 L. ed. U. S. 593; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. (U. S.) 528.

On constitutionality of statute authorizing officer to take charge of assets of bank upon suspicion of insolvency—see note to State Sav. & C. Bank v. Anderson, L.R.A. 1915E, 675.

Constitutional law — due process of law — closing insolvent bank.

2. A state may, consistently with the due process of law clause of U. S. Const., 14th Amend., clothe a bank commissioner with power to close the doors of a state bank if, on examination, it is found to be insolvent, without awaiting judicial proceedings.

[For other cases, see Constitutional Law, IV. b. 7, in Digest Sup. Ct. 1908.]

[No. 815.]

Submitted January 24, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment which affirmed a judgment of the District Court of Ada County, in that state, in favor of plaintiff in an action by the state for the use and benefit of certain depositors in a state bank against a former state commissioner and the surety on his bond. Dismissed for want of jurisdiction.

See same case below, 27 Idaho, 752, 152 Pac. 189.

The facts are stated in the opinion.

Mr. Samuel H. Hays submitted the cause for plaintiffs in error. Messrs. John F. Nugent and Pasco B. Carter were on the brief:

The state is seeking to recover the entire fund deposited. The supreme court of the state held that the state in this case is the trustee of an express trust. We may properly consider the fund represented by the total judgment as a trust fund recovered under such trust. In such cases, the aggregate amount is to be taken in ascertaining the amount in controversy.

Handley v. Stutz, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; Baltimore & O. S. W. R. Co. v. United States, 220 U. S. 94, 55 L. ed. 384, 31 Sup. Ct. Rep. 368; Kaus v. American Surety Co. 199 Fed. 972; Spokane Valley Land & Water Co. v. Kootenai County, 199 Fed. 481; Jones v. Mutual Fidelity Co. 123 Fed. 506.

The state was only a nominal plaintiff, being a trustee without any financial interest in the matter; therefore, the question of citizenship was the citizenship of the real parties in interest, they being citizens of Idaho.

New Orleans v. Gaines (New Orleans v. Whitney) 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; Mexican C. R. Co. v. Eckman, 187 U. S. 429, 432, 47 L. ed. 245, 247, 23 Sup. Ct. Rep. 211.

Section 73 of the banking act of the state of Idaho was unconstitutional in that it did not provide for due process of law.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Mr. Joseph H. Peterson, Attorney General of Idaho, submitted the cause for defendants in error. Messrs. Paris Martin and W. E. Cameron were on the brief:

In order for this court to be justified in holding that the Idaho supreme court committed error in affirming the action of the trial court in refusing to grant the petition of the plaintiffs in error to remove this cause to the Federal district court, it must first appear from the record that the cause was one within the possible jurisdiction of the Federal district court, and was one which could properly have been commenced in that Federal court.

Ex parte Wisner, 203 U. S. 449, 457, 51 L. ed. 264, 267, 27 Sup. Ct. Rep. 150; Re Winn, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515.

There was a general averment in the petition for removal that the amount in controversy in this suit exceeded the sum of $3,000, exclusive of interest and costs, but this was a mere conclusion.

Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506.

When two or more parties having separate and distinct demands, as in the case at bar, are united for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; and the separate, distinct demands of the various parties cannot be united, aggregated, and added together for the purpose of making up an amount sufficient to confer jurisdiction upon a Federal court.

Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Putney v. Whitmire, 66 Fed. 387; Smithson v. Hubbell, 81 Fed. 594; Cooper v. Preston, 105 Fed. 403; Washington County v. Williams, 49 C. C. A. 621, 111 Fed. 813; McDaniel v. Traylor, 123 Fed. 338; Wisconsin C. R. Co. v. Phœnix Ins. Co. 123 Fed. 989; Eaton v. Hoge, 72 C. C. A. 74, 141 Fed. 64, 5 Ann. Cas. 487; Troy Bank v. G. A. Whitehead & Co. 184 Fed. 932, 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9; Auer v. Lombard, 19 C. C. A. 72, 33 U. S. App. 438, 72 Fed. 209; Schwed v. Smith, 106 U. S. 188, 27 L. ed. 156, 1 Sup. Ct. Rep. 221; Freeman v. Dawson, 110 U. S. 264, 28 L. ed. 141, 4 Sup. Ct. Rep. 94; Ex parte Phœnix Ins. Co. 117 U. S. 367, 29 L. ed. 923, 6 Sup. Ct. Rep. 772; Clay v. Field, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; Northern P. R. Co. v. Walker, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; Davis v. Schwartz, 155 U. S. 647, 39 L. ed. 296, 15 Sup. Ct. Rep.

237; Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; North American Transp. & Trading Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869; Woodside v. Beckham, 216 U. S. 117, 54 L. ed. 408, 30 Sup. Ct. Rep. 367; Oliver v. Alexander, 6 Pet. 143, 8 L. ed. 349; Rich v. Lambert, 12 How. 347, 13 L. ed. 1017; Seaver v. Bigelow, 5 Wall. 208, 18 L. ed. 595; Farmers' Loan & T. Co. v. Waterman, 106 U. S. 265, 27 L. ed. 115, 1 Sup. Ct. Rep. 131; Stewart v. Dunham, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163; Gibson v. Shufeldt, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; State ex rel. Barker v. Chicago & A. R. Co. 216 Fed. 562; Wheless v. St. Louis, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402.

A state is not a citizen within the meaning of removal acts.

Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

Admitting, for the sake of argument, that a Federal constitutional question is involved in the case, and that the Idaho supreme court decided a Federal constitutional question, and that the decision of such Federal constitutional question was necessary to the decision rendered by the Idaho supreme court, yet that question is so wholly devoid of merit as to leave no room for real controversy in the matter.

Noble State Bank v. Haskell, 219 U. S. 575, 55 L. ed. 341, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 299, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Re Mandel, 224 Fed. 642; State Sav. & Commercial Bank v. Anderson, 165 Cal. 445, L.R.A.1915E, 675, 132 Pac. 755.

[139] Mr. Chief Justice White delivered the opinion of the court:

The case is before us on a motion to dismiss or affirm. The action of the court below which it is sought to review affirmed a judgment of the trial court entered on the verdict of a jury in a suit brought by the state for the use and benefit of O. W. Allen and two hundred and eighteen other named depositors of the Boise State Bank against Platt, a state bank commissioner, and the surety on his bond, for losses alleged to have been suffered by each of the individuals named as the result of alleged neglect of official duty imposed by the state law upon the bank commissioner. The wrong relied upon was his alleged misconduct in not closing the doors of the bank, and permitting it to continue business after he had discovered, as the result of an official examination, that the bank was hopelessly insolvent. The bill as a first cause of action fully set out the facts and stated the legal grounds relied upon to establish the loss and right of O. W. Allen to recover, and separate causes of action were then stated in favor of each of the two hundred and eighteen other depositors. There was an application to remove the case to the district court of the United States on the ground of diverse citizenship, the depositors named being citizens of Idaho, and Platt, the bank commissioner, being then a resident of California, and the Surety Company of Pennsylvania, which application was denied. After issue joined there was a trial before a jury and a verdict in favor of the plaintiff, the state, and against the defendants, "on each and every cause of action set forth in the complaint herein, to and for the use and benefit of each of the parties named in each of the separate causes of action set forth in plaintiff's complaint." And it was conformably adjudged "that the said plaintiff do have and recover of and from the said defendants . . . for the [140] use and benefit of each of the following-named parties, the sums set opposite their respective names, to wit," etc. No one of the amounts thus awarded to the plaintiff for the use of any one of the named persons equalled $3,000, but the sum of all the claims equalled $30,000. In affirming the judgment the court below held that the relief prayed was authorized by the state statutes, and that they also conferred authority upon the state to bring the suit as an express trustee for the use and benefit of the respective parties.

The Federal questions relied upon are, first, the alleged wrongful denial of the right to remove, and second, an asserted error committed by the court below in refusing to sustain a claim under the due process clause of the 14th Amendment.

The first is plainly without merit. Treating the state as the party plaintiff, it is not open to question that there was no right to remove. Stone v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; Missouri, K. & T. R. Co. v. Missouri R. & W. Comrs. (Missouri, K. & T. R. Co. v. Hickman) 183 U. S. 53, 58, 46 L. ed. 78, 80, 22 Sup. Ct. Rep. 18. And if we were to accede to the contention made in argument that the state must be treated as merely a nominal party, and the right to remove be then determined by the citizenship of the individuals for whose benefit recovery was

allowed, it would yet follow, since none of the distinct judgments in favor of any of the individuals are large enough to confer jurisdiction, that the court below correctly held that there was no basis for the right to remove. Woodside v. Beckham, 216 U. S. 117, 54 L. ed. 408, 30 Sup. Ct. Rep. 367; Troy Bank v. G. A. Whitehead & Co. 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9; Rogers v. Hennepin County, 239 U. S. 621, ante, 469, 36 Sup. Ct. Rep. 217. In fact, the correctness of these conclusions is made clear by the arguments advanced to the contrary, since they serve only to confuse and are destructive of each other. Thus, on the one hand, for the purpose of establishing the existence of diversity of citizenship justifying the removal, it is urged that the state must be treated as merely a nominal party, having [141] no interest, and as in no wise concerned in the judgment, and then upon the hypothesis that the state is eliminated, in order to establish a jurisdictional amount sufficient to remove, the award of distinct and separate amounts made by the judgment in favor of each of the distinct plaintiffs is wholly ignored, and it is urged that there is but judgment, which is in favor of the state, and which is composed of the aggregate of the distinct amounts.

Second. The proposition under the 14th Amendment relied upon is that, consistently with that Amendment, the state had not the power to put upon the bank commissioner the duty of closing the bank in case, on examination, it was found to be insolvent, since such authority, consistently with due process, could only have been exerted after judicial proceedings to ascertain the facts, and the awarding of relief accordingly. The pleadings leave it exceedingly doubtful whether the question thus urged was presented in either of the courts below, and it is, besides, obvious from the opinion of the court below that it considered that the only question raised under the Constitution of the United States was a contention that there would result a want of due process if the state statutes conferred upon an administrative officer the authority to liquidate the affairs of the insolvent bank without judicial proceedings. We say this because, in its opinion, the court observed that if that was the contention, it was irrelevant, as the statutes did not authorize liquidation except as a result of judicial proceedings, although they did impose upon the bank commissioner the duty, after he found a bank to be insolvent, to close its doors and prevent the further transaction of business until, in the orderly course of procedure, a judicial liquidation might be accomplished. But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the 14th Amendment, because [142] power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed 117, 31 Sup. Ct. Rep. 189.

Dismissed for want of jurisdiction.

BANNING COMPANY, Mary H. Banning, Lucy T. Greenleaf, Mary H. Morris, Hancock, Banning, & Pacific Electric Railway Company, Plffs. in Err.,

v.

PEOPLE OF THE STATE OF CALIFORNIA upon the Information of U. S. WEBB, Attorney General.

(See S. C. Reporter's ed. 142-156.)

Constitutional law — impairing contract obligations — sale of state lands.

Compliance with the provisions of Cal. act of April 27, 1863, governing the sale of tide lands of the state, by making an application for their purchase, taking the required oath, and expending money for a survey, cannot be said to consummate, without the payment of some instalment of the purchase price, a binding contract between the purchaser and the state, protected by U. S. Const. art. 1, § 10, against impairment by subsequent legislation, notwithstanding a subsequent judgment of a state court in his favor, rendered in a contest over conflicting applications.

[For other cases, see Constitutional Law, 1088-1097, in Digest Sup. Ct. 1908.]

[No. 73.]

Argued January 19, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of California to review a decree which affirmed a decree of the Superior Court of Los Angeles County in favor of the

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NOTE.—Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

state in a suit by it to quiet title to tide lands. Affirmed.

See same case below, 166 Cal. 630, 138 Pac. 100.

The facts are stated in the opinion.

Mr. James A. Gibson argued the cause, and, with Mr. Edward E. Bacon, filed a brief for plaintiffs in error:

The state's offer to sell, accepted by filing an application to purchase, consummates a binding contract.

McConnaughy v. Pennoyer, 43 Fed. 196, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

Decisions under pre-emption laws are distinguishable. They do not involve the doctrine of contract by offer and acceptance.

Northern P. R. Co. v. De Lacey, 174 U. S. 622, 628, 43 L. ed. 1111, 1113, 19 Sup. Ct. Rep. 791; Tarpey v. Madsen, 178 U. S. 215, 221, 44 L. ed. 1042, 1045, 20 Sup. Ct. Rep. 849; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 86, 21 L. ed. 82, 85; Frisbie v. Whitney, 9 Wall. 187, 193, 197, 19 L. ed. 668, 670, 672.

Sufficient consideration for the state's contract is found in expenditures on the faith of an offer, and an implied promise by the applicant to pay the purchase price.

Hendrick v. Lindsay, 93 U. S. 143, 148, 149, 23 L. ed. 855, 857.

Our contention of contract by offer and acceptance is sustained by numerous decisions under the contract clause of the Federal Constitution.

Blair v. Chicago, 201 U. S. 400, 472, 50 L. ed. 801, 831, 27 Sup. Ct. Rep. 427; Russell v. Sebastian, 233 U. S. 195, 204, 58 L. ed. 912, 921, L.R.A. —, —, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 660, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 680, 681, 29 L. ed. 525, 527, 528, 6 Sup. Ct. Rep. 273; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 9, 43 L. ed. 341, 345, 19 Sup. Ct. Rep. 77; Louisville v. Cumberland Teleph. & Teleg. Co. 224 U. S. 649, 663, 664, 56 L. ed. 934, 940, 941, 32 Sup. Ct. Rep. 572; Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 552, 57 L. ed. 633, 639, 44 L.R.A.(N.S.) 405, 33 Sup. Ct. Rep. 303; Owensboro v. Cumberland Teleph. & Teleg. Co. 230 U. S. 58, 65, 57 L. ed. 1389, 1393, 33 Sup. Ct. Rep. 988; Boisé Artesian Hot & Cold Water Co. v. Boisé City, 230 U. S. 84, 90, 91, 57 L. ed. 1400, 1406, 1407, 33 Sup. Ct. Rep. 997; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, L.R.A. —, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906.

A judgment is conclusive as to all the *media concludendi*, and it needs no authority to show that it cannot be impeached either in or out of the state, by showing that it was based upon a mistake of law.

American Exp. Co. v. Mullins, 212 U. S. 311, 314, 53 L. ed. 525, 527, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536.

The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

United States Fidelity & G. Co. v. United States, 209 U. S. 306, 314, 52 L. ed. 804, 807, 28 Sup. Ct. Rep. 537.

In all cases where the court has acquired jurisdiction of the action, its jurisdiction must extend to the determination of the right of the applicant, or the successful applicant, to purchase from the state.

Hinckley v. Fowler, 43 Cal. 64; Cadierque v. Duran, 49 Cal. 356; Christman v. Brainard, 51 Cal. 534; Wright v. Laugenour, 55 Cal. 280; Dillon v. Saloude, 68 Cal. 267, 9 Pac. 162; Cushing v. Keslar, 68 Cal. 473, 9 Pac. 659; Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620; Anthony v. Jillson, 83 Cal. 299, 23 Pac. 419, 16 Mor. Min. Rep. 26; Goldberg v. Thompson, 96 Cal. 117, 30 Pac. 1019.

Where only one of the contestants is an applicant for purchase, it is held in numerous cases to be the duty of the court to determine as to his right to purchase; and the same principle will apply, in other cases, to the prevailing applicant.

Tyler v. Houghton, 25 Cal. 30; Cadierque v. Duran, 49 Cal. 356; Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620; Perri v. Beaumont, 91 Cal. 33, 27 Pac. 534; Youle v. Thomas, 146 Cal. 537, 80 Pac. 714; McFaul v. Pfankuch, 98 Cal. 402, 33 Pac. 397; Lobree v. Mullan, 70 Cal. 150, 11 Pac. 685; Cunningham v. Shanklin, 60 Cal. 118.

Several of the decisions which we have cited in support of our construction of the statute were rendered prior to the institution of the contest action in which the right of purchase was adjudicated to the predecessor of plaintiffs in error.

Hinckley v. Fowler, 43 Cal. 56; Tyler v. Houghton, 25 Cal. 30.

It is not within the power of a legislature to take away rights which have once been vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the

power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U. S. 102, 123, 43 L. ed. 382, 389, 19 Sup. Ct. Rep. 134; United States v. Klein, 13 Wall. 128, 20 L. ed. 519.

Messrs. Albert Lee Stephens and James A. Anderson argued the cause, and, with Mr. W. H. Anderson and Mr. U. S. Webb, Attorney General of California, filed a brief for defendant in error:

By an unbroken line of decisions, beginning in 1870 and extending to the present date without any conflict, it has become the thoroughly established law of the state of California that applicants to purchase state lands of any character or description acquire no vested right until payment of part of the purchase price; such rule of decision has become a law of property with reference to school lands by express adjudication since 1870, and by express adjudication since 1897 as to tide lands.

People v. Shearer, 30 Cal. 645; Hutton v. Frisbie, 37 Cal. 475; Eckart v. Campbell, 39 Cal. 256; Johnson v. Squires, 55 Cal. 103; Urton v. Wilson, 65 Cal. 11, 2 Pac. 411; Mosely v. Torrence, 71 Cal. 321, 12 Pac. 430; Manley v. Cunningham, 72 Cal. 236, 13 Pac. 622; Klauber v. Higgins, 117 Cal. 451, 49 Pac. 466; Messenger v. Kingsbury, 158 Cal. 615, 112 Pac. 65; Polk v. Sleeper, 158 Cal. 632, 112 Pac. 179; Ayers v. Kingsbury, 25 Cal. App. 183, 143 Pac. 85.

An unbroken line of decisions of this court has established the doctrine that an applicant to purchase lands of the United States either under the pre-emption laws, or under town-site laws, or under special laws authorizing the sale of land, acquires no rights as against the government until all of the preliminary steps required by law are complied with; and, where payment is required, until such payment, in whole or in part, has been made; such laws of the United States are so similar to the laws of the state of California with reference to the sale of its public lands that the decisions of this court with reference to the former are direct authority here.

Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235; Rector v. Ashley, 6 Wall. 142–150, 18 L. ed. 733–735; Hot Springs Cases, 92 U. S. 713, 23 L. ed. 696; Frisbie v. Whitney, 9 Wall. 187, 193, 19 L. ed. 668, 671; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

This court will follow the decisions of the state supreme court, construing a statute under which it is claimed a vested right has accrued, where the question is balanced in doubt.

Burgess v. Seligman, 107 U. S. 20, 32, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; Board of Liquidation v. Louisiana, 179 U. S. 622, 638, 45 L. ed. 347, 354, 21 Sup. Ct. Rep. 263; Freeport Water Co. v. Freeport, 180 U. S. 587, 609, 45 L. ed. 679, 693, 21 Sup. Ct. Rep. 493; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 506, 51 L. ed. 1155, 1159, 27 Sup. Ct. Rep. 762; Yazoo & M. Valley R. Co. v. Adams, 181 U. S. 580, 581, 45 L. ed. 1011, 1012, 21 Sup. Ct. Rep. 729; Milwaukee Electric R. & Light Co. v. Railroad Commission, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 823, 824; Campbell v. Wade, 132 U. S. 34–37, 33 L. ed. 240–242, 10 Sup. Ct. Rep. 9.

There was no implied promise to pay when the applicant filed his application.

Eckart v. Campbell, 39 Cal. 256.

As to the effect of re-enacting provisions in a law which is simultaneously repealed, see 36 Cyc. 1084.

See also Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U. S. 1–11, 41 L. ed. 327–332, 17 Sup. Ct. Rep. 7; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450–456, 17 L. ed. 805–807.

The adjudication by the superior court on the contest referred to it by the surveyor general does not estop the state.

Cunningham v. Crowley, 51 Cal. 128; Lobree v. Mullan, 70 Cal. 153, 11 Pac. 685; Youle v. Thomas, 146 Cal. 537, 80 Pac. 714; Berry v. Cammet, 44 Cal. 351; Polk v. Sleeper, 158 Cal. 632, 112 Pac. 179; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447–457, 27 L. ed. 226–230, 1 Sup. Ct. Rep. 389; Klauber v. Higgins, 117 Cal. 458, 49 Pac. 466.

The state had power to retake lands covering the shores and a large part of the bed of a navigable bay in front of a seaport, even though some right in the land may have been theretofore granted by the state.

Eldridge v. Cowell, 4 Cal. 80; Guy v. Hermance, 5 Cal. 73, 63 Am. Dec. 85; People v. Williams, 64 Cal. 498, 2 Pac. 393; People ex rel. Harbor Comrs. v. Kerber, 152 Cal. 736, 125 Am. St. Rep. 93, 93 Pac. 878; Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; Illinois C. R. Co. v. Illinois, 146 U. S. 387–476, 36 L. ed. 1018–1051, 13 Sup. Ct. Rep. 110.

Mr. Justice McKenna delivered the opinion of the court:

Suit brought by the state of California to quiet title to certain lands embraced in a

patent issued under certain statutes of the state, authorizing the sale of tide lands.

The lands involved constituted location No. 57 of the state tide lands, and the state alleged that they had been at all times a portion of the inner bay of San Pedro and below the line of ordinary high tide; that they were partly within the limits of the city of San Pedro and partly within the limits of Wilmington; that prior to and since 1870 no portion of them had ever been reclaimable for agricultural or other purposes, and that the state had at all times withheld them from sale.

The intermediate pleadings we may omit. The defendants (plaintiffs in error here) filed separate answers, the pertinent parts of which may be summarized as follows: They denied the title of the state, the location of the lands as alleged, or their relation to the cities of San Pedro and Wilmington, or that they were not susceptible of reclamation for agricultural purposes, or that they had been withheld from sale by the state.

For an affirmative defense it was alleged that one Phineas Banning, in February, 1866, made application to the [146] state under an act of its legislature for the disposition of state lands to purchase the lands in controversy; that he possessed the qualifications to apply to purchase the lands, and on February 15, 1866, did apply to purchase them under an act of the legislature providing for their sale, approved April 27, 1863, and in conformity to his application and the provisions of § 7 of that act caused a survey of the lands to be made and a plat and field notes thereof to be completed by the county surveyor of Los Angeles county, and paid a large sum of money to such surveyor April 2, 1866, for legal fees; that he caused a copy of his application and affidavit to be filed in the office of the surveyor general of the state February 15, 1866; that on said date he subscribed the oath required by § 28 of the act of 1863, and complied with § 29; that by reason of such proceedings he acquired the title to the lands and a contract was created between him and the state whereby the state agreed to sell him the lands upon the terms provided in the act of 1863. That he complied with all other provisions of the act and of other acts, and that a patent was duly issued to him and the title thereby conveyed to him, and by him conveyed to defendants. That the state by this action is attempting to impair the obligation of the contract between the state and Banning, in violation of article 1, § 10, of the Constitution of the United States.

That subsequently other applications were made to purchase other lands in the vicinity of location No. 57, which overlapped and conflicted with that made by Banning; that one of said applicants, to wit, one William McFadden, made a demand upon the surveyor general of the state that, in pursuance of § 3413 of the Political Code of the state, the contest between the applicants be referred to the proper court for judicial determination of the question as to which of the applicants was entitled to a patent from the state. That, in accordance with [147] the requests, the surveyor general referred the contest to the district court of the seventeenth judicial district of the state in and for the county of Los Angeles, and in pursuance thereof McFadden commenced an action against Banning and certain other parties, and it was therein adjudged that Banning was entitled to purchase and to have a patent issued to him, and that Banning was entitled to the approval of his survey and application as to all of the lands described in his amendatory application of January 2, 1878, except a certain described tract, and was entitled to comply with the further provisions of the law to purchase and receive a patent therefor.

That Banning, on April 5, 1880, paid the first instalment on the purchase price of the land, and, on April 10, 1880, a certificate of purchase was issued to him whereby it was certified that he had in all respects complied with the law and was entitled to receive a patent; that subsequently, on December 14, 1881, another certificate was issued certifying that full payment had been made to the state and that the decree of the court in the contest proceedings had been fully complied with, and that he was entitled to a patent, and thereafter on December 16, 1881, a patent was duly issued in accordance with the certificate and the decree of the district court, and duly recorded in the office of the recorder of Los Angeles county.

That the defendants have succeeded to the rights of Banning and have become vested with a fee-simple title to the lands paramount to the claim of the state or of any person; that the state is estopped by the judgment of the district court and the proceedings from claiming any right, title, or interest in them or any of them, and that the patent and proceedings are a bar to the claim of the state or of anyone.

As a third defense, §§ 312, 315–319 [148] of the Code of Procedure of the state were pleaded as a bar to the action.

The trial court found to be true the allegations of the state as to the character of the lands, their location within the inner harbor of San Pedro, and that, since 1870, they have been within 2 miles of the city

of San Pedro and Wilmington, being partly within the limits of those cities.

The court also found the fact of the application of Banning as alleged, the conflict with McFadden, its reference to the district court for decision, the decision and judgment rendered, and the subsequent proceedings had, the payment of the purchase price of the lands, and the issue of patent to Banning. It further found that the patent was void, that no title vested thereby to any land below ordinary high tide, that the state was not estopped by the judgment or the subsequent proceedings, and that they did not bar the claims of the state, nor constitute an adjudication of the matters in controversy against the state, or debar it from prosecuting this action. The court also decided against the bar of the sections of the Code of Procedure.

From these findings the court concluded and decreed that the state was the owner of the lands, and that the defendants had not nor had either of them any estate or title in them. A motion for new trial was made and denied, and on appeal the supreme court affirmed the judgment and order denying the new trial.

There is no dispute about the facts. Banning complied with the act of 1863 and subsequent acts concerning the sale of the lands, and acquired title if they had the efficacy to convey it, or were not suspended in their operation by subsequent legislation and by the Constitution of the state, adopted in 1879.[1] The supreme court denied in [149] some respects such efficacy, and decided that all of the right of Banning to acquire title to the lands was taken away by the Constitution of 1879, and the legislation to which we shall presently refer.

We need not encumber the opinion with a detail of the statutes. It is conceded and the supreme court has decided that title could be acquired to the tide lands of the state under the act of 1863, and it is conceded that Banning proceeded regularly under that statute and acquired the title if other statutes or the Constitution of 1879 did not intervene to prevent. It is upon the efficacy of the later statutes and the Constitution that the questions in the case depend.

The specific contention of plaintiffs in error is that, by the application to purchase the lands under the act of 1863, the expenditure of money in accordance with its provisions for a survey of the lands, the statute of 1868 and the Political Code, and the judgment in the McFadden contest, a contract between Banning and the state was made which the Constitution of 1879 or subsequent statutes could not impair.

The opposing contention is that no inviolable right of purchase vested in Banning or contract occurred until the payment by him of the purchase price of the lands, and that such payment was after the adoption of the Constitution and legislation withdrawing the lands from sale. In other words, that the lands were withdrawn from sale before any right became consummated.

[150] Some dates are necessary to be given: Banning's application was made in February, 1866. It was allowed to repose without attention until the contest initiated by McFadden in April, 1878, on account of McFadden's application that overlapped and conflicted with Banning's. Judgment was entered in this contest November 26, 1879. This judgment decided Banning's to be the prior right. He made a first payment on the lands March 5, 1880. The certificate was issued April 10, 1880, and a patent executed December 16, 1881. The Constitution was adopted in 1879, as we have seen. And further, in 1872, the town of Wilmington was incorporated, and the supreme court held that by an act passed April 4, 1870, all lands within 2 miles of "'any town or village'" (Statutes of 1869–70, § 877) were excluded from sale. This provision was repeated in the Political Code of 1872, § 3488. The act of incorporation of Wilmington was repealed in 1887 (Stats. 1887, 108, 109), but the court said: "If, in point of law, Wilmington was an incorporated town . . . during the interval between the passage and the repeal of the law, then all proceedings to purchase the lands in question taken in that interval would be invalid with respect to land within the 2-mile limit." [People ex rel. Webb v. California Fish Co. 166 Cal. 603, 138 Pac. 79.] This being the law, and the lands lying within 2 miles of the limits of Wilmington as incorporated by the act of 1872, the court said: "The patent is void and all claims of any of the defendants thereunder are invalid." [166 Cal. 632, 138 Pac. 100.]

[1] "No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof." Article XV., § 2.

The Constitution of the state has special relevancy in regard to contentions not before us. We refer to and insert it only for the sake of completeness, it being referred to throughout the argument.

We accept this construction of the act incorporating Wilmington and the effect of the act of April 4, 1870, and of § 3488 of the Political Code and the exclusion thereby of tide lands within 2 miles of Wilmington from sale; and we are brought to the short point of the effect of the application and proceedings under it by the payment of the first instalment of the purchase price of the lands and the other acts relied on, whether they consummated [151] a contract between the state and Banning, protected by the Constitution of the United States.

To support such conclusion plaintiffs in error cite McConnaughy v. Pennoyer, 43 Fed. 196, in which Judge Deady expressed the view of an Oregon statute which offered the lands of that state for sale, that such an application was "a written acceptance of the offer of the state, in relation to the land of the state described therein," and they cite the same case in this court (140 U. S. 1, 18, 35 L. ed. 363, 368, 11 Sup. Ct. Rep. 699), where that view was pronounced forcible and might have been conclusive but for the opposing consideration that suggested itself that the bare application itself, unaccompanied by the payment of any consideration, partook of the nature of a preemption claim under the laws of the United States, with reference to which it had been held that the occupancy and improvement of the land by the settler and the filing of the declaratory statement of such fact conferred no vested right as against the government of the United States until all of the preliminary steps prescribed by law, including the payment of the price, were complied with. Yosemite Valley Case (Hutchings v. Low), 15 Wall. 77, 21 L. ed. 82, and Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668, were cited. The court found it unnecessary to determine between those views.

The cited cases were approved in Campbell v. Wade, 132 U. S. 34, 38, 33 L. ed. 240, 242, 10 Sup. Ct. Rep. 9, and their principle applied to statutes of the state of Texas, one offering land for sale and the other withdrawing it before the performance of the conditions which gave a right of purchase. These conditions were an application to the surveyor of the county in which the land was situated to survey the land and within sixty days after survey to file it in the General Land Office. Within sixty days after such filing, it was provided by the statute, it should be the right of the applicant to pay the purchase money, and upon doing so to receive patent for the land. "But for this declaration of the act," this [152] court said, by Mr. Justice Field, "we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state."

Considering the same statute in Telfener v. Russ, 145 U. S. 522, 532, 36 L. ed. 800, 805, 12 Sup. Ct. Rep. 930, it was said that the right was "designated in the decision of the supreme court of the state as a vested right that could not be defeated by subsequent legislation."

Plaintiffs in error cite Northern P. R. Co. v. De Lacey, 174 U. S. 622, 43 L. de. 1111, 19 Sup. Ct. Rep. 791, as in some way modifying the doctrine of the Yosemite Valley Case and of Frisbie v. Whitney. That case involved the question whether a claim of pre-emption had, under the circumstances stated in the case, so far attached to the land in controversy that it did not pass under a grant to the railroad company as land to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights." It was held to have so passed; in other words, that the claim had not attached to the land, DeLacy not having performed the conditions of its pre-emption. The case has no value in the solution of the questions presented by the case at bar. Nor have the other cases cited by plaintiffs in error for the proposition that an offer made by a state, though no particular person be designated, and accepted, constitutes a contract which will be protected by the Federal Constitution. The proposition in its generality may be admitted. Its illustration and application in the cited cases it would protract this opinion unnecessarily to detail. It is enough to say that the cases are not apposite. The offer and acceptance must have the characteristics of a bargain, must be conventional counterparts, as in the cited cases, and of which we may say generally franchises were offered on one part and accepted on the other by the undertaking of works costly to construct and costly to maintain, and from which the public derived great benefit.

[153] But even in such case it was pointed out in Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 386, 48 L. ed. 229, 231, 24 Sup. Ct. Rep. 107, that the offer of a state does not necessarily imply a contract. It may be of encouragement merely, "holding out a hope, but not amounting to a covenant." The offer of the state was an exemption from taxation, and the asserted acceptance of the offer which was said to consummate a contract was the building of a railroad, and it was observed that the "building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other.

No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting." The "offer" and "acceptance" we held not to constitute a contract. This comment is applicable to the case at bar, and the supreme court of the state has decided, as we shall presently see, that the filing of the application does not constitute a binding contract upon the part of the applicant and the state.

But plaintiffs in error say that this court is not bound, against the invocation of the contract clause of the Constitution of the United States, by the decision of the supreme court of the state of California as to the construction and effect of the act of 1863, and subsequent legislation supplementing its provisions. Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 59 L. ed. 175, 35 Sup. Ct. Rep. 62; New York Electric Lines Co. v. Empire City Subway Co. 235 U. S. 179, 59 L. ed. 184, L.R.A. —, —, 35 Sup. Ct. Rep. 72, Ann. Cas. 1915A, 906. And they insist that the language of the act explicitly offered the lands for sale, which offer was accepted by Banning through his application, the oath taken by him, and the expenditures [154] made by him, and that this construction has supporting strength from the judicial contest authorized by the act, and that the judgment rendered in such contest was effective not only against the losing contestant, but against the state as well.

If we apply the analogy of the pre-emption laws we shall have to reject immediately the contention based on the proceedings aside from the judgment rendered upon a conflict of applications, and against the asserted effect of such judgment we have also the analogy of a conflict of claims under the mining laws of the United States. In other words, the state made an offer to sell, which might have been perfected into an inviolable right, and provided for a contest of conflicting claims, not as against itself, but as to the rights of the contending parties. The rightful claimant being determined and his right of purchase perfected, the state is then bound by its offer, and is then, and not until then, precluded from legislation withdrawing it. And the right of purchase is perfected only by the payment of some instalment of the purchase price of the land. It is only then that the state has received anything of value from the applicant. What he has done prior, the expenditures he has made, are but the qualifications to become a purchaser, not binding him to proceed, nor binding the state to wait for that which may never be done before it determines on other uses or disposition of the lands. And to wait might mean serious embarrassment. We have seen in the case at bar that Banning applied first in 1866. His application was permitted to repose in the files of the county or state officers until 1878, when activity upon it was provoked by another application.

Plaintiffs in error have been unable to cite a single decision in sanction of their contention. The supreme court refers to one (Hinckley v. Fowler, 43 Cal. 63), decided in 1872, as possibly being urged to support it. [155] If we may venture to express our understanding of that case, we should say that it is seriously disputable if it so decides. However, the court said that the case, so far as it announced such view, that is, "so far as it announces the rule that the filing of the application creates a contract binding on the state before any part of the price is paid, must be considered as overruled by the later decisions." Messenger v. Kingsbury, 158 Cal. 615, 112 Pac. 65, and cases cited. Also Polk v. Sleeper, 158 Cal. 632, 112 Pac. 179. And these cases have become rules of property and factors in decision,—indeed, would determine it, even if we had doubt of the construction of the applicable statutes, under the ruling of Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, and many subsequent cases.

A somewhat confused contention is made that by the act of March 28, 1868, and under the Political Code the rights of plaintiffs in error were preserved, and yet it seems to be contended that, though both act and Code contain a provision excluding from their operation tide lands within 2 miles of any town or village, such provision is not applicable to lands theretofore applied for. The contentions we may suppose were rejected by the supreme court. And plaintiffs in error say that a decision either way cannot affect their "prior contention, that a binding contract of sale was created by the acceptance of the state's offer, through the filing in 1866 of an application to purchase under the act of 1863." Further discussion of the contentions is therefore unnecessary. Nor is further discussion of the effect of the judgment in the contest proceedings necessary. If, by the incorporation of Wilmington in 1872, the act of April, 1870, and the Political Code of 1872, which excluded all tide lands within 2 miles of Wilmington, became effective, the lands were withdrawn from sale, and plaintiffs in error could have acquired no rights by

proceedings subsequent to such incorporation. This, we have seen, was the judgment of [156] the supreme court of the state. The court had decided in prior cases that the state was not a party to the contest (Cunningham v. Crowley, 51 Cal. 128, 133); that the contest decided only the rights of the opposing parties (Berry v. Cammet, 44 Cal. 347; Polk v. Sleeper, supra).

The judgment undoubtedly is conclusive between the parties, determines their rights, as between themselves, and establishes the privilege to purchase the lands acquired by the prior application, even against the state, *"so long as the statute remained in force,"* to use the language of Hinckley v. Fowler, supra. This explanation may be given of all the cases cited by plaintiffs in error upon the effect of the judgment.[1] As long as the statute existed, rights could be acquired under it. Upon its repeal or limitation, such opportunity was taken away.

Judgment affirmed.

CARNEGIE STEEL COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 156–166.)

United States — contracts — excuse for delay — unavoidable cause.

Delay in the performance of a contract to manufacture 18-inch face-hardened armor plate for the United States, caused by the manufacturer's ignorance, shared by the world when the contract was made, of the necessary scientific process, was not due to "unavoidable causes, such as fires, storms, labor strikes, actions of the United States, and so forth," within the meaning of the provision of the contract that, in computing the liquidated damages which might be deducted by the United States from the contract price for delay, the manufacturer should be given credit for delays due to such causes.

[For other cases, see United States, VI. e, in Digest Sup. Ct. 1908.]

[No. 171.]

Argued January 21, 1916. Decided February 21, 1916.

APPEAL from the Court of Claims to review a judgment sustaining in part a demurrer of the United States to a petition for the recovery of an amount alleged to be due claimant under a contract with the United States. Affirmed.

See same case below, 49 Ct. Cl. 403.

The facts are stated in the opinion.

Mr. James H. Hayden argued the cause and filed a brief for appellant:

The contract in suit was drawn by the Bureau of Ordnance, and any language of doubtful meaning contained in it should be given an interpretation favorable to the company, rather than one favorable to the Ordnance Department.

Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; Orient Mut. Ins. Co. v. Wright, 1 Wall. 456, 17 L. ed. 505.

The proviso in the contract relates to the forfeiture by the company of part of the sum that the Department agreed to pay for the armor actually furnished. Clauses of contracts and of statutes relating to forfeitures invariably receive the one of two or more possible interpretations which is most favorable to the party against whom the forfeiture is asserted.

Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 340, 14 L. ed. 157, 171; New York Indians v. United States, 170 U. S. 1, 25, 42 L. ed. 927, 935, 18 Sup. Ct. Rep. 531.

Where the meaning of an instrument or statute is obscure and the language employed is a proper subject for interpretation, courts will give effect to every provision and word, and will not treat any part of it as meaningless or nugatory, unless its provisions are in hopeless conflict.

Philadelphia v. River Front R. Co. 133 Pa. 134, 19 Atl. 356.

The proviso does not purport to be complete in itself, and on its face bears evidence of its incompleteness. The expression "such as" and the abbreviation "etc." —a catch-all—demonstrate that fact. It follows that the doctrine *expressio unius est exclusio alterius* is not to be followed in determining the true intent and meaning of the proviso.

United States v. Barnes, 222 U. S. 513, 56 L. ed. 291, 32 Sup. Ct. Rep. 417.

Presumably the Ordnance Department believed that delay would be detrimental to the government, and the penal clauses of the contract were designed to prevent it; but it is evident that the Department realized that difficulties might be encountered

[1] Cadierque v. Duran, 49 Cal. 356; Christman v. Brainard, 51 Cal. 534; Wright v. Laugenour, 55 Cal. 280; Dillon v. Saloude, 68 Cal. 267, 9 Pac. 162; Cushing v. Keslar, 68 Cal. 473, 9 Pac. 659; Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620; Anthony v. Jillson, 83 Cal. 299, 300, 23 Pac. 419, 16 Mor. Min. Rep. 26; Goldberg v. Thompson, 96 Cal. 117, 30 Pac. 1019.

Note.—On the effect of intervening impossibility to perform contract as relief from the obligation—see note to Stewart v. Stone, 14 L.R.A. 215.

during the manufacture of the armor for which it would be quite unjust to hold the company responsible, or for which no contractor would assume responsibility. Accordingly, it was provided that the company should not be held responsible for delay found to have been produced by causes of a certain kind,—not that the delay due to such causes would be less detrimental to the government, but because the company's excuse would appeal to the Department's sense of right. That was the office of the proviso.

Minis v. United States, 15 Pet. 423, 10 L. ed 791; White v. United States, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171.

Is it not unreasonable to assume that the Department selected, arbitrarily, four of the many unavoidable causes possessing the same characteristics, and said that the company would be excused if the performance of the contract should be delayed by one of the four causes, but not otherwise?

Weiss v. Swift & Co. 36 Pa. Super. Ct. 376.

In the present instance the facts were not such as to warrant an attempt to apply the maxim *expressio unius est exclusio alterius.*

Broom, Legal Maxims, 8th ed. 506, 515; Broom, Legal Maxims, 7th ed. 589.

Nor is this case for the application of the doctrine of *ejusdem generis.*

United States v. Mescall, 215 U. S. 26, 54 L. ed. 77, 30 Sup. Ct. Rep. 19; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 14, 37 L. ed. 625, 629, 13 Sup. Ct. Rep. 779; Endlich, Interpretation of Statutes, § 112; McReynolds v. People, 230 Ill. 623, 82 N. E. 945; Brown v. Corbin, 40 Minn. 508, 42 N. W. 481.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

The delays were not within the terms of the contract, such as fires, storms, labor strikes, actions of the United States, etc., and therefore appellant was liable for the same.

Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762; Hanthorn v. Quinn, 42 Or. 1, 69 Pac. 817; The Harriman, 9 Wall. 161, 19 L. ed. 629; Florida R. Co. v. Smith, 21 Wall. 255, 263, 22 L. ed. 513, 515; Smoot's Case, 15 Wall. 36, 46, 21 L. ed. 107, 110; Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 527, 40 L. ed. 515, 524, 16 Sup. Ct. Rep. 379; Simpson v. United States, 172 U. S. 372, 43 L. ed. 482, 19 Sup. Ct. Rep. 212; United States v. Gleason, 175 U. S. 588, 602, 44 L. ed. 284, 289, 20 Sup. Ct. Rep. 228; Satterlee v. United States, 30 Ct. Cl. 33; Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604; Marsh v. Johnston, 125 App. Div. 597, 109 N. Y. Supp. 1106; Lorillard v. Clyde, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; Buffalo & L. Land Co. v. Bellevue Land & Improv. Co. 165 N. Y. 247, 51 L.R.A. 951, 59 N. E. 5; Chicago & N. W. R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Beach, Contr. § 217; Chitty, Contr. 272; Day v. United States, 48 Ct. Cl. 128.

Mr. Justice McKenna delivered the opinion of the court:

Petition in the court of claims for the recovery of $8,595.35, alleged to be due claimant as a balance of the price of armor plate furnished the government under a contract between it and claimant.

The contract is an elaborate one and by it claimant engaged to manufacture for the Ordnance Department armor plates of a certain designated thickness, in conformity with instructions, specifications, and drawings attached to and made a part of the contract. And claimant agreed to provide certain of the 18-inch plates for the purpose of the ballistic test prescribed by the specifications, and that such plates, when subjected to the ballistic test, should fulfil certain requirements set forth in the specifications. The dates of delivery were to be on or before September 7, 1911, and November 7, 1911, and the place of delivery the Bethlehem Steel Company, South Bethlehem, Pennsylvania.

The government engaged to receive the plates when manufactured, tested, and approved as provided, and make payment for them in instalments from time to time as the manufacture of the armor and material progressed [161] and after delivery. In the event of the claimant failing to prosecute the manufacture of the armor and material properly, or to complete delivery on or before the dates named in the contract, the Chief of Ordnance might complete such manufacture at the expense of claimant, charging it with the cost thereof in excess of the contract price; "or else (2) waive the time limit named in the contract and permit the claimant to complete the delivery of the armor and material within a reasonable time, and thereupon deduct from the sum stipulated to be paid the claimant for all of the armor and material, as liquidated damages, a sum equal to $1/30$ of 1 per centum of the contract price of all armor and material remaining undelivered on November 7, 1911, for each day of delay in its delivery; Provided, however, that in computing the amount of any such deduction, the claimant should be given credit for delays occurring during the performance of

the contract, which the Chief of Ordnance might determine to have been due 'to unavoidable causes, such as fires, storms, labor strikes, actions of the United States, and so forth,' and that the date of completion of the delivery, for the purposes of the final settlement between the parties, should be a date to be ascertained by deducting, from the whole period between the signing of the contract and the date of the actual delivery, all delays which were found to have been due to unavoidable causes."

It is alleged that claimant encountered difficulties which were unforeseen by both parties when the contract was made, and were then unforseeable, and in consequence thereof the delivery of the armor and pertaining material was delayed unavoidably.

That prior to the manufacture of the armor no face-hardened armor 18 inches in thickness had been manufactured in this or any foreign country, and no information with respect to the process or processes to be employed in its manufacture was obtainable.

[162] That, for the purpose of learning what manner of treatment or face-hardening process should be applied to the 18-inch plates, and in order that they might attain the highest degree of efficiency possible, and meet all the requirements of the specifications, claimant completed one of the plates, applying to it a treatment or face-hardening process deduced from the formula which claimant and every other manufacturer of armor plate in this and every foreign country had followed in the manufacture of armor plate, and which was recognized by authorities on the subject as the one which would give the best results.

That upon its completion the plate was, on April 19, 1911, subjected to the ballistic test and it met the requirements of the specifications. Thereupon claimant proceeded to complete all of the plates, certain of which were selected for the purpose of the ballistic test and failed to fulfil the requirements of the specifications. Other plates were selected and failed. Thereupon claimant, with all due diligence and despatch, made or caused to be made by metallurgical experts exhaustive tests and experiments, and it was ascertained that, in order to pass the test required by the Ordnance Department, the plates must possess certain metallurgical qualities or conditions which, up to that time, were unknown to anyone, and the necessity for which was not foreseeable when the contract was made. In conducting the test it was necessary to use plates of full size and the tests were conducted with all due diligence and despatch. From *the plates* thus tested the Ordnance Department selected a third plate which was tested January 19th and 24th, 1912, and was found to fulfil the requirements of the specifications. Claimant in due course finished all of the plates which the contract called for, and they were approved and delivered as in the manner prescribed.

It is alleged that by reason of the circumstances detailed [163] there were delays in the delivery of the plates, and that the delays were due to causes which were unavoidable within the meaning of the contract.

On account of the delays, however, the Ordnance Department proposed to deduct from the contract price of the armor and pertaining material the sum of $8,598.15 as liquidated damages on account of a portion of the delay. Claimant made protest, asserting that the delays were due to causes provided for in articles 4 and 8 of the contract.

By article 4 it was provided that in case of failure of claimant to deliver any or all of the armor contracted for there would be deducted from any payment to be made to claimant $1/30$ of 1 per cent of the contract price of all of the armor remaining undelivered for each and every day of delay in the completion of the contract, not, however, by way of penalty, but as liquidated damages.

It was, however, provided in article 8 of the contract, that the Chief of Ordnance, in case of delay in the delivery of the armor, as provided in article 1 of the contract, instead of completing the manufacture or delivery of the material at the expense of claimant, might waive the time limit and deduct from any payment due or to become due the liquidated damages, if any, provided for in article 4: "Provided, however, that in making final settlement based upon the date of completion of the delivery, the party of the first part [claimant] shall receive credit for such delays occurring during the performance of the contract as the Chief of Ordnance may determine to have been due to unavoidable causes, such as fires, storms, labor strikes, action of the United States, etc., and the date of completion shall be considered for the purposes of final settlement as the date of the actual completion of the delivery, less the delays due to unavoidable causes; but none of the above causes shall constitute a basis for an action against the United States for damages."

[164] The government filed a demurrer to the petition. It was sustained as to $7,564.08 of the amount sued for and overruled as to $1,031.08. The damages on account of delay to the amount of the latter sum the court found was due to the government's delay.

The other sum, that is $7,564.08, the court attributed to the claimant, the court saying, through Chief Justice Campbell, that "the difficulties under which claimant labored . . . were not due to 'unavoidable causes' within the meaning of those terms in the contract, and, though unforeseen, did not render the performance impossible;" and added: "The court cannot make a different contract from that which the parties made for themselves. The Harriman, 9 Wall. 161, 172, 19 L. ed. 629, 633; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; Satterlee's Case, 30 Ct. Cl. 31; Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327." [49 Ct. Cl. 407.]

It will be observed that the point in the case is a short one. It is whether the causes of delay alleged in the petition were unavoidable, or were of the character described in the contract; that is, "such as fires, storms, labor strikes, action of the United States, etc." The contention that the alleged causes can be assigned to such category creates some surprise. It would seem that the very essence of the promise of a contract to deliver articles is ability to procure or make them. But claimant says its ignorance was not peculiar, that it was shared by the world, and no one knew that the process adequate to produce 14-inch armor plate would not produce 18-inch armor plate. Yet claimant shows that its own experiments demonstrated the inadequacy of the accepted formula. A successful process was therefore foreseeable and discoverable. Ant it would seem to have been an obvious prudence to have preceded manufacture, if not engagement, by experiment rather than risk failure and delay and their consequent penalties by extending an old formula to a new condition.

[165] But even if this cannot be asserted, the case falls within The Harriman, supra, where it is said that "the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be affected. Nothing short of this will excuse nonperformance."

And it was held in Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, that "it was a well-settled rule of law that if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him." Cases were cited, and it was said the principle was sustained by many adjudications.

It was said, however, in The Harriman, that "the answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation," and such a stipulation is relied on in the case at bar. Ignorance of the scientific process necessary for face-hardening 18-inch armor plate is asserted to be an unavoidable cause of the character of the enumeration of article 8 of the contract; that is, such as fires, storms, labor strikes, action of the United States, etc." The contention is that it is the same "genus or kind," because (1) it was not foreseeable when the contract was made; (2) was not the result of any act or neglect on the part of claimant; (3) was not a cause the company could prevent. What we have already said answers these contentions. Ability to perform a contract is of its very essence. It would have no sense or incentive, no assurance of fulfillment, otherwise; and a delay resulting from the absence of such ability is not of the same kind enumerated in the contract—is not a cause extraneous to it and [166] independent of the engagements and exertions of the parties.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Appt.,
v.
GUARDIAN TRUST COMPANY, Central Improvement Company, Cambria Steel Company, and Kansas City Suburban Belt Railroad Company.

(See S. C. Reporter's ed. 166–178.)

Corporations — reorganization — liability to creditors.

1. Unsecured creditors of a corporation whose property, though worth enough above the mortgage to pay their claims, was sold on foreclosure for the amount of the mortgage to a new corporation formed under a reorganization scheme by which the new company was to issue its stocks and bonds

NOTE.—On the effect of consolidation, merger, or absorption of corporation on its unsecured liabilities in the absence of statutory or contract provision—see notes to Atlantic & B. R. Co. v. Johnson, 11 L.R.A. (N.S.) 1119; Luedecke v. Des Moines Cabinet Co. 32 L.R.A.(N.S.) 616; and Jennings, N. & Co. v. Crystal Ice Co. 47 L.R.A.(N.S.) 1058.

On the liability of a consolidated railroad

in exchange for stock and bonds in the old company,—are entitled to charge the new corporation with their debts.

[For other cases, see Corporations, III. b, in Digest Sup. Ct. 1908.]

Estoppel — by accepting benefits.

2. A creditor of, and stockholder in, a corporation, by assenting to a reorganization plan which did not on its face give notice of intent to prefer the company's stockholders to its creditors, and by exchanging its stock under such plan for stock in the new corporation, did not lose its rights to charge the new corporation with its debt, where such corporation acquired all the property of the old corporation under a sale on foreclosure for the amount of the mortgage, though such property was worth enough above the mortgage to pay the creditors.

[For other cases, see Estoppel, III. b, 7, in Digest Sup. Ct. 1908.]

Corporations — reorganization — liability to creditors.

3. The right of an unsecured creditor of a corporation, whose property, though worth enough above the mortgage to pay the debt, was sold on foreclosure for the amount of the mortgage to a new corporation formed under a reorganization scheme, to charge the new corporation with its debt, was not affected by a provision in the reorganization agreement that no right or obligation is created thereby or assumed thereunder by or for any new company in favor of any bondholder or any other creditor or holder of any claim with respect to any property acquired by purchase at any foreclosure sale, even though such creditor became a party to the reorganization agreement because of its other interests as a stockholder in the old company.

[For other cases, see Corporations, III. b, in Digest Sup. Ct. 1908.]

Corporations — reorganization — liability to creditors.

4. The exchange of stock in an old corporation, having a substantial value, for stock in another corporation formed pursuant to a reorganization scheme, justifies the conclusion that there was a valuable equity in the property of the old corporation for which the new corporation must account to unsecured creditors of the old corporation where, in carrying out the reorganization plan, the new corporation acquired all the property of the old corporation for the amount of the mortgage.

[For other cases, see Corporations, III. b, in Digest Sup. Ct. 1908.]

Corporations — reorganization — rights of creditors — laches.

5. A creditor is not barred by laches from asserting its right to charge with its debt a new corporation which, in carrying out a reorganization scheme, acquired all the property of the old corporation, which was worth more than the mortgage, at a sale on foreclosure for the amount of the mortgage, where the creditor set up its claim in another suit prior to the foreclosure sale and tried to become a party to the foreclosure suit, and did succeed therein in saving its rights from prejudice, and, when the corporations came into the suit at bar, set up its claim again.

[For other cases, see Limitation of Actions, I. b, 2, in Digest Sup. Ct. 1908.]

Appeal — in equity case — review of merits — exception on other grounds.

6. The erroneous conclusion of the master in an equity suit that, under the facts surrounding a corporate reorganization, the new corporation was not liable for the unsecured debts of the old corporation, could be reversed by the circuit court of appeals on appeal upon the merits, although the exceptions to such conclusion were put upon other grounds.

[For other cases, see Appeal and Error, VI. a, 4, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — Federal question.

7. Allegations in the bill and in a petition in intervention which assert respectively a lien under a judgment of a Federal court and title under a decree of a Federal court raised Federal questions which confer jurisdiction on the Federal Supreme Court on appeal from a decree of a circuit court of appeals in the suit.

[For other cases, see Appeal and Error, 790–807, in Digest Sup. Ct. 1908.]

[No. 85.]

Argued December 13, 14, and 15, 1915 Decided February 21, 1916.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, on a second appeal, held, reversing a decree of the Circuit Court for the Western District of Missouri, that a certain unsecured creditor of a corporation could charge with its debt a new corporation formed under a reorganization scheme. Affirmed.

See same case below, first appeal, 120 C. C. A. 121, 201 Fed. 811; second appeal, 127 C. C. A. 184, 210 Fed. 696.

The facts are stated in the opinion.

Messrs. Samuel W. Moore and Samuel Untermyer argued the cause and filed a brief for appellant:

If the bill of the Cambria Company stated facts sufficient to present a distinct ground of Federal jurisdiction independent of that of diversity of citizenship, then the decision of the court of appeals was not final, and the motion to dismiss the appeal must be overruled.

company for the debts of its predecessor—see note to Chicago & I. Coal R. Co. v. Hall, 23 L.R.A. 231.

On the right of a corporation which has transferred all or substantially all of its assets to another corporation to subject assets so transferred to an equitable lien or preference—see note to Ex parte Savings Bank, 5 L.R.A.(N.S.) 520.

Vicksburg v. Henson, 231 U. S. 259, 58 L. ed. 209, 34 Sup. Ct. Rep. 95; Warner v. Searle & H. Co. 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79; St. Louis K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, 10 Am. Neg. Cas. 585; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 56 L. ed. 1055, 32 Sup. Ct. Rep. 620.

It is the face of the bill of the Cambria Company to which we must look for the jurisdictional averments. It is not material or important what questions arising upon the issues made by this bill were actually decided.

Florida, C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974; Siler v. Louisville & N. R. Co. 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451.

Where the case made by the plaintiff is one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States.

Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365; Re Lennon, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658.

The right of the Cambria Company to relief turned upon the existence of the judgment lien created by act of Congress, which the Cambria Company asserted and the Trust Company denied. Did not the disposition of this issue depend upon the laws of the United States, and was not the jurisdiction of the lower court, as depending upon the subject-matter, properly invoked?

Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep 340; First Nat. Bank v. Society for Savings, 25 C. C. A. 466, 42 U. S. App. 517, 80 Fed. 581; Sowles v. Witters, 46 Fed. 497.

The reason of the rule finds support in many adjudicated cases. An action on the bond of a marshal of the United States, or on the bond of a clerk, or on the official bond of a cashier of a national bank, or on the bond of a Federal contractor, given for the protection of persons furnishing materials and labor for the construction of public works, or on a supersedeas bond, are held to arise under the laws of the United States for the reason that the case depends upon the scope and effect of the bond, and the meaning of the statute under which it was given.

Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Walker v. Windsor Nat. Bank, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 76; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; United States v. American Bonding & T. Co. 22 C. C. A. 420, 61 U. S. App. 584, 89 Fed. 925; United States use of Anniston Pipe & Foundry Co. v. National Surety Co. 34 C. C. A. 526, 92 Fed. 549; United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400; Hardaway v. National Surety Co. 80 C. C. A. 283, 150 Fed. 465; Seymour v. Phillips & C. Constr. Co. 7 Biss. 460, Fed. Cas. No. 12,689.

An action against a corporation created by Congress is one arising under the laws of the United States, for the reason that the corporation has no powers and can incur no obligations except as authorized or provided by its charter. (Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905). Likewise, an action on an injunction bond given in the course of proceedings in the Federal court arises under the laws of the United States.

Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

A suit on a supersedeas bond, given in conformity to the Federal statute, to supersede a judgment in an action for a breach of contract, during the pendency of a writ of error from a Federal circuit court of appeals, is one which arises under the Constitution or laws of the United States.

American Surety Co. v. Shultz, 237 U. S. 159, 59 L. ed. 892, 35 Sup. Ct. Rep. 525.

The intervening petition of the Southern Company was a suit arising under the laws of the United States, and for that reason alone the right of appeal to this court exists, regardless of the source of jurisdiction of the Cambria bill. The decision of the court of appeals in this case was not final for the further reason that the intervening petition of the Southern Company (which was in the nature of an original bill asserted the equitable title to certain real and personal properties held or claimed by the Trust Company, based upon foreclosure decrees rendered in the United States circuit court for the western district of Missouri, and sales had thereunder, at

which the Southern Company became the purchaser.

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; Pittsburgh C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 508, 43 L. ed. 528, 533, 19 Sup. Ct. Rep. 238; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372.

The Southern Company set up a right to recover as the result of a judicial sale made under a decree of the United States circuit court, and therefore a Federal question was presented.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382; State ex rel. Atty. Gen. v. Frost, 113 Wis. 623, 89 N. W. 915; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

Where an ancillary bill upon its face presents Federal questions, the right of appeal to this court from the circuit court of appeals exists, regardless of the source of jurisdiction of the main action.

Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653.

The plan of reorganization is binding upon the Trust Company because it actively participated in the plan, and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

14 Am. & Eng. Enc. Law, 273, 281; Whitaker v. Whitaker, 157 Mo. 353, 58 S. W. 5; 20 Cyc. 434, 435, 608.

The application of the doctrine of "quasi estoppel," or of estoppel by the acceptance of benefits, is fatal to any right of recovery on the part of the Trust Company.

16 Cyc. 784; Wormser v. Metropolitan Street R. Co. 184 N. Y. 83, 112 Am. St. Rep. 596, 76 N. E. 1036, 6 Ann. Cas. 123; Post v. Beacon Vacuum Pump & Electrical Co. 28 C. C. A. 431, 50 U. S. App. 271, 84 Fed. 371; Towers v. African Tug Co. [1904] 1 Ch. 558, 73 L. J. Ch. N. S. 395, 52 Week. Rep. 530, 90 L. T. N. S. 298, 20 Times L. R. 292, 11 Manson, 198; United States ex rel. International Contracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; North Chicago Street R. Co. v. Chicago Union Traction Co. 150 Fed. 626; Farmers' Bank v. Groves, 12 How. 51, 13 L. ed. 889; Compton v. Jesup, 167 U. S. 1, 42 L. ed. 55, 17 Sup. Ct. Rep. 795; United States v. Hodson, 10 Wall. 395, 19 L. ed. 937; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Winslow v. Baltimore & O. R. Co. 208 U. S. 59, 52 L. ed. 388, 28 Sup. Ct. Rep. 190; Loy v. Alston, 96 C. C. A. 578, 172 Fed. 90; Shackleton v. Baggaley, 95 C. C. A. 505, 170 Fed. 57; United States use of Hine v. Morse, 218 U. S. 493, 54 L. ed. 1123, 31 Sup. Ct. Rep. 37, 21 Ann. Cas. 782; State ex rel. Pope v. Germania Bank, 90 Minn. 150, 95 N. W. 1116; Seminole Securities Co. v. Southern L. Ins. Co. 182 Fed. 85; Gaddes v. Pawtucket Inst. for Savings, 33 R. I. 177, 80 Atl. 415, Ann. Cas. 1913B, 407; Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996.

The doctrine of equitable election is a complete bar to a recovery by the Trust Company.

Peters v. Bain, 133 U. S. 670, 33 L. ed. 696, 10 Sup. Ct. Rep. 354; Merchants' Nat. Bank v. Sexton, 228 U. S. 634, 57 L. ed. 998, 33 Sup. Ct. Rep. 725; 11 Am. & Eng. Enc. Law, 2d ed. p. 59; Codrington v. Lindsay, L. R. 8 Ch. 578, 42 L. J. Ch. N. S. 526, 28 L. T. N. S. 177, 21 Week. Rep. 182; Pitman v. Ewing [1911] A. C. 217, 80 L. J. P. C. N. S. 178, 104 L. T. N. S. 611, 48 Scot. L. R. 401, 21 Ann. Cas. 547; Fox v. Windes, 127 Mo. 512, 48 Am. St. Rep. 648, 30 S. W. 325; 1 Herman, Estoppel & Res Judicata, p. 11; 2 Herman, Estoppel & Res Judicata, § 1028, p. 1156; Stone v. Cook, 179 Mo. 545, 78 S. W. 801; Kavanaugh v. Shacklett, 111 Va. 423, 69 S. E. 335; Savings Bank v. Todd, 114 Va. 708, 77 S. E. 446.

The doctrine of equitable estoppel is also a complete bar to a recovery by the trust company.

Farmers' Loan & T. Co. v. Central R. & Bkg. Co. 120 Fed. 1006; Matthews v Murchison, 15 Fed. 691; Symmes v. Union Trust Co. 60 Fed. 830; Vose v. Cowdrey, 49 N. Y. 343; Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E. 701; Jessup v. Hulse, 21 N. Y. 168; Old Nat. Bank v. Heckman, 148 Ind. 490, 47 N. E. 953; Jacobs v. Jefferson Lumber Co. — Tex. —, 15 S. W. 236; Mitchell v. Mitchell, 212 Pa. 62, 61 Atl. 570; Olliver v. King, 8 De G. M. & G. 110, 25 L. J. Ch. N. S. 427, 2 Jur. N. S. 312, 4 Week. Rep. 382; Perisho v. Perisho, 71 Ill. App. 222; Rapalee v. Stewart, 27 N. Y. 310; Canton Roll & Mach. Co. v. Rolling Mill Co. 155 Fed. 321; Thompson v. Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885; Gutzweiller v. Lackman, 23 Mo. 168; Smith v. Espy, 9 N. J. Eq. 160; Richards v. White, 7 Minn. 345, Gil. 271; Fiske v. Carr, 20 Me. 301.

Where a person's conduct is such as to operate as an estoppel, the estoppel will be applied regardless of the fact that he may protest and insist that it shall not have that effect.

United States ex rel. International Con-

tracting Co. v. Lamont, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; Wormser v. Metropolitan Street R. Co. 184 N. Y. 83, 112 Am. St. Rep. 596, 76 N. E. 1036, 6 Ann. Cas. 123; Post v. Beacon Vacuum Pump & Electrical Co. 28 C. C. A. 431, 50 U. S. App. 271, 84 Fed. 371.

The provision of the plan which made a tentative appropriation of $475,000 for the payment of floating debts of all the companies was not a contract for the benefit of the Trust Company as a creditor, upon which it was entitled to maintain an action. The purpose and intention of this provision was to benefit the security holders, and not to benefit the unsecured creditors of the constituent companies. That unsecured creditors may have been incidentally benefited does not change the rule or extend the contract to strangers not in privity with it.

German Alliance Ins. Co. v. Home Water Supply Co. 226 U. S. 220, 57 L. ed. 195, 42 L.R.A.(N.S.) 1000, 33 Sup. Ct. Rep. 32; St. Louis v. G. H. Wright Contracting Co. 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6; Beattie Mfg. Co. v. Clark, 208 Mo. 89, 106 S. W. 29; Howsmon v. Trenton Water Co. 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; Metropolitan Trust Co. v. Topeka Water Co. 132 Fed. 702; Allen & C. Mfg. Co. v. Shreveport Waterworks Co. 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980, 2 Ann. Cas. 471; Second Nat. Bank v. Grand Lodge F. & A. M. 98 U. S. 123, 25 L. ed. 75; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; Sayward v. Dexter, H. & Co. 19 C. C. A. 176, 44 U. S. App. 376, 72 Fed. 758; American Exch. Nat. Bank v. Northern P. R. Co. 76 Fed. 130; Moyer v. Ft. Wayne, C. & L. R. Co. 132 Ind. 88, 31 N. E. 567; Freeman v. Pennsylvania Co. 173 Pa. 274, 33 Atl. 1034; McIlvane v. Big Stony Lumber Co. 105 Va. 613, 54 S. E. 473; Armour & Co. v. Western Constr. Co. 36 Wash. 529, 78 Pac. 1106.

The acceptance and retention of benefits under a will, contract, plan of reorganization, or what not, operates as a complete estoppel or bar against any action or proceeding which does not recognize and give effect in its entirety to the transaction from which the benefits have been derived. Whatever name may be given to this rule, it is one firmly established in our jurisprudence. It is not dependent upon (a) the existence of a misrepresentation, (b) ignorance of the truth, or (c) action induced by the misrepresentation, or (d) injury if the truth is permitted to be proved.

Bigelow, Estoppel, 6th ed. p. 732; 16 Cyc. 784; Hector v. Mann, 225 Mo. 228, 124 S. W. 1109; Utermehle v. Norment, 197 U. S. 40, 49 L. ed. 655, 25 Sup. Ct. Rep. 291, 3 Ann. Cas. 520; Humes Constr. Co. v. Philadelphia Casualty Co. 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D, 906; Tozer v. Ocean Acci. & Guarantee Corp. 94 Minn. 478, 103 N. W. 509; Gaddes v. Pawtucket Inst. for Savings, 33 R. I. 177, 80 Atl. 415, Ann. Cas. 1913B, 407; Field v. Doyon, 64 Wis. 560, 25 N. W. 653; Chard v. Warren, 122 N. C. 75, 29 S. E. 373; Greeley v. Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; St. Louis v. Davidson, 102 Mo. 149, 22 Am. St. Rep. 764, 14 S. W. 825; Bigelow, Estoppel, 5th ed. 685; Robinson v. Pebworth, 71 Ala. 240.

The application to the facts in this case of the familiar rules that he who seeks equity must do equity, and must come into court with clean hands, is fatal to the contention of the Trust Company, even if it be assumed (as it is not) that the reorganization plan amounted to a fraudulent conveyance to stockholders of assets to which general creditors had a right to resort for the satisfaction of their claims.

Harriman v. Northern Securities Co. 197 U. S. 244, 295, 49 L. ed. 739, 763, 25 Sup. Ct. Rep. 493; Randall v. Howard, 2 Black, 585, 17 L. ed. 269; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Dent v. Ferguson, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825; Schermerhorn v. De Chambrun, 12 C. C. A. 81, 26 U. S. App. 212, 64 Fed. 195; Lawton v. Estes, 167 Mass. 181, 57 Am. St. Rep. 450, 45 N. E. 90; Deppen v. German-American Title Co. 24 Ky. L. Rep. 110, 70 S. W. 868; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Scott v. Edes, 3 Minn. 388, Gil. 271.

If the plan became fraudulent only after the Trust Company's debt was not paid, as the court of appeals decided, nevertheless the Trust Company's retention of the fruits of the scheme is a conclusive bar to a recovery.

Kahn v. Peter, 104 Ala. 523, 16 So. 524; Brewer v. Nash, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857.

The plan could not become fraudulent by events subsequently transpiring.

20 Cyc. 413; Krueger v. Vorhauer, 164 Mo. 156, 63 S. W. 1098.

If the reorganization plan was ever fraudulent and voidable as to creditors, it was so at the time of its execution by the Trust Company, and the covenant is a complete bar.

Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117.

A retention of the fruits of the fraud is a conclusive election to hold under the plan, and is an insurmountable barrier to any attack upon the plan.

Stone v. Cook, 179 Mo. 534, 64 L.R.A. 287, 78 S. W. 801; 11 Am. & Eng. Enc. Law, 2d ed. p. 98; Young v. Young, 51 N. J. Eq. 491, 27 Atl. 627; Medill v. Snyder, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962.

If the Southern Company, after becoming the owner of the property of the Gulf Company and of the stocks and bonds of the Belt Company on April 1, 1900, had continued in the operation and management of the Gulf property acquired at foreclosure sale, and had continued to own the stocks and bonds of the Belt Company, without causing any action to be instituted for the foreclosure of the mortgage securing the bonds, for a period of, say, five, ten, or twenty years, no one would contend that such a transaction was unlawful, irregular, or even unusual.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Atchison T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 7 L.R.A. 414, 19 Am. St. Rep. 129, 23 Pac. 151; Stone v. Cleveland, C. C. & St. L. R. Co. 202 N. Y. 352, 35 L.R.A.(N.S.) 770, 95 N. E. 816.

If, upon the expiration of any one of the periods supposed, the Belt Company had made default in the payment of interest upon the bonds held by the Southern Company, and the trustee in the mortgage of the Belt Company, as required by the terms of the mortgage in such contingency, had caused the property to be foreclosed and sold, no stockholders' interest being preserved to the Southern Company, no creditor of the Belt Company could have complained, and no one would have imagined that there was any fraudulent conveyance to defeat the claims of creditors.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

Wenger v. Chicago & E. R. Co. 51 C. C. A. 660, 114 Fed. 34; Farmers' Loan & T. Co. v. Louisville, N. A. & C. R. Co. 103 Fed. 130.

A resulting trust was created in favor of the railway companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company.

Osborne v. Perkins, 50 C. C. A. 158, 112 Fed. 127; Lauter v. Jarvis-Conklin Mortg. Trust Co. 29 C. C. A. 473, 54 U. S. App. 49, 85 Fed. 894; Condit v. Maxwell, 142 Mo. 266, 44 S. W. 467; Sanford v. Savings & L. Soc. 80 Fed. 54; Wade v. Sewell, 56 Fed. 129; Ducie v. Ford, 138 U. S. 587, 34 L. ed. 1091, 11 Sup. Ct. Rep. 417; Albright v. Oyster, 140 U. S. 493, 35 L. ed. 534, 11 Sup. Ct. Rep. 916; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; Augusta T. & G. R. Co. v. Kittel, 2 C. C. A. 615, 2 U. S. App. 409, 52 Fed. 63; Brady v. Johnson, 75 Md. 445, 20 L.R.A. 737, 26 Atl. 49; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 536, 36 L. ed. 1079, 13 Sup. Ct. Rep. 170; Contracting & Bldg. Co. v. Continental Trust Co. 47 C. C. A. 143, 108 Fed. 1; New England Waterworks Co. v. Farmers' Loan & T. Co. 69 C. C. A. 297, 136 Fed. 521; Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. ed. 1014, 11 Sup. Ct. Rep. 357.

Where the properties are bought with the funds of the mortgagor for its purposes, it is universally held that the after-acquired property clauses attach immediately, regardless of the circumstances that the legal title may be vested in an individual or in a corporation.

Guaranty Trust Co. v. Atlantic Coast Electric R. Co. 71 C. C. A. 41, 138 Fed. 517; New England Waterworks Co. v. Farmers' Loan & T. Co. 69 C. C. A. 297, 136 Fed. 521; Farmers' Loan & T. Co. v. Denver L. & G. R. Co. 60 C. C. A. 588, 126 Fed. 46, Wade v. Chicago, S. & St. L. R. Co. 140 U. S. 327, 341, 37 L. ed. 755, 761, 13 Sup. Ct. Rep. 842; Central Trust Co. v. Kneeland, 138 U. S. 414, 424, 34 L. ed. 1014, 1017, 11 Sup. Ct. Rep. 357; Augusta T. & G. R. Co. v. Kittel, 2 C. C. A. 615, 2 U. S. App. 409, 52 Fed. 63.

It is the particular province of a court of equity to look through a transaction to the substance of it, and to disregard the form or appearance it may take.

McGourkey v. Toledo & O. R. Co. 146 U. S. 536, 566, 36 L. ed. 1079, 1090, 13 Sup. Ct. Rep. 170; Smith v. Moore, 118 C. C. A. 127, 199 Fed. 690; Linn & L. Timber Co. v. United States, 116 C. C. A. 267, 196 Fed. 593.

If the possession of the Trust Company of this stock as pledgee gave to it an equitable interest in the property itself, why did not the ownership of the stock by the Belt Company give to it an equitable interest in the property itself, which passed under the after-acquired property clause of its mortgage? And if this equitable interest did pass to the trustee, how could it ever have been afterwards devested from the trustee and reinvested in the Trust Company?

Pere Marquette R. Co. v. Graham, 136 Mich. 444, 99 N. W. 408; Columbia Finance & T. Co. v. Kentucky Union R. Co. 9 C. C. A. 264, 22 U. S. App. 54, 60 Fed. 794; Knevals v. Florida, C. & P. R. Co. 13 C. C. A. 410, 23 U. S. App. 549, 66 Fed. 224; Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co. 108 Mo. 298, 18 S. W. 1101; United States Trust Co. v. Wabash, St. L. & P. R. Co. 32 Fed. 480; Brady v. Johnson, 75 Md. 445, 20 L.R.A. 737, 26 Atl. 49; Monmouth County Electric Co. v. McKenna, 68 N. J. Eq. 160, 60 Atl. 32; Harris v. Youngstown Bridge Co. 33 C. C. A. 60, 62 U. S. App. 112, 90 Fed. 322; Contracting & Build. Co. v. Continental Trust Co. 47 C. C. A. 143, 108 Fed. 1; Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546.

The Trust Company was acting in a dual capacity. It was trustee for the bondholders under the mortgages with after-acquired property clauses which, as the master found, attached to the properties of the Central Company. It also, in its individual capacity, took, or attempted to take, the same properties to secure an indebtedness to it from the Belt Company. A trustee, under such circumstances, will not be permitted to take or receive any of the Belt Company's assets or properties and appropriate them as security for its own indebtedness.

Guaranty Trust Co. v. Atlantic Coast Electric Co. 71 C. C. A. 41, 138 Fed. 517; King v. Remington, 36 Minn. 15, 29 N. W. 352; Ex parte James, 8 Ves. Jr. 337, 7 Revised Rep. 76; Ex parte Bennett, 10 Ves. Jr. 381, 8 Revised Rep. 1; Poillon v. Martin, 1 Sandf. Ch. 569; Duncomb v. New York, H. & N. R. Co. 84 N. Y. 190; Case v. Carroll, 35 N. Y. 385; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Ex parte Hughes, 6 Ves. Jr. 617; Fulton v. Whitney, 66 N. Y. 548; Oliver v. Court, 8 Price, 127, Daniell, 301, 22 Revised Rep. 720.

There is no basis whatever for the contention that the entire floating debt of the constituent companies has been paid except only the debt of the Trust Company.

Hoard v. Chesapeake & O. R. Co. 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; State Trust Co. v. Kansas City, P. & G. R. Co. 110 Fed. 10; State Trust Co. v. Kansas City, P. & G. R. Co. 120 Fed. 398, 128 Fed. 129, 129 Fed. 455; Westinghouse Air Brake Co. v. Kansas City Southern R. Co. 71 C. C. A. 1, 137 Fed. 26; Fordyce v. Bradley, 49 C. C. A. 598, 111 Fed. 769; State Trust Co. v. Kansas City, P. & G. R. Co. 115 Fed. 367, 115 Fed. 1023.

A different rule applies to one who is both creditor and security holder.

Bank of Ft. Madison v. Alden, 129 U. S. 372, 32 L. ed. 725, 9 Sup. Ct. Rep. 332; Thompson v. Bemis Paper Co. 127 Mass. 595; Cunningham v. Holley, M. M. & Co. 58 C. C. A. 140, 121 Fed. 720; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630.

The reorganization plan and agreement do not constitute a contract for the payment of the floating debt of the constituent companies.

Robinson v. Iron R. Co. 135 U. S. 522, 34 L. ed. 276, 10 Sup. Ct. Rep. 907.

Even if the reorganization plan and agreement amounted to an express contract to pay the floating debt (which is strenuously denied), yet it was not a contract made for the benefit of unsecured creditors, as its object, and hence the Trust Company cannot maintain an action upon it.

German Alliance Ins. Co. v. Home Water Supply Co. 226 U. S. 220, 57 L. ed. 195, 42 L.R.A.(N.S.) 1000, 33 Sup. Ct. Rep. 32; Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123, 124, 25 L. ed. 75, 76; St. Louis v. G. H. Wright Contracting Co. 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6; Beattie Mfg. Co. v. Clark, 208 Mo. 89, 106 S. W. 29; Howsmon v. Trenton Water Co. 119 Mo. 304, 23 L.R.A. 146, 41 Am. St. Rep. 654, 24 S. W. 784; Metropolitan Trust Co. v. Topeka Water Co. 132 Fed. 702; Allen & C. Mfg. Co. v. Shreveport Waterworks Co. 113 La. 1091, 68 L.R.A. 650, 104 Am. St. Rep. 525, 37 So. 980, 2 Ann. Cas. 471; Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667, 10 Sup. Ct. Rep. 494; Sayward v. Dexter, H. & Co. 19 C. C. A. 176, 44 U. S. App. 376, 72 Fed. 758; Moyer v. Ft. Wayne, C. & L. R. Co. 132 Ind. 88, 31 N. E. 567; Freeman v. Pennsylvania R. Co. 173 Pa. 274, 33 Atl. 1034; McIlvane v. Big Stony Lumber Co. 105 Va. 613, 54 S. E. 473; Armour & Co. v. Western Constr. Co. 38 Wash. 529, 78 Pac. 1106; Rochester Dry Goods Co. v. Fahy, 111 App. Div. 748, 97 N. Y. Supp. 1013; Nalle v. Costley, — Tex. Civ. App. —, 174 S. W. 625; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Clark v. P. M. Hennessey Constr. Co. 122 Minn. 476, 142 N. W. 873; O'Connell v. Mercantile Trust Co. 165 Mo. App. 398, 147 S. W. 841; Gulf Compress Co. v. Harris, C. & Co.

158 Ala. 343, 24 L.R.A.(N.S.) 399, 48 So. 477.

The Southern Company is not liable for the debts of the Belt Company upon the theory of a statutory consolidation of the two companies.

Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; Burge v. St. Louis, M. & S. R. Co. 100 Mo. App. 460, 74 S. W. 7; 3 Purdy's Beach, Priv. Corp. p. 1844; 6 Am. & Eng. Enc. Law, 2d ed. p. 801; St. Louis & S. F. R. Co. v. Cross, 171 Fed. 480; Gulf, C. & S. F. R. Co. v. Newell, 73 Tex. 334, 15 Am. St. Rep. 788, 11 S. W. 342; Chase v. Michigan Teleph. Co. 121 Mich. 631, 80 N. W. 717; Hawkins v. Central of Georgia R. Co. 119 Ga. 159, 46 S. E. 82; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628; Meyer v. Johnston, 53 Ala. 237.

If the Southern Company and the Belt Company became consolidated under the Missouri statute, as claimed by the Trust Company, then both corporations ceased to exist. The Trust Company has recognized and continues to recognize the existence of both companies, and is estopped to assert that they were consolidated and thereby became extinct.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 595, 29 L. ed. 499, 501, 6 Sup. Ct. Rep. 194; State ex rel. Houck v. Lesueur, 145 Mo. 322, 46 S. W. 1075; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240, 77 Miss. 194, 60 L.R.A. 33, 24 So. 200, 317, 28 So. 956; Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725; Lee v. Atlantic Coast Line R. Co. 150 Fed. 775.

The acquisition by the Southern Company of the stocks and bonds of the Belt Company and other companies under the reorganization plan and agreement did not operate as a consolidation of those companies.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; Peterson v. Chicago, R. I. & P. R. Co. 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; Atchison, T. & S. F. R. Co. v. Cochran, 43 Kan. 225, 7 L.R.A. 414, 19 Am. St. Rep. 129, 23 Pac. 151; Com. v. Monongahela Bridge Co. 216 Pa. 108, 64 Atl. 909, 8 Ann. Cas. 1073; Ulmer v. Lime Rock R. Co. 98 Me. 579, 66 L.R.A. 387, 57 Atl. 1001; Exchange Bank v. Macon Constr. Co. (McTighe v. Macon Constr. Co.) 97 Ga. 1, 33 L.R.A. 800, 25 S. E. 326; Jessup v. Illinois C. R. Co. 36 Fed. 735.

The foreclosure of the mortgage upon the property of the Belt Company, the sale thereunder, and the purchase by the Southern Company, did not operate to establish a consolidation.

National Foundry & Pipe Works v. Oconto City Water Supply Co. 105 Wis. 48, 81 N. W. 125; Hoard v. Chesapeake & O. R. Co. 123 U. S. 222, 31 L. ed. 130, 8 Sup. Ct. Rep. 74; Dickey v. Kansas City & I. Rapid Transit R. Co. 122 Mo. 223, 26 S. W. 685; Helton v. St. Louis, K. & N. R. Co. 25 Mo. App. 322.

Messrs. **Frederick W. Lehmann** and **George H. English, Jr.**, argued the cause, and, with Mr. Edward P. Gates, filed a brief for the Guardian Trust Company:

The property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders.

Central Improv. Co. v. Cambria Steel Co. 120 C. C. A. 121, 201 Fed. 811, 127 C. C. A. 184, 210 Fed. 696; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

The amount bid at the foreclosure sale of the Belt property was no evidence of its value.

Investment Registry v. Chicago & M. E. R. Co. 129 C. C. A. 130, 212 Fed. 594; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Louisville Trust Co. v. Louisville N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827.

The plan of reorganization provided for the payment of the debts of the old companies.

The estimate as to the floating debt was not intended as a limitation upon the amount to be paid under the plan.

The provision for the payment of debts made by the plan was not limited by the interests of the bondholders.

There was no exclusion of creditors who were also bondholders and stockholders.

All the creditors save the Trust Company were paid, and the Trust Company was paid in part.

The Trust Company was entitled to enforce the provisions of the plan as a contract made for its benefit.

Second Nat. Bank v. Grand Lodge, F. & A. M. 98 U. S. 123, 25 L. ed. 75; Johns v. Wilson, 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. Rep. 445; Meyer v. Lowell, 44 Mo. 328; Beattie Mfg. Co. v. Clark, 208 Mo. 89, 106 S. W. 29.

There was no covenant by the Trust Company that it would not hold the new company for any of the debts of the old.

Webster v. Dwelling House Ins. Co. 53

Ohio St. 558, 30 L.R.A. 719, 53 Am. St. Rep. 658, 42 N. E. 546; Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757.

The Trust Company was not barred as a creditor by participating in the plan as bondholder and stockholder.

The Southern Company was liable as being a consolidation of the old companies.

Leavenworth County v. Chicago, R. I. & P. R. Co. 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708; State ex rel. Houck v. Lesueur, 145 Mo. 322, 46 S. W. 1075; Evans v. Interstate Rapid Transit R. Co. 106 Mo. 594, 17 S. W. 489; Wells v. Missouri-Edison Electric Co. 108 Mo. App. 607, 84 S. W. 204; Barrie v. United R. Co. 138 Mo. App. 557, 119 S. W. 1020; Johnson v. United R. Co. 247 Mo. 326, 152 S. W. 362, 374; Chicago, S. F. & C. R. Co. v. Ashling 160 Ill. 373, 43 N. E. 373; Shadford v. Detroit, Y. & A. A. R. Co. 130 Mich. 300, 89 N. W. 960.

The lands of the Central Improvement Company did not pass under the after-acquired property clause of the Belt mortgage.

Humphreys v. McKissock, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; Pardee v. Aldridge, 189 U. S. 429, 47 L. ed. 883, 23 Sup. Ct. Rep. 514; Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637; Boston & N. Y. Air Line R. Co. v. Coffin, 50 Conn. 150; Dinsmore v. Racine & M. R. Co. 12 Wis. 650.

There is no reason of law, policy, or morals for preferring stockholders to general creditors in the reorganization of railroad properties.

Messrs. George H. English, Jr., Edward P. Gates, and Walter C. Clephane filed a separate brief for the Guardian Trust Company.

Mr. Harry S. Mecartney argued the cause, and, with Mr. Newell H. Clapp, filed a brief for intervening stockholders of the Guardian Trust Company:

The plan invited deposits of bonds and stocks upon the express condition of the payment of the floating debt. The decree ordered against the Southern can validly rest upon this express promise alone.

The Key City, 14 Wall. 653, 20 L. ed. 896; Tysen v. Wabash R. Co. 15 Fed. 763.

The words of a document will, in cases of doubt, be construed most strongly against the party using them; and particularly is this true in cases of deeds poll.

17 Am. & Eng. Enc. Law, 14.

A construction is to be placed on a document such as will render it reasonable rather than unreasonable, and just to both the parties rather than unjust. (17 Am. & Eng. Enc. Law, 18), and as being made for a legal rather than an illegal purpose.

Such an agreement is construed strictly against the committee.

5 Thomp. Corp. 2d ed. § 5993; United Waterworks Co. v. Omaha Water Co. 164 N. Y. 53, 58 N. E. 58; United Waterworks Co. v. Stone, 127 Fed. 587; Industrial & General Trust v. Tod, 180 N. Y. 215, 73 N. E. 7; Kratzenstein v. Western Assur. Co. 116 N. Y. 54, 5 L.R.A. 799, 22 N. E. 221.

If the agreement and plan did not constitute an express contract, *i. e.*, a complete agreement to pay the floating debt, then they did constitute a contract implied in fact to make such payment.

15 Am. & Eng. Enc. Law, 1077, 1078.

One of the instances where a new corporation is liable for the debts of an old one is where it has in express terms or by reasonable implication assumed the debts of the old corporation.

10 Cyc. 287, and cases cited; Chicago & I. Coal R. Co. v. Hall, 23 L.R.A. 231, note.

The principle of estoppel and election absolutely controls this entire case.

16 Cyc. 784–786.

The merging or joining together of the stock and assets of the Belt and Southern companies constituted a consolidation in fact of such companies.

Leavenworth County v. Chicago, R. I. & P. R. Co. 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708; Chicago, S. F. & C. R. Co v. Ashling, 160 Ill. 373, 43 N. E. 373; Williamson v. New Jersey Southern R. Co. 26 N. J. Eq. 398; Shadford v. Detroit, Y. & A. A. R. Co. 130 Mich. 300, 89 N. W. 960.

The exchange of stock is the distinguishing feature—the very test—of a consolidation.

Morawetz, Priv. Corp. § 939; 7 R. C. L. §§ 155, 156; Louisville, N. A. & C. R. Co. v. Boney, 3 L.R.A. 435, note; Chicago & I. Coal R. Co. v. Hall, 23 L.R.A. 231, note; 7 Thomp. Corp. 2d ed. § 8241.

There being a statute of Missouri allowing consolidation, the Southern Company is estopped to deny that it did not observe the technical method required or furnished by statutes to accomplish the same.

Morawetz, Priv. Corp. § 939; 7 R. C. L. §§ 130, 155, 156; Louisville, N. A. & C. R. Co. v. Boney, 3 L.R.A. 435, note; Chicago & I. Coal R. Co. v. Hall, 23 L.R.A. 231, note; 7 Thomp. Corp. 2d ed. § 8241.

The new corporation is liable:

1st. When it is merely a "continuation" of the old (this case).

2d. When it has by "express terms or by.

reasonable implication" assumed the debts of the old (this case).

3d. Where it has received the assets of the old under such circumstances as to make the transaction a fraud upon the creditors.

4th. Where a statute imposes such a liability (this case).

Chicago & I. Coal R. Co. v. Hall, 23 L.R.A. 231, note; 7 R. C. L. § 156.

The equities in favor of the Trust Company result from consolidation alone, and from the express promise in the plan.

Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

The liability in every such case is a full liability, and is not limited to the value of the stock or property given the old stockholders, nor to the value of the assets transferred.

7 R. C. L. § 155.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a decree in which the circuit court of appeals decided that the Guardian Trust Company, as an unsecured creditor of the Kansas City Suburban Belt Railroad Company, was entitled to charge the appellant for the Belt Company's debt, because the reorganization scheme, adopted upon a foreclosure of a mortgage of the Belt Company's property and a purchase by the appellant, left the unsecured creditors inadequately provided for, while it made a considerable provision for the stockholders in the Belt Road. 120 C. C. A. 121, 201 Fed. 811, 127 C. C. A. 184, 210 Fed. 696. See Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 Sup. Ct. Rep. 554.

The facts are less complicated than the proceedings that [173] have grown out of them. The Kansas City, Pittsburg, & Gulf Railroad extended from Kansas City to Port Arthur on the Gulf of Mexico. It used terminals at Kansas City belonging to the Belt company above mentioned, and companies in its control, and at Port Arthur belonging to a Dock Company. All three were mortgaged, and after a default on the bonds of the Gulf Company in 1899, a plan was made to bring the road and terminals into one hand. The Gulf Company's mortgage was to be foreclosed and a new company formed, which was to exchange its own securities for the stock and bonds of the Gulf, Dock, and Belt Companies, making a new mortgage to raise the necessary funds. The Gulf Company's mortgage was foreclosed, the appellant company was formed, issued its new securities, and in March and April, 1900, became the owner of the Gulf road and of most of the stocks and bonds of the old companies, including the Belt Company. In September, 1900, a suit was begun to foreclose the Belt mortgage, and on December 31, 1901, it was sold for the amount of its mortgage to the appellant. The court of appeals thought it plain that the foreclosure was part of the original plan; and as it also thought that the mortgaged property was worth enough above the mortgage to pay the unsecured creditors, it held that the stockholders, when receiving pay for their stock, were receiving it in substance as the proceeds of a transaction that removed all property of the Belt Company from its unsecured creditors' reach. The appellant was the principal holder of the Belt Company stock, as well as the purchaser of its property with notice of the outstanding debts, and therefore was decreed to pay the Trust Company's claim.

The proceedings began with a creditors' bill by the Cambria Steel Company against the Belt Company and the Guardian Trust Company to prevent the latter from selling securities held by it for an alleged debt of the Belt Company, the bill denying the debt. The court of [174] appeals thought that this suit was really a suit of the appellant. The Cambria Steel Company has disappeared and the proceedings have been carried on by the Belt Company, the instrument of the appellant, and later by the appellant, intervening in the suit, and all charging that the Trust Company was indebted to the Belt. The Trust Company, on the other hand, asserted its rights and prayed judgment for its debt in its answer to the Belt, although it failed to insert a similar prayer in its answer to appellant. The ground of the appellant's intervention was that the Belt mortgage covered after-acquired property, so that it was entitled to the securities in the Trust Company's hands unless the Trust Company could make good its claim. On the other hand, the decree foreclosing the Belt mortgage expressly left open the right of the Trust Company to contend that the appellant was bound to pay the Belt Company's unsecured debts.

The appellant attacks the conclusion of the circuit court of appeals upon several grounds. In the first place it contends that the Trust Company is bound by the plan because it was a party to it, exchanged its own Belt Company stock in pursuance of it, was a depositary under it, and used all its influence to induce other stockholders and bondholders to come in. It asserts that the plans contained an express covenant not to hold the new company liable for the debts of the old one It also asserts that the property was not worth more than the mortgage. We will consider these and some subordinate matters in turn.

The plan presented elaborate estimates of

the funds required. One item was: "For present stock [of the Kansas City Suburban Belt Railroad Company] one quarter of a share of new preferred stock and three quarters of a share of new common stock of the company as reorganized for each share of the present stock of those who may deposit thereunder." The Trust Company exchanged its stock and it is said that by its retention of this benefit [175] it has precluded itself from claiming its debt. But the plan also stated at the outset as one of the results to be attained, "The payment of the floating debt and the existing Car Trust obligations," and at a later point it allowed for payment of floating debts, $475,000, to come from proceeds of the sale of first mortgage bonds and preferred stock and payment of $10 per share by participating stockholders. It is true that the estimate turned out to be much too small, but the plan did not on its face give notice of an intent to prefer the Belt stockholders to its creditors, and therefore the Trust Company, by assenting to it and exchanging stock under it, lost no rights. What has happened is that, owing perhaps to unexpected difficulties, the plan has not been carried out. The appellant has no ground for complaining that the Trust Company has not tendered back its stock, which it took before the foreclosure of the Belt Road was begun.

But it is said that the Trust Company covenanted not to assert its claim because the agreement provided that "no right is conferred, nor any trust, liability, or obligation (except . . .) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, . . . with respect to any property acquired by purchase at any foreclosure sale." It appears to us that argument cannot make plainer the meaning of these words. They exclude an obligation arising from the instrument, but neither purport to nor could exclude rights of creditors founded on the facts to which we have referred. Those rights were untouched, and none the less that this particular creditor became a party to the agreement because of its other interests that were concerned. We may remark in this connection that we are equally unable to find in the plan a contract in favor of the Trust Company as an unsecured creditor. The plan sets out a [176] general scheme that it was hoped would be worked out, but its nature, the words quoted, and the authority given to the committee for carrying out the plan to modify it and to use their discretion,—all are inconsistent with the notion of a promise that all unsecured debts should be paid.

As the claim of the Trust Company was put by the court of appeals upon the equitable right of creditors to be preferred to stockholders against the property of a debtor corporation, it is essential to inquire whether the appellant received any such property,—that is, whether it got by the foreclosure more than enough to satisfy the mortgage, which was a paramount lien. The master found, as he expressed it, in the absence of proof to the contrary, that the amount for which the property was sold, $1,000,000, the amount of the mortgage, was its fair market value. Although the evidence was not reported, the circuit court of appeals was of opinion that it sufficiently appeared that there was a valuable equity. The argument for the appellant assumes that the different conclusion was reached while leaving the master's finding to stand. But the decision rather lays that finding on one side upon considerations that may be summed up in a few words. The allowance made for the Belt Company's bonds shows that they were regarded as well secured. The stockholders of the Gulf Company in their exchange paid $10 a share for stock of the appellant received by them. Therefore it must be assumed that the stock of the appellant was worth at least that amount. Therefore the $4,750,000 of that stock given for the Belt Company's stock was worth at least $475,000, and probably more. But the value of this stock depended on the value of the Belt Company's property above the mortgage. It appears to us that while perhaps not justifying definite figures, the reasoning warrants the belief that there was an equity for which the appellant must account.

The appellant urges that the foreclosure sale is to be [177] treated as a distinct transaction,—that after it had become the owner of the greater part of the bonds and stock of the Belt Company it was free to do as it pleased. If it had simply kept the stock it would have incurred no liability to creditors of the Belt Company, and an independent foreclosure would put it in no worse place. But the ownership of the Belt Road by the new company was contemplated from the first, and although no fraud on creditors was suggested or intended in the plan, still the court of appeals was justified in regarding the whole proceeding as one from the start to the close, and in throwing on the appellant the responsibility of so carrying it out as to avoid inequitable results.

It is said that the Trust Company is barred by laches: that the appellant took possession on January 1, 1902, and that the Trust Company did not assert its claim until 1905 in this cause; that it knew and

was intimately connected with every step of the reorganization, and was silent at a time when its conduct would influence others, as the successful assertion of its claim would have depressed the market value of the appellant's stock and bonds. But the Trust Company set up its claim in this suit in answer to the Cambria bill on November 5, 1900. The very ground of the bill was to prevent the Trust Company from selling securities to satisfy the claim as it had given notice that it intended to. The company tried to become a party to the Belt foreclosure and did succeed in saving its rights from prejudice. When later the Belt Company and the appellants came into this suit, it set up its claim again. Without going into further detail we are of opinion that the Trust Company is not barred.

Some technical objections may be left pretty much upon the decision below. 127 C. C. A. 184, 210 Fed. 699. It is objected that the liability of the appellant is not open because the exception to the master's conclusion against it was put upon other grounds than the merits, but we [178] see no reason to doubt that the court of appeals was right in thinking that justice would be done by adopting the course that it did. So it is said that the appellant was induced by the form of the exceptions to forego reopening the master's finding that the Belt Company was indebted to the Trust Company. But it is not to be believed that the appellant has given up anything that it thought worth insisting upon. 127 C. C. A. 184, 210 Fed. 700. So as to the absence of a specific prayer for relief in the Trust Company's answer to the appellant's intervention in its own name. In short, while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements should lead courts to avoid artificial scruples, still we are not prepared to say that the court of appeals was wrong in finding that there had been a transgression of the well-settled rule of equity in this case, or that it went further than to see that substantial justice should be done.

There is a motion to dismiss upon which, in view of our decision, the defendant in error would not desire to insist, and on the other side a petition for certiorari in case its appeal should be dismissed. In the circumstances the distinctions become of little importance. But the Cambria bill asserted a lien under the judgment of a Federal court, and the petition of the appellant asserted title under a decree of a Federal court, so that the decree may be affirmed upon the appeal. Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Commercial Pub Co. v. Beckwith, 188 U. S. 567, 569, 47 L. ed. 598, 599, 23 Sup. Ct. Rep. 382. The case has been so fully discussed below that we think it unnecessary to go into further detail.

Decree affirmed.

The Chief Justice and Mr. Justice Van Devanter are of opinion that, upon the findings of the master, the decree should be reversed, and therefore dissent.

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[179] ISADOR STRAUS and Nathan Straus, Trading and Doing Business under the Firm Name and Style of R. H. Macy & Company, Petitioners,

v.

NOTASEME HOSIERY COMPANY.

(See S. C. Reporter's ed. 179-183.)

Trademark — false representation as bar to relief.

1. A trademark for hosiery, in which the word "Notaseme" is prominently displayed, with the statement that it is registered in the United States Patent Office, when in fact the trademark as registered does not contain the word "Notaseme," registration having previously been refused to the trademark with that word upon it, embodies such misrepresentation that it will not be protected.

[For other cases, see Trademark IV. b, in Digest Sup. Ct. 1908.]

Damages — unfair competition — lost profits.

2. Unfair imitation of a label does not charge the user with liability to account for all the profits, where the supposed unfairness consists mainly in the imitation of a device which, by reason of misrepresentation, has lost its protection as a trademark.

[For other cases, see Damages, VI. t, in Digest Sup. Ct. 1908.]

Damages — unfair competition — lost profits.

3. So far as purchasers from the unfair imitator of a label, which, by reason of misrepresentation, has lost its protection as a trademark, bought for any other reason but the inducement of the design supposed to indicate the other's product, the latter has no claim on the imitator's profits.

[For other cases, see Damages, VI. t, in Digest Sup. Ct. 1908.]

[No. 184.]

Argued January 17 and 18, 1916. Decided February 21, 1916.

Note.—On deception as bar to relief for infringement of trademark—see notes to Joseph v. Macowsky, 19 L.R.A. 53; and Clinton E. Worden & Co. v. California Fig Syrup Co. 47 L. ed. U. S. 282.

On damages for infringement of trademark, as affected by loss of profits—see Rose v. Hirsh, 51 L.R.A. 823.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, on a second appeal, affirmed a decree of the District Court for the Southern District of New York in favor of complainant in a suit for infringement of a trademark and unfair competition. Reversed.

See same case below on first appeal, 119 C. C. A. 134, 201 Fed. 99; on second appeal, 131 C. C. A. 503, 215 Fed. 361.

The facts are stated in the opinion.

Mr. Edmond E. Wise argued the cause and filed a brief for petitioners:

The petitioners were not guilty of unfair trade.

Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 461, 55 L. ed. 543, 31 Sup. Ct. Rep. 456; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; J. G. Rowley Co. v. Rowlet, 113 C. C. A. 386, 193 Fed. 390; Rathbone, S. & Co. v. Champion Steel Range Co. 37 L.R.A.(N.S.) 258, 110 C. C. A. 596, 189 Fed. 26; Hanover Star Mill. Co. v. Allen & W. Co. L.R.A. 1916D, 136, 125 C. C. A. 515, 208 Fed. 516; Rushmore v. Badger Brass Mfg. Co. 117 C. C. A. 255, 198 Fed. 379; G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369; 3 Cyc. 760, and notes. Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609.

The court below erroneously followed the rule of permitting recovery of profits authorized by statute in cases of patents, copyrights, and trademarks, although there was a total lack of proof of confusion of goods, of substitution of goods, or competition between the parties.

Hanover Star Mill. Co. v. Allen & W. Co. L.R.A. 1916D, 136, 125 C. C. A. 515, 208 Fed. 516; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Rushmore v. Badger Brass Mfg. Co. 117 C. C. A. 255, 198 Fed. 379; G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369.

Even if the rule in patent and trademark cases as to the recovery of profits as damages were applicable, the decision of the court below was erroneous in awarding as damages all profits made by the petitioners on the sale of "Irontex" hosiery in the absence of proof of how much, if in any respects at all, the label contributed to the sale of the article.

Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604, 614, 615, 56 L. ed. 1222, 1225, 1226, 41 L.R.A.(N.S.) 653, 32 Sup. Ct. Rep. 691; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 235 U. S. 641, 59 L. ed. 398, 35 Sup. Ct. Rep. 221.

In actual use, the word "Notaseme" in white script on the black band, with the word "trademark" in the flourish under the word, was the conspicuous feature of the mark, and, in that form, had been refused registration by the Patent Office, because the word correctly described the character of the article. That the rejection in that form was perfectly proper is beyond criticism. (Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270); and the fact that the words were condensed into one does not change this rule.

Barrett Chemical Co. v. Stern, 176 N. Y. 27, 68 N. E. 65.

When that descriptive name was removed and the label was registered as a trademark, the rectangular figure traversed by a black band did not, in the slightest degree, indicate by its own meaning (and there was no proof of such indication by association) the origin or ownership of the article to which it was to be applied, and as it did not do so, it served no useful purpose.

Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993.

Though colors on a label may make the dress of the article striking and attractive, the mere coloring is not usually the subject of a trademark.

Coats v. Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966.

Where a symbol or label is worded so as to make a distinct assertion which is false, the trademark will not be recognized, nor can any right to its exclusive use be maintained.

Holzapfels Composition Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6.

Mr. E. Hayward Fairbanks argued the cause, and, with Mr. James H. Griffin, filed a brief for respondent:

In such a trademark case as this, where a property right, a monopoly created by statute, is invaded, a complainant is entitled to all defendants' profits, however made, from the illegal use of the spurious mark, and in case of any uncertainty, all doubts will be resolved against the infringer.

Burdell v. Denig, 92 U. S. 716, 23 L. ed. 764; Dan. Ch. Pr. 6th Am. ed. p. 1634; Upton, Trade-Marks, 233, 234; Benkert v. Feder, 34 Fed. 535; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 207, 26 L. ed.

975, 981; Tilgman v. Proctor, 125 U. S. 136, 148, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894; Thaddeus Davids Co. v. Davids Mfg. Co. 233 U. S. 461, 58 L. ed. 1046, 34 Sup. Ct. Rep. 648, Ann. Cas. 1915B, 322; Edelsten v. Edelsten, 1 DeG. J. &. S. 185, 9 Jur. N. S. 479, 7 L. T. N. S. 768, 11 Week. Rep. 328; Lever v. Goodwin, L. R. 36 Ch. Div. 1, 57 L. T. N. S. 583, 36 Week. Rep. 177; Sawyer v. Kellogg, 9 Fed. 601; Atlantic Mill. Co. v. Rowland, 27 Fed. 24; Graham v. Plate, 40 Cal. 593, 6 Am. Rep. 639; Avery v. Meikle, 85 Ky. 435, 448, 7 Am. St. Rep. 604, 3 S. W. 609; W. R. Linn Shoe Co. v. Auburn Lynn Shoe Co. 100 Me. 461, 479, 4 L.R.A. (N.S.) 960, 62 Atl. 499; Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; Forster Mfg. Co. v. Cutter-Tower Co. 211 Mass. 219, 97 N. E. 749; Paul, Trade-Marks, § 326.

Broadly speaking, it is not exact to separate the doctrine of trademark infringement and unfair competition. The underlying doctrine is the same, the control of fraud, great or petty, however the fraudulent transaction has been carried on, by the intervention of equity. Trademark infringement is obviously but one form of unfair competition.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Blanchard v. Hill, 2 Atk. 484; Reddaway v. Banham [1896] A. C. 204, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396.

The successful suitor in equity is entitled to recover the gains and profits which accrued to the infringer and wrongdoer by his adoption of a garb for his goods to which another has a better and prior right, particularly where there exists a plain, fraudulent intent, persisted in after notice, as here.

P. E. Sharpless Co. v. Lawrence, 130 C. C. A. 59, 213 Fed. 423; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Singer Mfg. Co. v. Bent, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1016; Sawyer v. Horn, 4 Hughes, 239, 1 Fed. 24; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. W. 609; Forster Mfg. Co. v. Cutter-Tower Co. 211 Mass. 219, 97 N. E. 749; Florence Mfg. Co. v. Dowd, 110 C. C. A. 608, 189 Fed. 44; Gulden v. Chance, 105 C. C. A. 16, 182 Fed. 303; G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369; Regis v. Jaynes, 191 Mass. 246, 77 N. E. 774; Paul, Trade-Marks, p. 566, § 326; Williams v. Mitchell, 45 C. C. A. 265, 106 Fed. 168; Walter Baker & Co. v. Slack, 65 C. C. A. 138, 130 Fed. 514; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co. 124 C. C. A. 409, 206 Fed. 611.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by the Notaseme Hosiery Company to restrain infringement of a registered trademark and unfair competition alleged to have been practised by the petitioners, and to recover damages and [180] profits. The plaintiff's trademark, as registered, was a rectangle with a black band running from the left hand upper to the right hand lower corner, the upper and lower panels on the two sides of the band being printed in red. As used, it contained the word "Notaseme" in white script upon the black band, with the words "Trade Mark" in small letters upon the white, and beneath the label was printed "Reg. U. S. Pat. Office." In fact registration had been refused to the label with the word "Notaseme" upon it, that word being merely a corrupted description of the seamless hosiery sold. The defendants, among other items of a large retail business in New York, sold hose with seams, which they advertised under the name "Irontex." After this name had been adopted, in pursuance of their request designs were submitted to them and one was chosen. It turned out that this was made by the printer who had made the Notaseme label. It also was a rectangle with a diagonal black band and red panels, the band in this case running from the right hand upper corner to the left hand lower, and having the word "Irontex" in white script upon the band and "The hose that—wears like iron" printed in black upon the two triangles of red. The defendants never had seen or heard of the plaintiff, its label or its goods, until November, 1909, when they were notified by the plaintiff that they were infringing its registered trademark. They ultimately stood upon their rights.

At the original hearing in the circuit court it was held that the plaintiff had embodied such a misrepresentation in the trademark as used that it would not be protected, and that unfair dealing was not made out. This decision was reversed by the circuit court of appeals on the ground that although the evidence did not show actual deception, the label used by the defendants so far resembled the plaintiff's that it would have deception as its natural result, and that the plaintiff was entitled to [181] relief whether the trademark on its label was good or bad as such. 119 C. C. A. 134, 201 Fed. 99. The plaintiff was allowed to

recover profits from a reasonable time after the defendants had notice of the similarity of the two designs, which was put at January 1, 1910. 209 Fed. 495, 131 C. C. A. 503, 215 Fed. 361.

We agree with the circuit court that the plaintiff is not in a position to recover for an infringement of a registered trademark. The mark that it used held out to the public as registered in the Patent Office precisely the element that had been rejected there. It affirmed that the authority of the United States had sanctioned that for which that authority had been refused, and by grasping at too much lost all, so far as this case is concerned. Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 8, 46 L. ed. 49, 53, 22 Sup. Ct. Rep. 6. The liability of the defendant must be derived from unfair competition if it exists.

That it was unfair to continue the use of a label so similar in general character to the plaintiff's we are not disposed to deny. But it does not follow that the defendants are chargeable with profits as a matter of course. Very possibly the statutory rule for wrongful use of a trademark may be extended by analogy to unfair competition in a proper case. But, as the ground of recovery in the latter instance is that the defendant has taken some undue advantage of the plaintiff's reputation, or that of his goods, and as the nature and extent of the wrong may vary indefinitely, it cannot be assumed in all cases that the defendant's sales were due to that alone.

Ordinarily imitation is enough to imply that the matter imitated is important, at least, to the sale of the goods. But when the similarity arises as the one before us did, it indicates nothing, except perhaps the poverty of the designer's invention. Furthermore the defendants' persistence in their use of the design after notice proves little or nothing against them. They had been advertising [182] their goods by name and using the design in connection with the name. The natural interpretation is not that they wanted to steal the plaintiff's good will, of which they then learned for the first time, but that they wished to preserve their own. When they stood upon their rights of course they made themselves responsible for the continued use of a label that might be held likely to deceive, and if it should be held manifestly to have that tendency, they would be chargeable for what, in contemplation of law, was an intentional wrong, or a fraud, although the case is wholly devoid of any indication of an actual intent to deceive, or to steal the reputation of the plaintiff's goods. If the defendants' conduct was a wrong, as we have assumed, it was a wrong knowingly committed, but no further inference against the defendants can be drawn from the fact.

It seems a strong thing to give relief on the ground of unfair competition when the supposed unfairness consists mainly in the imitation of a device that sought, obtained, and lost protection as a trademark. If a would-be trademark loses its protection as such, that means that the public has a right to use it, and it would be strange to bring the protection back simply by giving it another name. If the red square with the diagonal black band is not a trademark, it would seem to be free to the world. See Flagg Mfg. Co. v. Holway, 178 Mass. 83, 91, 59 N. E. 667. Saxlehner v. Wagner, 216 U. S. 375, 380, 381, 54 L. ed. 525, 527, 528, 30 Sup. Ct. Rep. 298. We assume that, coupled with the script upon the band, there is sufficient pictorial similarity to deceive some persons, but, unless we go considerably farther, to charge the defendants with all the profits would be unjust.

The question remains whether the petitioners' sales probably were induced to any large extent by confusion in the mind of the public between the petitioners' goods and the plaintiff's. The goods were different in character, were called by a different name, were sold mainly in different [183] places and by parties not likely to be mistaken for each other. The petitioners had advertised them as Irontex since April, 1908. Their business was that of retailers in the city of New York, where they were widely known. The Notaseme Company's business was wholesale, from Philadelphia, starting with New England and the South. So far as purchasers bought because the petitioners recommended the goods, or on the strength of the name, by whatever recommended, as distinguished from the colors and figures of the label, or from knowledge of the specific article, or from preference for full fashioned over seamless hose, or for any reason but the inducement of the red square, bar, and script supposed to indicate the plaintiff's hose, the plaintiff has no claim on the petitioners' profits.

There is some indication that the plaintiff's business was mainly in hosiery for men, while Macy & Company's was more than three quarters for women and children. That the name, which the defendants do not imitate, but, on the contrary, exclude by using another wholly unlike it, was thought more important by the plaintiff than it now is willing to admit, is shown not only by the use of it upon the trademark proper, but by the adoption of a new name for the plaintiff company to conform to it. Taking all these considerations into account, coupled with the absence of evidence that any de-

ceit or substitution was accomplished in fact, we find it impossible to believe that any considerable part of the petitioner's business was due to their goods being supposed to be the plaintiff's hose. The petitioners properly were enjoined from further use of the mark in controversy, but, so far as the decree charged them with profits, it is reversed.

Decree reversed.

Mr. Justice McKenna and Mr. Justice Pitney dissent.

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[184] GEORGE D. ROGERS, A. L. Goetzman, and F. E. Crandall, Representing Themselves and Others Similarly Situated, Plffs. in Err.,

v.

COUNTY OF HENNEPIN et al.

(See S. C. Reporter's ed. 184–192.)

Error to state court — Federal question — decision on non-Federal ground.

1. A decision of the highest court of a state affirming a decree below which dismissed a suit to cancel certain tax assessments, and to enjoin the collection of the tax, cannot be said to rest upon a ground independent of the Federal questions raised with respect to the validity of the tax, where the sole reason assigned by the court for its decision was the controlling effect of its prior decision in an action by the state to recover the tax in which some, though not all, of the same objections as to the validity of the tax under the Federal Constitution were raised and overruled.

[For other cases, see Appeal and Error, 1465–1528, in Digest Sup. Ct. 1908.]

Taxes — intangible property — membership in chamber of commerce.

2. Memberships in an incorporated chamber of commerce which has no capital stock and transacts no business for profit, merely furnishing buildings and equipment for its members, who, under its rules, transact business upon the trading floor, which is in fact a grain exchange, are property and taxable as such.

[For other cases, see Taxes, I. c, 1, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — local law.

3. The question whether memberships in a chamber of commerce are in fact taxable under the statutes of a state is a matter of local law with which the Federal Supreme Court, on writ of error to a state court, is not concerned.

[For other cases, see Appeal and Error, 2124–2151, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — taxes.

4. The assessment for taxation of memberships in a chamber of commerce under the head of "moneys and credits" is an administrative matter which does not touch the fundamentals contemplated by the 14th Amendment to the Federal Constitution.

[For other cases, see Constitutional Law, IV. b, 6, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — due process of law — double taxation.

5. State taxation of memberships in an incorporated chamber of commerce is not repugnant to the Federal Constitution as double taxation because the property of the corporation has been fully taxed, since such memberships are property, distinct from the assets of the corporation.

[For other cases, see Constitutional Law, IV. a, 4; IV. b, 6, in Digest Sup. Ct. 1908.]

Taxes — situs — membership in chamber of commerce.

6. A state may fix the situs for taxation of memberships in an incorporated chamber of commerce, furnishing the buildings and equipment for a grain exchange, at the place in the state at which the exchange is located, whether such memberships be held by residents or nonresidents.

[For other cases, see Taxes, I. c, 6, in Digest Sup. Ct. 1908.]

Note.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider when reviewing the *judgments of* state courts—see note to State ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On membership in board of trade or exchange as subject of taxation—see note to State v. McPhail, 50 L.R.A.(N.S.) 255.

Constitutional law — equal protection — taxes.

7. The taxation of memberships in an incorporated chamber of commerce does not deny the members the equal protection of the laws guaranteed by U. S. Const., 14th Amend., because of the exemption from taxation of such organizations as the associated press, lodges, fraternal orders, churches, etc.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued December 6, 1915. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a decree which affirmed a decree of the District Court for the County of Hennepin, in that state, in favor of defendants in a suit to cancel certain tax assessments and to restrain the collection of the taxes. Affirmed.

See same case below, 124 Minn. 539, 145 N. W. 112.

The facts are stated in the opinion.

Mr. H. V. Mercer argued the cause and filed a brief for plaintiffs in error:

It is as possible to invade the rights of due process of law and equal protection, secured by the 14th Amendment, through the judicial, as through any other, department of the state.

Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455.

The upholding of this decision on the basis of "money and credits" by reference to State v. McPhail, 124 Minn. 398, 50 L.R.A.(N.S.) 255, 145 N. W. 108, Ann. Cas. 1915C, 538, is so utterly devoid of statutory or other basis as to be a mere arbitrary judicial foreclosure of the question without statutory authority therefor.

Fayerweather v. Ritch, supra.

The Federal court had a right to pass upon this question, on its own judgment, under the circumstances, as to the interpretation of the statute.

Merritt v. American Steel Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228; Northrop v. Columbian Lumber Co. 108 C. C. A. 640, 186 Fed. 770; Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; Great Southern Fire Proof Hotel v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; Ætna L. Ins. Co. v. Moore, 231 U. S. 544, 58 L. ed. 356, 34 Sup. Ct. Rep. 186.

The decision in the McPhail Case, if in any way treated as a decision as to "money and credits," does what this court said it could not itself do.

James v. Bowman, 190 U. S. 127–141, 47 L. ed. 978–983, 23 Sup. Ct. Rep. 678.

It was not within the jurisdictional province of Minnesota to assess those beyond its border.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 342, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Joslyn v. St. Paul Distilling Co. 44 Minn. 183, 46 N. W. 337; State v. Nelson, 107 Minn. 319, 119 N. W. 1058.

State v. McPhail does not apply the facts of this case to the rule of equality.

State v. Nelson, 107 Minn. 323, 119 N. W. 1058; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 342, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Fayerweather v. Ritch, 195 U. S. 276, 49 L. ed. 193, 25 Sup. Ct. Rep. 58.

Both the Minnesota Constitution and the 14th Amendment to the Federal Constitution prohibit an intentional and deliberate discrimination in taxation that is substantially unfair.

State ex rel. Mudeking v. Parr, 109 Minn. 147, 134 Am. St. Rep. 759, 123 N. W. 408; State v. Cudahy Packing Co. 103 Minn. 419, 115 N. W. 645, 1089; Central R. Co. v. Jersey City, 199 Fed. 237; Detroit, G. H. & M. R. Co. v. Fuller, 205 Fed. 86; Ritterbusch v. Atchison, T. & S. F. R. Co. 117 C. C. A. 154, 198 Fed. 46; Lacy v. McCafferty, 131 C. C. A. 494, 215 Fed. 352; Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A. 1, 173 Fed. 461; Pullman Co. v. Knott, 235 U. S. 23, 59 L. ed. 105, 35 Sup. Ct. Rep. 2; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 298, 59 L. ed. 234, 237, 35 Sup. Ct. Rep. 27; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217–227, 52 L. ed. 1031–1037, 28 Sup. Ct. Rep. 638; 37 Am. Law Rev. p. 654; Pelton v. Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Upshur County v. Rich, 135 U. S. 467, 473, 476, 34 L. ed. 196, 198, 199, 10 Sup. Ct. Rep. 651; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Coulter v.

Louisville & N. R. Co. 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; First Nat. Bank v. Albright, 208 U. S. 548, 52 L. ed. 614, 28 Sup. Ct. Rep. 349; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. Rep. 31; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

Other courts have universally refused taxation of such memberships.

San Francisco v. Anderson, 103 Cal. 69, 42 Am. St. Rep. 98, 36 Pac. 1034; People ex rel. Lammon v. Feitner, 167 N. Y. 1, 82 Am. St. Rep. 698, 60 N. E. 265; White v. Brownell, 2 Daly, 329; Baltimore v. Johnson, 96 Md. 737, 61 L.R.A. 568, 54 Atl. 646; Arapahoe County v. Rocky Mountain News Printing Co. 15 Colo. App. 189, 61 Pac. 494.

Mr. Lyndon A. Smith, Attorney General of Minnesota, and Mr. William J. Stevenson, argued the cause, and, with Mr. John M. Rees, filed a brief for defendants in error:

There is ample statutory authority for taxing this class of property in Minnesota, and the state statutes have been interpreted by the highest court in the state to include such property. This raises no Federal question.

Columbus Southern R. Co. v. Wright, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; Games v. Stiles, 14 Pet. 322, 10 L. ed. 476; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 497, 22 L. ed. 595, 598; Bailey v. Magwire, 22 Wall. 215, 22 L. ed. 850; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; Adams v. Nashville, 95 U. S. 19, 24 L. ed. 369; Lane County v. Oregon, 7 Wall. 71, 19 L. ed. 101; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Central P. R. Co. v. Nevada, 162 U. S. 512, 40 L. ed. 1057, 16 Sup. Ct. Rep. 885; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 538, 31 L. ed. 194, 199, 8 Sup. Ct. Rep. 203; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

The claim that the local assessor failed to list other like property does not show that plaintiffs in error were prejudiced thereby.

First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412.

The claim of double taxation amounts at most only to overvaluation, and is immaterial here.

Bank of Commerce v. Tennessee, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 18 L. ed. 229; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; State v. Jones, 24 Minn. 251; State v. Rand, 39 Minn. 502, 40 N. W. 835.

The residence of plaintiffs in error outside the taxing district or the state does not of itself show that in this action there has been any depriving of such parties of a Federal right.

Columbus Southern R. Co. v. Wright, 151 U. S. 470, 481, 483, 38 L. ed. 238, 243, 244, 14 Sup. Ct. Rep. 396; Gallup v. Schmidt, 183 U. S. 300, 305, 46 L. ed. 207, 212, 22 Sup. Ct. Rep. 162; New York ex rel. New York C. & H. R. R. Co. v. Miller, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Corry v. Baltimore, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 428, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392.

Mr. Justice Hughes delivered the opinion of the court:

This is a suit in equity to cancel certain assessments for the year 1912, and to restrain the collection of taxes imposed accordingly upon the plaintiffs and others in like case with respect to their memberships in the Chamber of Commerce of the city of Minneapolis. There were three groups alleged to be represented by the respective plaintiffs: One, of members residing in Minneapolis; another, of those residing within the state, but outside that city; and a third, of citizens and residents of other states. The complaint, among other things, averred in substance that the Chamber of Commerce was incorporated under the laws of Minnesota; that it had no capital stock and transacted no business for profit; that it furnished buildings and equipment for its members, who, under its rules, transacted business with each other (for themselves and their customers) upon the trading floor which was in fact a grain exchange; that the property of the corporation had been fully taxed; that the memberships, in case of winding up, would have actually no value [186] above the assets so taxed; that it had been the practical construction of the tax laws of the state that such memberships were not taxable; that the assessments in question

had been laid under the head of "Moneys and Credits," and that they were excessive; that memberships in other associations were not taxed "although standing in a similar position;" that the members of the Chamber of Commerce were "unlawfully and prejudicially" discriminated against "by unequally assessing them," and that their property was taken "without due process of law, contrary to the state and Federal Constitutions;" that, unless restrained, the attempt to enforce the tax would result in a multiplicity of suits; that in the case of members residing outside of the city of Minneapolis, the certificates of membership were "kept at their respective residences" and such members did not "operate" upon the exchange personally except "at rare intervals," and that their use of such memberships was practically limited to benefits obtained "from having other members buy or sell grain for them as commission merchants" at one half the "regular commission" by reason of "a privilege extended to the members under the rules."

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court denied a motion for temporary injunction and sustained the demurrer, and thereupon judgment was entered in favor of the defendants. The plaintiffs appealed to the supreme court of the state, assigning as error the holding of the trial court that the assessments "did not deny to the several members in the respective classes the equal protection of the laws" and did not constitute a taking of property "without due process of law and without compensation," contrary to the Federal Constitution. The latter objection was stated in various forms, specific complaint being made of the assessment of those members who were said to be outside the [187] jurisdiction of the taxing officers. Another appeal was then pending in the same court in the case of State v. McPhail, 124 Minn. 398, 50 L.R.A.(N.S.) 255, 145 N. W. 108, Ann. Cas. 1915C, 538, relating to the taxation of memberships in the Board of Trade of Duluth, and, by stipulation, the appeals were heard together. In the Duluth Case, the supreme court held that the membership was taxable under the statutes of the state, and, further, sustained the tax there laid as against contentions under the due process and equal protection clauses of the 14th Amendment. The court said: "We do not sustain the claims that the taxation of memberships in a board of trade or stock exchange would violate provisions of the Federal or state Constitution. . . . We see no improper classification here, nor any lack of equality or uniformity. Nor would it be double taxation The members of the board are not required to pay taxes on the physical and tangible property of the board, nor does the board pay taxes upon the intangible rights which constitute the value of a membership. And we hold that proceedings to tax such a membership do not deprive the member of his property without due process of law, take property for public use without just compensation, or deny such member the equal protection of the laws, in violation of familiar provisions of the Federal Constitution and Amendments." State v. McPhail, supra.

At the same time, the decision in the instant case was rendered with an opinion *per curiam* in which, after a summary statement of the nature of the case, the court ruled as follows: "The case was submitted on briefs in this court with State v. McPhail. The decision in that case, filed herewith, controls this. Judgment affirmed." 124 Minn. 539, 145 N. W. 112. And this writ of error has been sued out.

The defendants in error insist that the decision of the state court involved no Federal question; that the suit was for injunction and that the plaintiffs had an adequate [188] remedy at law. They invoke the familiar rule that when the decision of the state court rests upon an independent or non-Federal ground, adequate to support it, this court has no jurisdiction. Hammond v. Johnston, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; Gaar, S. & Co. v. Shannon, 223 U. S. 468, 470, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236. But the state court, which alone determines local questions of procedure, did not deny relief because an injunction was sought or because it was considered that under the state law another remedy was appropriate. It said nothing whatever as to the form of remedy, or as to the right to proceed in equity, but considered and decided the case on the merits, including the Federal questions. No other conclusion can be drawn from the fact that the sole reason for the decision is found in the reference to State v. McPhail as authority,—a case in which no procedural question was involved. There, the action was brought by the state itself to recover the tax, and the decision was directly and exclusively upon the validity of the tax, it being sustained first, as one authorized by the state law, and, then, as not repugnant to the Federal Constitution. The fact that there were some objections to the constitutional validity of the tax in the present case that were not urged in the McPhail Case does not affect the matter. They were all grounds for the contention that the tax denied the equal protection of the laws and took property without due

process of law. That was the ultimate contention which was overruled with respect to the tax in the McPhail Case, and the allusion to that decision as "controlling" plainly meant that the court thought that all the reasons urged for a different view were without merit, and that the present tax did not violate the 14th Amendment. It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has [189] jurisdiction to review the judgment, assuming it to be a final judgment, as it is here. Hancock Nat. Bank v. Farnum, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506; San José Land & Water Co. v. San Jose Ranch Co. 189 U. S. 177, 179, 180, 47 L. ed. 765, 766, 768, 23 Sup. Ct. Rep. 487; American Exp. Co. v. Mullins, 212 U. S. 311, 313, 53 L. ed. 525, 526, 29 Sup. Ct. Rep. 381, 15 Ann. Cas. 536; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 63, 53 L. ed. 695, 698, 29 Sup. Ct. Rep. 397; Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309; North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159; Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 49, 59 L. ed. 1192, 1195, 35 Sup. Ct. Rep. 671.

It is not to be doubted—giving full effect to all the allegations of the complaint—that the memberships, despite the restrictions of the rules, were property. See Hyde v. Woods, 94 U. S. 523, 525, 24 L. ed. 264, 265; Sparhawk v. Yerkes, 142 U. S. 1, 12, 35 L. ed. 915, 917, 12 Sup. Ct. Rep. 104; Page v. Edmunds, 187 U. S. 596, 604, 47 L. ed. 318, 322, 23 Sup. Ct. Rep. 200. As was said by the supreme court of the state with respect to memberships deemed to be essentially similar: "A membership has a use value and a buying and selling or market value. It is bought and sold. . . . There is a lien upon it for balances due members. . . . It passes by will or descent and by insolvency or bankruptcy. . . . It is true that there are certain restrictions in the ownership and use of a membership. These may increase or decrease its value, probably in the case of a board of trade membership greatly enhance it. They do not prevent its being property." 124 Minn. p. 401. Of course, there is nothing in the Federal Constitution which prevents the memberships here involved from being taxed, and the question whether they were in fact taxable under the statutes of the state was a matter of local law with which we are not concerned. It was the province of the state court to determine what the terms of the taxing statute authorized, and it is for this court to say whether, in view of the operation of the statute, as thus defined, it overrides the Federal right which is claimed. Clement Nat. Bank v. Vermont, 231 U. S. 130, 134, 58 L. ed. 153, 155, 34 Sup. Ct. Rep. 31. It is insisted that there was no legislative [190] authority for an official listing of this kind of property, or for an official estimate of its value, and hence that there is no valid taxing scheme. But it is manifest that the state court, in holding the memberships to be embraced within the description of property subject to taxation under the statutes, also held that the statutory scheme, including the provision for listing and for official valuation, did apply to these memberships. See 124 Minn. pp. 404–406. Complaint is made that in the present case the memberships were assessed under the head of "Moneys and Credits." But this is an administrative matter which does not touch the fundamentals contemplated by the 14th Amendment. If there was any error or irregularity in the particular application of the state statute in the case of the assessments in question, it was subject to correction according to the local practice; and the argument that the statute is defective because there is no legislative authority for listing and estimate we think is directly opposed to the construction placed upon the statute by the state court. It is also apparent that there is no merit in the objection that there was a violation of the Federal Constitution through what is called double taxation. The membership, as property, was distinct from the assets of the corporation. Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 584, 18 L. ed. 229, 234; Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. ed. 558, 560; Davidson v. New Orleans, 96 U. S. 97, 106, 24 L. ed. 616, 620; Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456; and see St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 367, 368, 59 L. ed. 265, 273, 274, 35 Sup. Ct. Rep. 99. The correct valuation of the membership, in view of all relevant facts, was a matter for the taxing officials, and we do not sit to review their judgment. The complaint makes no case whatever of a denial by the statutory scheme of proper opportunity for the hearing of grievances where the estimate is regarded by the members as excessive. See New York ex rel. Brooklyn City R. Co. v. New York State Tax Comrs. 199 U. S. 48, 51, 52, 50 L. ed. 79, 84, 85, 25 Sup.

Ct. Rep. 713; Orient Ins. Co. v. Board of Assessors, 221 [191] U. S. 358, 360, 55 L. ed. 769, 771, 31 Sup. Ct. Rep. 554. On the contrary, the complaint alleges that the plaintiff duly appeared before the Board of Equalization of the city of Minneapolis and the Minnesota Tax Commission, acting as the State Board of Equalization, and on behalf of himself and other members asked to have the assessment canceled, or, if not canceled, to have it reduced to what was asserted to be a fairer valuation, and that the boards were each apparently inclined to grant the application; but, as it would seem, withheld action pending the decision of the courts as to the taxability of the memberships.

There is the further contention with respect to the authority of the state to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicil. But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the exchange in the city of Minneapolis, and we are of the opinion, applying a principle which has had recognition with respect to credits in favor of nonresidents arising from business within the state, and in the case of shares of stock of domestic corporations, that it was competent for the state to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or nonresidents, at the place within the state where the exchange was located. Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 499, 22 L. ed. 189, 193; New Orleans v. Stempel, 175 U. S. 309, 319, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 403, 48 L. ed. 232, 238, 24 Sup. Ct. Rep. 109; Corry v. Baltimore, 196 U. S. 466, 474, 49 L. ed. 556, 561, 25 Sup. Ct. Rep. 297; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 402, 51 L. ed. 853, 856, 27 Sup. Ct. Rep. 499; Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346, 354, 355, 55 L. ed. 762, 767, 768, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550; Hawley v. Malden, 232 U. S. 1, 12, 58 L. ed. 477, 482, 34 Sup. Ct. Rep. 201.

With respect to discrimination, there is no tenable objection because of the exemption from taxation (if they were exempt) of the various organizations to which the plaintiffs in error refer,—such as the "Associated Press, [192] lodges, fraternal orders, churches, etc." The description itself suggests manifest distinctions which the state is entitled to observe in its taxing policy, despite the general allegation that these associations stand "in a similar position." 60 L. ed.

The state has a broad discretion as to tax exemptions (Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533), and the averments of the complaint are very far from showing any basis for a charge of violation of the 14th Amendment by unwarrantable discrimination. And, finally, with respect to the argument that the plaintiffs in error were denied due process of law because the state court decided the case upon the authority of the McPhail Case, without referring to the asserted distinctions between the two cases, it is enough to say that the cause was heard and determined, and, viewing the judgment as passing upon all the Federal questions raised, we find no error.

Judgment affirmed.

Mr. Justice McReynolds is of opinion that the writ of error should be dismissed.

UNITED STATES, Appt.,
v.
W. J. MORRISON, Finley Morrison, and the Sligh Furniture Company.

(See S. C. Reporter's ed. 192–214.)

Public lands — school grant — when title passes — necessity of survey.

1. Title did not pass to the state of Oregon under the provision of the act of February 14, 1859 (11 Stat. at L. 383, chap. 33, Comp. Stat. 1913, § 6799 (42)), § 4, admitting Oregon as a state, that sections 16 and 36 in each township, or equivalent lands if such sections have been sold or otherwise disposed of, "shall be granted" to said state for the use of the schools, until the school sections were defined by a completed survey, and until that time Congress was at liberty to dispose of the land, its obligation in that event being properly to compensate the state for whatever deficiencies resulted.

[For other cases, see Public Lands, I. c, 3, in Digest Sup. Ct. 1908.]

Public lands — school grant — control of Congress.

2. No limitation upon the authority of Congress to dispose of public lands before title thereto passed to the state, upon a completed survey, under the act of February 14, 1859 (11 Stat. at L. 383, chap. 33, Comp. Stat. 1913, § 6799 (42)), § 4, admitting Oregon as a state, was imposed by U. S. Rev. Stat. §§ 2275, 2276, Comp. Stat. 1913, §§ 4860, 4861, as amended by the act of February 28, 1891 (26 Stat. at L. 796, chap. 384, Comp Stat. 1913, §§ 4860, 4861), protecting settlements when made "before the survey of the lands in the field."

[For other cases, see Public Lands, I. c, 3, in Digest Sup. Ct. 1908.]

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Public lands — school grant — when survey is complete.

3. The survey of the lands embraced in the school grant made by the act of February 14, 1859 (11 Stat. at L. 383, chap. 33, Comp. Stat. 1913, § 6799 (42)), § 4, admitting Oregon as a state, did not become a completed administrative act so as to prevent Congress from otherwise disposing of such lands, until such survey was finally accepted by the Commissioner of the General Land Office, although such survey, after prolonged examination, was finally approved by him without modification.

[For other cases, see Public Lands, I. c. 3, in Digest Sup. Ct. 1908.]

Public lands — survey — official approval.

4. The descriptions by townships of lands withdrawn by the Secretary of the Interior for forestry purposes, and the reference in the official correspondence in connection with such withdrawal to a diagram showing townships and sections, does not constitute an official approval of the survey of such lands.

[For other cases, see Public Lands, I. e, 4, in Digest Sup. Ct. 1908.]

Public lands — forest reserve — excepted lands.

5. The exception in the President's proclamation of January 25, 1907 (34 Stat. at L. 3270), enlarging the Cascade Forest Reserve, "of all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent," referred to withdrawals or reservation by the government itself for other and inconsistent uses, and was made with a view to avoiding confusion in governmental action, not to let in subsequently accruing claims of title under school grants, as to which Congress had indicated its purpose to make compensation for deficiencies when lands which otherwise would have passed to the state thereunder had been duly taken for reservations.

[For other cases, see Public Lands, I., in Digest Sup. Ct. 1913 Supp.]

Public lands — forest reserve — unsurveyed lands.

6. Unsurveyed lands might be reserved by the President in the exercise of his authority under the acts of March 3, 1891 (26 Stat. at L. 1103, chap. 561, Comp. Stat. 1913, § 5121), § 24, and June 4, 1897 (30 Stat. at L. 36, chap. 2), to establish forest reservations on the public domain.

[For other cases, see Public Lands, I., in Digest Sup. Ct. 1913 Supp.]

[No. 138.]

Argued December 16, 1915. Decided February 21, 1916.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed, with directions to dismiss the bill, a decree of the District Court for the District of Oregon in favor of the United States in a suit by it to quiet title. Reversed, and decree of District Court affirmed.

See same case below, 128 C. C. A. 485, 212 Fed. 29.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellant:

The grant of school lands made to the state of Oregon by the act of February 14, 1859, did not operate to vest title in the state to any particular tract of land until the same was surveyed under the authority of the United States.

Lessieur v. Price, 12 How. 59, 13 L. ed. 893; United States v. Thomas, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; Wisconsin v. Hitchcock, 201 U. S. 202, 50 L. ed. 727, 26 Sup. Ct. Rep. 498; Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204; Re Colorado, 6 Land Dec. 412; California v. Wright, 24 Land Dec. 54; South Dakota v. Riley, 34 Land Dec. 657; South Dakota v. Thomas, 35 Land Dec. 171.

Public lands of the United States are not surveyed until the plat and field notes thereof are approved by the surveyor general, accepted by the Commissioner of the General Land Office, and filed in the local land office.

Barnard v. Ashley, 18 How. 43, 15 L. ed. 285; California v. Townsend, 2 Cupp's Public Land Laws, 1117; Anderson v. Minnesota, 37 Land Dec. 390; Tubbs v. Wilhoit, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208.

Regulations of the Land Department have all the force and effect of law. They are made in furtherance of the statutes, which cannot well be enforced without them.

Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811, 46 C. C. A. 476, 107 Fed. 597.

Mr. Mark Norris argued the cause, and, with Mr. Oscar E. Waer, filed a brief for appellee, the Sligh Furniture Company:

The grant was a grant *in præsenti*.

Ham v. Missouri, 18 How. 126, 15 L. ed. 334; Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; United States v. Thomas, 151 U. S. 577, 583, 38 L. ed. 276, 278, 14 Sup. Ct. Rep. 426; Alabama v. Schmidt, 232 U. S. 168, 58 L. ed. 555, 34 Sup. Ct. Rep. 301; United States v. Tully, 140 Fed. 904; Heydenfeldt v. Daney, Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204; Minnesota v. Hitchcock, 185

U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Wisconsin v. Hitchcock, 201 U. S. 202, 50 L. ed. 727, 26 Sup. Ct. Rep. 498; St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 5, 35 L. ed. 79, 11 Sup. Ct. Rep. 389; United States v. Oregon & C. R. Co. 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261; Butts v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; Southern P. R. Co. v. United States, 168 U. S 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; United States v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; Menotti v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; Missouri, K. & T. R. Co. v. Cook, 163 U. S. 491, 41 L. ed. 239, 16 Sup. Ct. Rep. 1093; New York Indians v. United States, 170 U. S. 1, 42 L. ed. 927, 18 Sup. Ct. Rep. 531; Wright v. Roseberry, 121 U. S. 488, 501, 30 L. ed. 1039, 1042, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, 138 U. S. 134, 136, 34 L. ed. 887, 888, 11 Sup. Ct. Rep 279; Rogers Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 570, 41 L. ed. 552, 557, 17 Sup. Ct. Rep. 188; Chandler v. Calumet & H. Min. Co. 149 U. S. 79, 91, 37 L. ed. 657, 661, 13 Sup. Ct. Rep. 798; French v. Fyan, 93 U. S. 169, 23 L. ed. 812; Martin v. Marks, 97 U. S. 345, 24 L. ed. 940; Hannibal & St. J. R. Co. v. Smith, 9 Wall. 95, 19 L. ed. 599; Rice v. Sioux City & St. P. R. Co. 110 U. S. 695, 28 L. ed. 289, 4 Sup. Ct. Rep. 177; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 591, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208.

If the grant was not *in præsenti*, title vested when the field survey was made.

Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Hibberd v. Slack, 84 Fed. 571.

If title had not vested upon the completion of the field survey, it did vest upon its approval by the surveyor general of Oregon.

Endlich, Interpretation of Statutes, ed. 1888, § 85; Platt v. Union P. R. Co. 99 U. S. 48, 63, 25 L. ed. 424, 429; Smith v. Townsend, 148 U. S. 490, 494, 37 L. ed. 533, 534, 13 Sup. Ct. Rep. 634; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 502, 38 L. ed. 793, 799, 14 Sup. Ct. Rep. 968; Dewey v. United States, 178 U. S. 510, 520, 44 L. ed. 1170, 1174, 20 Sup. Ct. Rep. 981; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; Daniels v. Wagner, 237 U. S. 547, 59 L. ed. 1102, L.R.A.1916A, 1116, 35 Sup. Ct. Rep. 740; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878, 11 Mor. Min. Rep. 673; Wright v. Roseberry, 121 U. S. 488, 519, 30 L. ed. 1039, 1048, 7 Sup. Ct. Rep. 985; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Davis v. Wiebbold, 139 U. S. 507, 529, 35 L. ed. 238, 246, 11 Sup. Ct. Rep. 628; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The official use of the plat as filed in the General Land Office constituted an approval of it, which binds the United States.

Wright v. Roseberry, 121 U. S. 488, 501, 30 L. ed. 1039, 1042, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, 138 U. S. 134, 144, 145, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279; Cooper v. Roberts, 18 How. 173, 15 L. ed. 338.

Immediately upon the formal approval of the survey, the statutory reservation and grant originally made to Oregon destroyed the effect of the temporary withdrawal, and vested title in the state.

Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 Sup. Ct. Rep. 412; Daniels v. Wagner, 237 U. S. 547, 59 L. ed. 1102, L.R.A.1916A, 1116, 35 Sup. Ct. Rep. 740; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 646, 26 L. ed. 875, 878, 11 Mor. Min. Rep. 673; Wright v. Roseberry, 121 U. S. 488, 519, 30 L. ed. 1039, 1048, 7 Sup. Ct. Rep. 985; Doolan v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The lands had not been "sold or otherwise disposed of" when the survey was formally approved on January 31, 1906, and title therefore vested in the state of Oregon on that date, if not before.

Ham v. Missouri, 18 How. 126, 15 L. ed. 334; Conley v. State, 85 Ga. 348, 11 S. E. 659; Platt v. Union P. R. Co. 99 U. S. 48, 25 L. ed. 424; Roberson v. State, 100 Ala. 37, 14 So. 554; Maxwell v. State, 140 Ala. 131, 37 So. 266.

The alleged executive withdrawal of these lands made December 16, 1905, was of no force.

Wolsey v. Chapman, 101 U. S. 769, 25 L. ed. 920; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; United States v. Blendauer, 122 Fed. 703; Newhall v. Sanger, 92 U. S. 761, 763, 23 L. ed. 769, 770; Bardon v. Northern P. R. Co. 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; Barker v. Harvey, 181 U. S. 481, 490, 45 L. ed. 963, 968, 21 Sup. Ct. Rep. 690; Union P. R. Co. v. Harris, 215 U. S. 388, 54 L. ed. 247, 30 Sup. Ct. Rep. 138; Barnard v. Ashley, 18 How. 43, 46, 15 L. ed. 285, 286; Hosmer v. Wallace, 97 U. S. 575, 579, 24 L. ed. 1130, 1131; Buxton v. Traver, 130 U. S. 232, 235, 32 L. ed. 920, 921, 9 Sup. Ct. Rep. 509.

The presidential proclamation of January

25, 1907, was of no force as far as the lands in question were concerned because

(a) The proclamation did not affect these lands.

(b) The proclamation expressly excepted the lands.

Bardon v. Northern P. R. Co. 145 U. S. 535, 539, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 856; Missouri, K. & T. R. Co. v. Roberts, 152 U. S. 114, 119, 38 L. ed. 377, 380, 14 Sup. Ct. Rep. 496; United States v. Blendauer, 122 Fed. 703.

Mr. Richard Sleight filed a brief for appellees W. J. and Finley Morrison:

The grant of the school sections to the state irrevocably pledged this land to the state, and placed it beyond the power of Congress or the President to divert it to other purposes.

Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440; Cooper v. Roberts, 18 How. 173, 15 L. ed. 338; Ham v. Missouri, 18 How. 126, 15 L. ed. 334; Schneider v. Hutchinson, 35 Or. 253, 76 Am. St. Rep. 474, 57 Pac. 324.

The title to school lands became vested in the state when the survey was made in the field.

Hibberd v. Slack, 84 Fed. 571; Oakley v. Stuart, 52 Cal. 535.

The act of 1891 (U. S. Rev. Stat. § 2275, Comp. Stat. 1913, § 4860, as amended) expressly gives the state the right of election to select other lands in lieu of those in the school sections which have been embraced within a reservation, or to await the extinguishment of the reservation, and the restoration of the lands therein embraced to the public domain, and then to take the specific lands in such sections.

United States v. Thomas, 151 U. S. 577, 583, 38 L. ed. 276, 278, 14 Sup. Ct. Rep. 426.

[196] Mr. Justice Hughes delivered the opinion of the court:

The United States brought this suit to quiet title to lands in section 16, township 3 south, range 6 east, Willamette Meridian, Oregon. By the act of February 14, 1859, chap. 33 (11 Stat. at L. 383, Comp. Stat. 1913, § 6799 (42)), for the admission of Oregon into the Union, it was provided (§ 4):

"That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. . . . Provided, however, That in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

The propositions of the enabling act were accepted by the legislative assembly of the state of Oregon on June 3, 1859. 1 Lord's Oregon Laws, pp. 28, 29.

There was a stipulation of facts, in substance, as follows:

Prior to May 27, 1902, no survey of any kind had been made by the United States of the lands in question. On June 2, 1902, a field survey was made under the direction of the United States surveyor general of Oregon. This officer approved the survey on June 2, 1903, and on June 8, 1903, transmitted copies of plat of survey and field notes to the Commissioner of the General Land Office. On October 13, 1904, the Commissioner informed the surveyor general that the deputy had failed to describe [197] the kind of instrument used in the execution of the work, or to record any polaris or solar observations at that time, and that a supplemental report would be necessary. Additional field notes were transmitted to the Commissioner on September 8, 1905. The Commissioner accepted the survey on January 31, 1906. In view of reports of illegal settlement, it was directed that no entries should be allowed until further permission, as the survey was accepted "for payment only." The plat was received in the local land office on February 7, 1906. On November 16, 1907, the suspension was revoked, and the surveyor general of Oregon was directed to place the plat on file in the local land office, and it was filed accordingly in substantially the same form in which it had been accepted by the surveyor general "without change or correction."

On December 16, 1905, the Secretary of the Interior "temporarily withdrew for forestry purposes from all forms of disposition whatsoever, except under the mineral laws of the United States, all the vacant and unappropriated public lands" within described areas, which include the land in controversy. Notice of this withdrawal was given on December 19, 1905, to the register and receiver of the local land office. In taking this action the Secretary of the Interior and the Commissioner described the lands "according to the rectangular system of government survey." On January 25, 1907,

the President issued a proclamation enlarging the Cascade Range Forest Reserve so as to include the section sixteen in question and other lands. This proclamation, by its terms, excepted "all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent." 34 Stat. at L. 3270.

It was the contention of the government that, by reason of the withdrawal by executive order for forestry purposes prior to the acceptance of the survey by the [198] Commissioner of the General Land Office, the title to the lands did not pass to the state under the school grant. The appellees claimed title under a conveyance from the state, its certificates of sales having been executed on October 10, 1906, and its deed on January 9, 1907. Decree in favor of the United States (United States v. Cowlishaw, 202 Fed. 317) was reversed by the circuit court of appeals (Morrison v. United States, 128 C. C. A. 485, 212 Fed. 29), and the government appeals to this court.

The first enactment for the sale of public lands in the western territory provided for setting apart section 16 of every township for the maintenance of public schools (ordinance of 1785; Cooper v. Roberts, 18 How. 173, 177, 15 L. ed. 338, 339); and, in carrying out this policy, grants were made for common-school purposes to each of the public-land states admitted to the Union. Between the years 1802 and 1846 the grants were of every section 16,[1] and, thereafter, of sections 16 and 36.[2] In some instances, additional sections have been granted. In the case of Oregon, the following provision had been made in establishing the territorial government (act of August 14, 1848, chap. 177, § 20, 9 Stat. at L. 323, 330):

"That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each [199] township in said territory shall be, and the same is hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same."

In 1850, Congress created the office of surveyor general of the public lands in Oregon, and provided for survey and for donations to settlers (act of September 27, 1850, chap. 76, 9 Stat. at L. 496), and this act provided (§ 9): "That no claim to a donation right . . . upon sections sixteen or thirty-six, shall be valid or allowed, if the residence and cultivation upon which the same is founded shall have commenced after the survey of the same." By the act of February 19, 1851, chap. 10 (9 Stat. at L. 568), Congress authorized the legislative assemblies of the territories of Oregon and Minnesota "to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste sections numbered sixteen and thirty-six . . . reserved in each township for the support of schools therein." In 1853 (act of January 7, 1853, chap. 6, 10 Stat. at L. 150) the legislative assembly of Oregon was authorized "in all cases where the sixteen or thirty-six sections, or any part thereof, shall be taken and occupied under the law making donations of land to actual settlers" to select, "in lieu thereof, an equal quantity of any unoccupied land in sections, or fractional sections, as the case may be." And these provisions were followed in 1859 by the proposition of the enabling act (supra) accepted by the state of Oregon that these sections "in every township of public lands" within the state, and "where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

Prior to survey, the designated sections were undefined and the lands were unidentified. It is insisted by the [200] appellees that there was a grant *in præsenti*, under which the state acquired a vested right in

[1] Ohio (2 Stat at L. 175, chap. 40); Louisiana (2 Stat. at L. 394, chap. 39, 5 Stat. at L. 600, chap. 33); Indiana (3 Stat. at L. 290, chap. 57); Mississippi (2 Stat. at L. 234, chap. 27, 10 Stat. at L. 6, chap. 35); Illinois (3 Stat. at L. 430, chap. 67); Alabama (3 Stat. at L. 491, chap. 47); Missouri (3 Stat. at L. 547, chap. 22, Comp. Stat. 1913, § 6799 (42)); Arkansas (5 Stat. at L. 58, chap. 120); Michigan (5 Stat. at L. 59, chap. 121); Florida (5 Stat. at L. 788, chap. 75, Comp. Stat. 1913, § 6799(42)); Iowa (5 Stat. at L. 789, chap. 76, Comp. Stat. 1913, § 6799(42)); Wisconsin (9 Stat. at L. 58, chap. 89, Comp. Stat. 1913, § 6799(42)).

[2] California (10 Stat. at L. 246, chap. 145); Minnesota (11 Stat. at L. 167, chap. 60, Comp. Stat. 1913, § 6799(42)); Oregon (11 Stat. at L. 383, chap. 33); Kansas (12 Stat. at L. 127, chap. 20); Nevada (13 Stat. at L. 32, chap. 36, Comp. Stat. 1913, § 6799(42)); Nebraska (13 Stat. at L. 49, chap. 59); Colorado (18 Stat. at L. 475, chap. 139); North Dakota, South Dakota, Montana, and Washington (25 Stat. at L. 679, chap. 180); Idaho (26 Stat. at L. 215, chap. 656); Wyoming (26 Stat. at L. 222, chap. 664); Utah (28 Stat. at L. 109, chap. 138); Oklahoma (34 Stat. at L. 272, chap. 3335, Comp. Stat. 1913, § 5245); New Mexico (36 Stat. at L. 561, chap. 310); Arizona (36 Stat. at L. 572, chap. 310).

the lands, subject only to identification which would relate back to the date of the grant, and that "any sale or disposal" subsequent to that date "was illegal and void." It will be observed, however, that the language used is not that of a present grant. The expression is "shall be granted," and these words are used both with respect to the described sections and to the undefined indemnity lands which would be received in compensation for losses. In the latter case, there was obviously no present grant, and none, we think, was intended in the former. Attention is called to the words "herein granted" in the proviso of the enabling act, but this is a mere reference to what precedes, and does not change, or purport to change, the terms of the donation. It must have been manifest to Congress, executing this definite policy with respect to the vast area of the public lands, that not improbably a long period would elapse in the case of numerous townships before surveys would be completed. Not only was it inevitable that upon survey there would be found to be fractional townships in which there would be either no section sixteen, or thirty-six, or only a portion of one or the other, but in various instances there might be prior claims, or actual settlements, or it might appear before surveys were had that there were important public interests which, in the judgment of Congress, should be subserved by some other disposition of lands of a particular character. On the other hand, it was not important to the state that it should receive specific lands, if suitable indemnity were given. It was in this situation that, in making its school grants to the public-land states, Congress provided that the described sections, or equivalent lands if the former in whole or in part had "been sold or otherwise been disposed of," should be granted. Whether or not provision had already been made for [201] the sale or disposition of public lands within the borders of the state at the time of its admission, the language of the school grant was substantially the same. And we think that its import is clear. The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses; but Congress, in making its compacts with the states, did not undertake to warrant that the designated sections would exist in every township, or that, if existing, the state should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sections, the title to the lands *should pass* to the state provided sale or other disposition had not previously been made; and, if it had been made, that the state should be entitled to select equivalent lands for the described purpose.

By the act of May 20, 1826, chap. 83 (4 Stat. at L. 179, Comp. Stat. 1913, § 4861), there had been provision made for compensation in the case of townships and fractional townships, for which the stated appropriation for school purposes had not been made. In 1859, a further act was passed (Feb. 26, 1859, chap. 58, 11 Stat. at L. 385, Comp. Stat. 1913, § 4860), to the effect that where settlement with a view to pre-emption had been made "before the survey of the lands in the field" on sections 16 or 36, these sections should "be subject to the pre-emption claim of such settler." And it was added—"if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors; and other lands are also hereby appropriated to compensate deficiencies for school purposes where said sections sixteen or thirty-six are fractional in quantity, where one or both are wanting by [202] reason of the township being fractional, or from any natural cause whatever." These lands were to be selected in accordance with the principles of adjustment defined in the act of 1826. These provisions were incorporated in §§ 2275 and 2276 of the Revised Statutes (Comp. Stat. 1913, §§ 4860, 4861). And the latter were amended by the act of February 28, 1891, chap. 384 (26 Stat. at L. 796, Comp. Stat. 1913, §§ 4860, 4861), which in part provided: "And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States." In this manner, Congress has undertaken to discharge its obligation by assuring to the states the equivalent of the school-grant sections when these have "been sold or otherwise been disposed of."

The question now presented was not involved in Ham v. Missouri, 18 How. 126, 15 L. ed. 334, or in Cooper v. Roberts, 18 How. 173, 15 L. ed. 338. The former case related to the school grant to Missouri under the act of March 6, 1820 (3 Stat. at L. 547, chap. 22, Comp. Stat. 1913, § 6799, (42)). Ham had been indicted for waste and trespass on the 16th section of one of the townships, and his conviction was affirmed. In defense, he claimed title under a Spanish grant. This had been rejected by the Board of Commissioners in 1811, and it appeared

that the United States had full power of disposition at the time of the donation to the state. Referring to the provision for the grant of equivalent lands, to take the place of those "sold or otherwise disposed of," the court said: "Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase 'or otherwise dispose of' must signify some disposition of the property equally efficient, and equally incompatible with any right in the state, present or potential, as deducible from the act of 1820, and the ordinance of the same year." But in the case cited there [203] had been no such disposition. Reliance was placed by Ham upon an act of 1828 (6 Stat. at L. 386, chap. 135) confirming the grant to his predecessors, but this confirmatory act explicitly provided that it should not "prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation." And it further appeared that the survey had been made of the land in question before the confirmatory act was passed (see 18 How. p. 134). In Cooper v. Roberts, supra, the plaintiff asserted title under the school grant made to Michigan (act of June 23, 1836, 5 Stat. at L. 59, chap. 121). The section 16 in controversy had been surveyed in 1847. Sale had been made by the state in February, 1851, and its patent had issued in November of that year. It was in 1850, after the lands had been surveyed, that the defendant's grantor had applied to the officers of the land office to enter the land, and the entry was allowed in 1852 with a reservation of the rights of Michigan, which the Secretary of the Interior deemed to be superior. It was in these circumstances, it being found that there was no legal impediment through any legislation, that the court held that the title had passed to the state.

In the case of Heydenfeldt v. Daney Gold & S. Min. Co. 93 U. S. 634, 23 L. ed. 995, 13 Mor. Min. Rep. 204, there had been a disposition of the land under the authority of Congress between the date of the school grant and the date of the survey. This case arose under the school grant to Nevada (act of March 21, 1864, 13 Stat. at L. 30, 32, chap. 36), which was one of the exceptional instances where words of present grant were used, these, however, being qualified by the clause relating to sale or other disposition. The act provided: "That sections numbers sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto . . . shall be, and are hereby, granted to said state for the support of common schools." The plaintiff claimed under a patent [204] issued by the state of Nevada in 1868. The land was mineral land, and the defendant was in possession, carrying on the mining business, having obtained a patent from the United States under the acts of July 26, 1866 (14 Stat. at L. 251, chap. 262), as amended, and May 10, 1872 (17 Stat. at L. 91, chap. 152, Comp. Stat. 1913, § 4614). The entry and claim of the defendant's predecessors in interest were made in 1867, prior to the survey of the section in question. It was held that the lands were subject to the disposition of Congress until the survey and its approval; and hence the judgment in favor of the defendant was affirmed. The words of present grant were deemed to be restricted by the words of qualification. The court said that it was intended to place Nevada "on an equal footing with states then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other states which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the mean time, further improvements would be arrested, and the persons who, prior to the surveys, had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections. . . . Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it, the whole or any part of a 16th or 36th section had been disposed of, the state was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the state was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left [205] free to legislate touching the national domain in any way it saw fit, to promote the public interests." It is said that the Nevada school grant added the words "by any act of Congress" to the phrase "otherwise disposed of," and that the former words are not in the Oregon grant. But this does not mark a distinction, as "otherwise disposed of," of course, implies that the disposition shall be by competent authority. It is also urged that the court emphasized the fact that there had been no sale or disposition of the public lands in Nevada prior to

the enabling act, and therefore that the clause could refer only to future disposition; whereas, in the case of Oregon, there had been earlier provisions for the disposal of the public domain. But Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the states on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another; it covered other dispositions, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed. Nor is a distinction to be observed between mineral lands and other lands, if in fact Congress disposed of them. The validity of the disposition would not be affected by the character of the lands, although this might supply the motive for the action of Congress. We regard the decision in the Heydenfeldt Case as establishing a definite rule of construction.

In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440. That was an action of replevin to recover logs cut on a section 16 in Wisconsin which had been granted by the enabling act of 1846 (9 Stat. at L. 58, chap. 89, Comp. Stat. 1913, § 6799 (42)). The exterior lines of the township in which the land was [206] situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the state issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. "The fee was in the United States, subject to that right, and could be transferred by them whenever they chose." By the treaty of 1848 (9 Stat. at L. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. at L. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently, a portion of this reservation was assigned by another treaty to the Stockbridge and Munsee tribes, and for the benefit of the latter Congress passed the act of February 6, 1871 (16 Stat. at L. 404, chap. 38), providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were *cut*. The court held that the title had vested in the state, and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the compact with the state (the school grant) the lands were "withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted;" and that after this compact "no subsequent sale or other disposition . . . could defeat the appropriation." But it was also stated that "when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation." That is, the lands had been surveyed in 1854; prior to [207] that time, there had been no other disposition of the fee by the United States; the title had vested in the state, subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the act of 1871. What was said in the opinion must be considered in the light of the facts (Weyerhaeuser v. Hoyt, 219 U. S. 380, 394, 55 L. ed. 258, 264, 31 Sup. Ct. Rep. 300). The Heydenfeldt Case was not cited and cannot be regarded as overruled. See New York Indians v. United States, 170 U. S. 1, 18, 42 L. ed. 927, 933, 18 Sup. Ct. Rep. 531; Minnesota v. Hitchcock, 185 U. S. 375, 399-401, 46 L. ed. 955, 967, 968, 22 Sup. Ct. Rep. 650.

The rule which the Heydenfeldt Case established has, we understand, been uniformly followed in the land office. After reviewing the cases, Secretary Lamar concluded (December 6, 1887, Re Colorado, 6 Land Dec. 412, 417) that the school grant "does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the state, and if at that date said sections have been sold or disposed of, the state takes indemnity therefor." And see, to the same effect, Niven v. California, 6 Land Dec. 439; State v. Kuhn, 24 Land Dec. 12, 13; State v. Wright, 24 Land Dec. 54, 57; State v. Riley, 34 Land Dec. 657, 660; State v. Thomas, 35 Land Dec. 171, 173; Re F. A. Hyde & Co. 37 Land Dec. 164, 166; Re Montana, 38 Land Dec. 247, 250.

The case of United States v. Thomas, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426, involved the Wisconsin school grant, the question being whether the Federal court in that state had jurisdiction to try an Indian charged with the murder of an-

other Indian within the limits of section 16 in a township forming part of an Indian reservation. It appeared that by treaty prior to the enabling act of 1846 the Indians had stipulated for the right of occupancy; that they had never been removed from the lands; and that, by treaty [208] of 1854, the particular reservation in question had been established. The lands were not surveyed until 1855. From any point of view it was clear that the title had never vested in the state, except as subordinate to the right of occupation of the Indians, and it was held that the Federal jurisdiction existed. Minnesota v. Hitchcock, supra, was a suit brought by the state to enjoin the Secretary of the Interior from selling any sections 16 and 36 in the Red Lake Indian Reservation, the sales having been authorized by the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), which was passed for the relief of the Chippewa Indians. The school grant to Minnesota was made by the enabling act of 1857 (11 Stat. at L. 167, chap. 60, Comp. Stat. 1913, § 6799 (42)). The lands in question, however, were not surveyed until after the act of 1889 had been passed, and the agreement it contemplated had been made with the Indians. The court dismissed the bill of the state. It was held that when Congress undertook in 1889 "to make provision for this body of lands, it could have, by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant;" but that Congress also "had the power to make arrangements with the Indians by which the entire tract would be otherwise appropriated. . . . Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the entire tract under a trust for its disposition in a particular way." The Heydenfeldt case was cited with approval. Referring to the joint resolution passed by Congress on March 3, 1857 (11 Stat. at L. 254), to the effect that in case of settlements on the 16th or 36th sections, their selection as town sites, or their reservation for public uses prior to survey, other lands should be selected in lieu thereof, [209] and to the contention of the state that the "public uses" thus contemplated were "governmental uses," the court said: "It is unnecessary to rest upon a determination of this question. We refer to the resolution as an express declaration by Congress that the school sections were not granted to the state absolutely, and beyond any further control by Congress, or any further action under the general land laws. As in Heydenfeldt v. Daney Gold & S. Min. Co. supra, priority was given to a mining entry over the state's school right, so here, in terms, preference is given to private entries, town-site entries, or reservations for public uses. In other words, the act of admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the act of February 28, 1891, although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands "where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

The case of Wisconsin v. Hitchcock, 201 U. S. 202, 50 L. ed. 727, 26 Sup. Ct. Rep. 498, followed United States v. Thomas, and Minnesota v. Hitchcock, supra. In Alabama v. Schmidt, 232 U. S. 168, 58 L. ed. 555, 34 Sup. Ct. Rep. 301, there was no question as to the acquisition of title by the state. It was held that, assuming that the state had acquired title to the lands embraced in the school grant, it had authority to subject the lands in its hands to the ordinary incidents of other titles in the state, including that of adverse possession.

[210] We conclude that the state of Oregon did not take title to the land prior to the survey; and that until the sections were defined by survey and title had vested in the state, Congress was at liberty to dispose of the land, its obligation in that event being properly to compensate the state for whatever deficiencies resulted.

The remaining question, then, is whether there had been a survey prior to an authorized withdrawal for forestry purposes. The surveying of the public lands is an administrative act confided to the control of the Commissioner of the General Land Office under the direction of the Secretary of the Interior. Act of July 4, 1836, chap. 352, 5 Stat. at L. 107, Rev. Stat. § 453, Comp. Stat. 1913, § 699. It was competent for the Commissioner, acting within this authority, to direct how surveys should be made, and to require that they should be subject to his examination and approval before they were filed as officially complete in the local land office. Cragin v. Powell, 128 U. S. 691, 697, 698, 32 L. ed. 566, 568, 9 Sup. Ct. Rep. 203; Tubbs v. Wilhoit, 138 U. S. 134, 143, 144, 34

L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279; Knight v. United Land Asso. 142 U. S. 161, 177, 182, 35 L. ed. 974, 979, 981, 12 Sup. Ct. Rep. 258; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 594, 42 L. ed. 591, 593, 18 Sup. Ct. Rep 208. This was a continuing authority which was not suspended by the school grant to the state. The subsequent adoption of rules relating to surveys did not alter the terms of the grant, but these rules did control the administrative action, which, in view of the terms of the grant, was necessary to make the grant effective. By order of April 17, 1879, the Commissioner required that surveyors general should not "file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved," and the surveyors general "officially notified to that effect." Re F. A. Hyde & Co. 37 Land Dec. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see Tubbs v. Wilhoit, 138 U. S. 134, 143, 144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279); and it necessarily follows that the making of the field survey and its approval [211] by the surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner, and for that purpose copies of the plat of survey and field notes were transmitted to the Commissioner, who, not being satisfied, required a supplemental report. The matter was still in abeyance when the lands in controversy were withdrawn for forestry purposes by the Secretary of the Interior on December 16, 1905. Reference is made to the terms of the territorial act of 1848 (supra) with respect to the reservation of the described sections when the lands were "surveyed . . . preparatory to bringing the same into market," but this provision furnishes no ground for the contention that an incomplete and unapproved survey was intended. Much less can it be said that, under the grant of the enabling act of 1859, the title would pass at any intermediate stage of the survey. Nor is there merit in the contention that is based on § 2275 of the Revised Statutes as amended by the act of February 28, 1891 (supra), protecting settlements when made "before the survey of the lands in the field." That act imposes no limitation upon the authority of Congress to dispose of the lands before title passes to the state; and if title passes upon survey, it must be upon a survey duly completed according to the authorized regulations of the Department. It is said, however, that in this case the plat was officially used by the Commissioner of the General Land Office and the Secretary of the Interior in connection with the withdrawal under consideration, and hence that the survey must be deemed to have been officially approved. Wright v. Roseberry, 121 U. S. 488, 517, 30 L. ed. 1039, 1047, 7 Sup. Ct. Rep. 985; Tubbs v. Wilhoit, supra. It is true that the lands withdrawn were conveniently described according to townships, and that the official correspondence referred to an accompanying diagram showing the townships and sections. But neither the [212] correspondence nor the diagram contained any reference to a survey of the lands in question or constituted an approval of a survey. These lands still remain to be officially defined in the appropriate manner, and according to the agreed statement the survey was accepted by the Commissioner of the General Land Office, as stated, on January 31, 1906, and was filed in the local land office on November 16, 1907, entries during the interval having been suspended pending certain investigations. We think that it is immaterial that the survey was finally approved by the Commissioner without modification, for pending the approval it remained in his hands, officially incomplete, awaiting the result of his examination. Again, it is urged that the survey, when approved, related back to the date of the grant, or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey, which, as we have seen, is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of relation cannot be invoked to destroy this authority.

In establishing and enlarging the Cascade Range Forest Reserve, the President acted under the express authority conferred by the acts of March 3, 1891, chap. 561, § 24 (26 Stat. at L. 1095, 1103, Comp. Stat. 1913, §§ 5116, 5121), and June 4, 1897, chap. 2 (30 Stat. at L. 11, 36). The power to establish the permanent reservation included the power to make temporary withdrawals (United States v. Midwest Oil Co. 236 U. S. 459, 476, 59 L. ed. 673, 682, 35 Sup. Ct. Rep. 309); and the order of the Secretary of the Interior, made on December 16, 1905, must be regarded as the act of the President. Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264. The disposition by the President, under the authority of Congress, was a disposition by Congress.

[213] It is finally contended that the proclamation by the President on January 25, 1907 [34 Stat. at L. 3270], expressly ex-

cepted the lands in question. The exception was "of all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for forest uses is inconsistent." The evident purpose of the proclamation was to confirm and make permanent the prior withdrawal for forestry purposes, not to override it. The very object of that withdrawal was to prevent claims of title from thereafter attaching to the lands. And the reference in the exception to "any withdrawal or reservation," as we view it, was to withdrawals or reservations by the government itself for other and inconsistent uses, and was with a view of avoiding confusion in governmental action, not to let in subsequently accruing claims of title under school grants as to which Congress had indicated its purpose to make compensation for deficiencies when lands which otherwise would have passed to the state thereunder had been duly taken for reservations. The contention that the lands were not "public lands" until surveyed, and hence were not subject to reservation by the President under the act of Congress, is plainly without basis. See Rev. Stat. § 453, Comp. Stat. 1913, § 699. The provisions for forest reservations refers to any part of the public lands which were subject to the disposition of Congress. It is also argued that the state, under the act of February 28, 1891 (supra), has the right to await the "extinguishment" of the "reservation," and the "restoration of the lands therein embraced to the public domain," and then to take the described sections. We are not called upon to consider any such question here, and we express no opinion upon it, as there has been no extinguishment of the reservation, and from any point of view it must be concluded that no title had passed to the state when it made the conveyance under which the appellees claim.

[214] The decree of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

ILLINOIS SURETY COMPANY, Plff. in Err.,
v.
UNITED STATES to the use of J. A. PEELER, L. M. Peeler, and P. A. Peeler, Partners, Trading under the Firm Name of Faith Granite Company, et al.

(See S. C. Reporter's ed. 214–227.)

Action — prematurity — suit on bond of public contractor.

1. The approval by the Treasury Department of the basis of settlement with a public contractor adopted by the supervising architect, who recommended that only actual damages be charged against the contractor, and that the proper voucher be issued in his favor for the specific amount found to be the balance due, is, although the check in payment was not then issued, the "final settlement" of the contract, within the meaning of the provision of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), that no suit on a contractor's bond shall be brought by persons supplying him with labor or materials within six months after the performance and final settlement of the contract.

[For other cases, see Action or Suit, I. b, in Digest Sup. Ct. 1908.]

Pleading — amendment — curing defective statement of right of action — suit on bond of public contractor.

2. The court may permit the defective statement in the complaint of an existing right of action by subcontractors under the act of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), upon the bond of a public contractor, to be corrected by the addition of appropriate allegations showing that the action was not prematurely brought.

[For other cases, see Pleading, I. n, in Digest Sup. Ct. 1908.]

Action — law or equity — suit on bond of public contractor.

3. A suit by laborers and materialmen, brought in the name of the United States under the authority of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), upon the bond of a public contractor, conditioned for the prompt payment by him of all persons supplying him with labor or material in the prosecution of the work provided for in such contract, is one at law, and not in equity, although the statute gives priority to the claim or judgment of the United States, and provides that the aggregate recovery shall not exceed the penalty on the bond, and that if the total amount due exceeds such penalty, judgment shall be given to each creditor *pro rata* of the amount of the recovery.

[For other cases, see Action or Suit, I. a, 1, in Digest Sup. Ct. 1908.]

Parties — suit on bond of public contractor — substitution.

4. The participation by an alleged assignee solely for its own benefit in a suit by laborers and materialmen, brought in the name of the United States, under the authority of the act of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), upon the bond of a public contractor, is not the equivalent of the filing of a claim on behalf of the assignor, who was not one of the plaintiffs, and on whose behalf there

was no intervention, and does not justify the rendition of judgment in favor of the assignor upon finding that the purported assignment was invalid.

[For other cases, see Parties, IV., in Digest Sup. Ct. 1908.]

[No. 176.]

Argued January 14, 1916. Decided February 21, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of South Carolina in favor of plaintiff in a suit by subcontractors upon the bond of a public contractor. Modified by striking out a provision in favor of one of the subcontractors, and as thus modified affirmed.

See same case below, 131 C. C. A. 476, 215 Fed. 334.

The facts are stated in the opinion.

Mr. Bynum E. Hinton argued the cause and filed a brief for plaintiff in error:

The right of action is in equity, and not at law.

United States use of Brading-Marshal Lumber Co. v. Wells, 203 Fed. 146; Illinois Surety Co. v. United States, 129 C. C. A. 584, 212 Fed. 136; United States use of Pittsburg Planing Mill Co. v. Scheurman, 218 Fed. 915.

An action which is inherently equitable in its character cannot be adjudicated in a court of law, even by consent of the parties.

Thompson v. Central Ohio R. Co. 6 Wall. 134, 18 L. ed. 765; Lindsay v. First Nat. Bank, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. Rep. 472; Levi v. Mathews, 76 C. C. A. 122, 145 Fed. 152.

This action was prematurely brought.

Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513; United States use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 241; United States ex rel. Brown-Ketcham Iron Works v. Robinson, 130 C. C. A. 432, 214 Fed. 38; United States use of Watson-Flagg Engineering Co. v. Winkler, 162 Fed. 397; United States use of Chief All Over v. Bailey, 207 Fed. 783.

A complete exposition of the government's method of settling its accounts will be found in McKnight's Case, 13 Ct. Cl. 299.

Each of the Departments has more or less different methods of procedure. The Treasury Department has the method shown in this case. The method of the War Department is different (United States use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 241). The method of the Navy Department appears to be different from either of these (Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513). The method of the Interior Department appears to be still different (United States use of Chief All Over v. Bailey, 207 Fed. 783).

The court was without authority to render judgment for the benefit of the Carolina Electrical Company.

Miller v. M'Intyre, 6 Pet. 61, 8 L. ed. 320; Hewitt v. Pennsylvania Steel Co. 24 Fed. 370; Miller v. Pollock, 99 Pa. 202; First Nat. Bank v. Shoemaker, 117 Pa. 94, 2 Am. St. Rep. 649, 11 Atl. 304.

The amended complaint and petitions did not relate back to the commencement of the action.

Lilly v. Charlotte, C. & A. R. Co. 32 S. C. 142, 10 S. E. 932; Coker v. Monaghan Mills, 119 Fed. 706; St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 698; Brinkmeier v. Missouri P. R. Co. 224 U. S. 269, 56 L. ed. 759, 32 Sup. Ct. Rep. 412.

Messrs. Benjamin E. Pierce and D. W. Robinson argued the cause, and, with Mr. John L. Rendleman, filed a brief for defendants in error:

Settlement may mean, and is sometimes used to mean, payment; but we submit that it is a much broader term; it does not necessarily mean payment, but, in its generally accepted meaning, is an adjustment or agreement between the parties as the conclusion of matters between them.

United States ex rel. Brown-Ketcham Iron Works v. Robinson, 130 C. C. A. 432, 214 Fed. 38; Stitzer v. United States, 105 C. C. A. 55, 182 Fed. 513; United States use of Watson-Flagg Engineering Co. v. Winkler, 162 Fed. 401; United States use of Chief All Over v. Bailey, 207 Fed. 783; United States use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 243; Bouvier's Law Dict. Settlement; Century Dict. Settlement; Rose v. Bradley, 91 Wis. 619, 65 N. W. 509; Sims v. Waters, 65 Ala. 442; Phipps v. Willis, 53 Or. 190, 96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119; Toombs v. Stockwell, 131 Mich. 633, 92 N. W. 288; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Greene County v. Light, 72 Ark. 41, 77 S. W. 915; Miller v. Consolidated Patrons & F. Mut. Ins. Co. 113 Iowa, 211, 84 N. W. 1049; Jackson v. Ely, 57 Ohio St. 450, 49 N. E. 792; Pomeroy v. Mills, 37 N. J. Eq. 578; Albers v. Merchants' Exch. 140 Mo. App. 446, 120 S. W. 139; Roberts v. Spencer, 112 Ind. 85, 13 N. E. 129; 7 Words & Phrases, 6446, 6447, and cases.

The settlement made by the Department, and its rulings and constructions of the statutes, are entitled to and are given great weight by the courts.

United States v. Cerecedo Hermanos Y

Compañia, 209 U. S. 339, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; Jacobs v. Prichard, 223 U. S. 214, 56 L. ed. 400, 32 Sup. Ct. Rep. 289; United States v. Hammers, 221 U. S. 225, 226, 55 L. ed. 714, 715, 31 Sup. Ct. Rep. 503.

It is the settled policy of the court that this act shall receive a liberal construction so as to advance its purpose.

United States use of Hill v. American Surety Co. 200 U. S. 203, 50 L. ed. 440, 26 Sup. Ct. Rep. 168; Mankin v. United States, 215 U. S. 539, 54 L. ed. 317, 30 Sup. Ct. Rep. 174; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 33, 34, 55 L. ed. 77, 31 Sup. Ct. Rep. 140; United States use of Alexander Bryant Co. v. New York Steam Fitting Co. 235 U. S. 327, 59 L. ed. 253, 35 Sup. Ct. Rep. 108; Title Guaranty & T. Co. v. Puget Sound Engine Works, 89 C. C. A. 624, 163 Fed. 168; Equitable Surety Co. v. United States, 234 U. S. 455, 456, 58 L. ed. 1396, 1397, 34 Sup. Ct. Rep. 803; United States v. Freeman, 3 How. 556, 11 L. ed. 724.

The amendment was clearly within U. S. Rev. Stat. § 954, Comp. Stat. 1913, § 1591; McDonald v. Nebraska, 41 C. C. A. 284, 101 Fed. 171; 4 Fed. Stat. Anno. 597, and cases; 2 Fed. Stat. Anno. Supp. 1443, 1444; Texas & P. R. Co. v. Cox, 145 U. S. 593, 597, 606, 36 L. ed. 829, 831, 833, 12 Sup. Ct. Rep. 905; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 576, 57 L. ed. 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Atlantic & P. R. Co. v. Laird, 164 U. S. 401, 41 L. ed. 488, 17 Sup. Ct. Rep. 120.

The law of the United States governs, and not the law or rules of the particular state.

Mexican C. R. Co. v. Duthie, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 610; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 290, 93 Fed. 260; Manitowoc Malting Co. v. Fuechtwanger, 169 Fed. 983.

The statute invests the courts of the United States with large discretion in permitting the correction of defects in pleadings and process by amendment, and rulings of this character constitute no ground for reversal unless the discretion is grossly abused.

Great Northern R. Co. v. Herron, 68 C. C. A. 601, 136 Fed. 49; Mexican C. R. Co. v. Duthie, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 610.

Where the question of failure of pleadings to show jurisdiction is raised in the trial court, it should permit amendment for the purpose of remedying the defect. Where the Supreme Court has reversed and remanded the cause for failure of record to show jurisdiction in the lower court, the latter may permit amendment to show that jurisdiction really existed when suit was brought, if the facts warrant it. Or the Supreme Court, in its mandate, may direct that amendment be permitted.

1 Rose's Code of Fed. Proc. § 9, p. 65; Howard v. De Cordova, 177 U. S. 614, 44 L. ed. 910, 20 Sup. Ct. Rep. 817; King Bridge Co. v. Otoe County, 120 U. S. 227, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; Springstead v. Crawfordsville State Bank, 231 U. S. 542, 58 L. ed. 356, 34 Sup. Ct. Rep. 195; Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; Metcalf v. Watertown, 128 U. S. 590, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; Campbell v. Johnson, 92 C. C. A. 566, 167 Fed. 102.

Whether we consider the conditions prescribed by the statute in the nature of a statute of limitation or as an essential condition to the success of plaintiff's right, any amendment relates to the commencement of the action, and the limitation of six months and one year, respectively, runs to the original commencement of the action, and not to the date of the amendment.

Patillo v. Allen-West Commission Co. 65 C. C. A. 510, 131 Fed. 680; Armstrong Cork Co. v. Merchants' Refrigerating Co. 107 C. C. A. 99, 184 Fed. 199; McDonald v. Nebraska, 41 C. C. A. 287, 101 Fed. 171; Van Doren v. Pennsylvania R. Co. 35 C. C. A. 293, 93 Fed. 271; Sanger v. Newton, 134 Mass. 308.

The rights of interveners in this case are in nowise affected by a nonsuit of plaintiff.

United States use of Port Blakely Mill Co. v. Massachusetts Bonding & Ins. Co. 198 Fed. 927; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; Title Guaranty & T. Co. v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 168; 17 Am. & Eng. Enc. Law, 2d ed. 185; 11 Enc. Pl. & Pr. 509; Poehlmann v. Kennedy, 48 Cal. 207.

The court had a right, and it was its duty, to render judgment in favor of the real party in interest without regard to the matter of form, and to make such one a real party to the action.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 576, 57 L. ed. 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; McDonald v. Nebraska, 41 C. C. A. 287, 101 Fed. 171.

The proceeding under this statute is an action at law.

United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; United States use of Gibson Lumber Co. v. Boomer, 106 C. C. A. 164, 183 Fed. 726; Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513; Baker Contract Co. v. United States, 122 C. C. A. 561, 204 Fed. 390; Eberhart v. United States, 123 C. C.

A. 181, 204 Fed. 884; United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Mankin v. United States, 215 U. S. 533, 538, 54 L. ed. 315, 317, 30 Sup. Ct. Rep. 174; United States v. Freel, 186 U. S. 309, 312, 46 L. ed. 1177, 1179, 22 Sup. Ct. Rep. 875; United States Fidelity & G. Co. v. United States, 204 U. S. 349, 51 L. ed. 516, 27 Sup. Ct. Rep. 381; Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 324; United States use of Alexander Bryant Co. v. New York Steam Fitting Co. 235 U. S. 327, 59 L. ed. 253, 35 Sup. Ct. Rep. 108; United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550, 133 C. C. A. 674, 218 Fed. 991; United States ex rel. Brown-Ketcham Iron Works v. Robinson, 130 C. C. A. 434, 214 Fed. 38; United States v. United States Fidelity & G. Co. 236 U. S. 512, 59 L. ed. 696, 35 Sup. Ct. Rep. 298, 116 C. C. A. 187, 194 Fed. 611.

Messrs. Arthur W. Fairchild, Edwin S. Mack, and George P. Miller, as *amici curiæ*, filed a brief on behalf of the Western Lime & Cement Company:

Before a suit may be commenced under this statute, there must be both complete performance of the contract and final settlement of the contract.

United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550; United States ex rel. Proctor Mfg. Co. v. Stannard, 207 Fed. 201; United States use of Chief All Over v. Bailey, 207 Fed. 782; Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513; United States use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 241.

"Settlement" means an adjustment of differences by agreement.

35 Cyc. 1443.

The real ground of the decision below was that there was an adjustment by agreement,—a proposition finding support in other decisions.

Illinois Surety Co. v. United States, 131 C. C. A. 476, 215 Fed. 334; United States v. Illinois Surety Co. 141 C. C. A. 409, 226 Fed. 662; Stitzer v. United States, 105 C. C. A. 51, 182 Fed. 513.

If, in the statute under consideration, the words "final settlement" refer to the same thing referred to by the words "settled" and "settlement," used in reference to the settlement and adjustment of claims and demands against the United States in the Department of the Treasury, we have then pointed out to all persons interested the action for which they must be on the alert, and the office in which they are to seek for the information. There is fixed, with a reasonable degree of definiteness, the thing, or action, which determines the date of final settlement. It is the only reasonable construction to be given to the act if the ordinary rule is not to be followed.

United States use of Chief All Over v. Bailey, 207 Fed. 782; United States use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 241.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought by subcontractors under the act of August 13, 1894 (28 Stat. at L. 278, chap. 280), as amended by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, Comp. Stat. 1913, § 6923), in the name of the United States, to recover upon a contractor's bond. The contract was for the construction of a postoffice building in Aiken, South Carolina (35 Stat. at L. 526, 528, chap. 228), and the Illinois Surety Company (plaintiff in error) was the surety. The summons and complaint were filed on March 4, 1913. Motion to dismiss was made on September 22, 1913, upon the ground that the complaint did not allege that there had been a completion and final settlement of the contract between the contractor and the United States; or that there had been such completion and settlement more than six months, and within one year, prior to the commencement of the action. [216] Another ground for the motion was that the remedy under the statute was in equity. The motion was denied, the court permitting the complaint to be amended so as to allege that the contract was completed in July, 1912; that final settlement was made by the Treasury Department on August 21, 1912; and that no suit had been brought by the United States against the contractor and his surety within the six months' period. The defendant, reserving its objection to the order denying the motion and allowing the amendment, answered. Jury trial was waived by written stipulation and the case was heard by the district judge, who found, in substance, the facts to be as follows:

That the building was completed, and on August 21, 1912, the Treasury Department "stated and determined the final balance" to be paid the contractor under the contract at the sum of $3,999.01; that this "adjustment and determination" was communicated to the contractor; that on August 26, 1912, a voucher of that date was prepared by the Department, showing the balance, as above stated, to which the contractor appended his signature, certifying the amount to be correct, and that on

that day there was a definite acceptance by the contractor of the adjustment; that on September 11, 1912, a check for the above-mentioned sum was made out by the disbursing clerk of the Department, payable to the order of the contractor, who thereafter collected it; that upon the request of the relator (the Faith Granite Company) the Secretary of the Treasury, on January 16, 1913, furnished to it a certified copy of the contract and bond, and that on the 6th day of March, 1913, . . . the present action was instituted by the filing. . . . and by service of summons and complaint on defendant Surety Company." It also appeared that no action had been instituted by the United States upon the bond within the six months allowed by the statute.

[217] The district court gave judgment for amounts found to be due to those for whose benefit the action was brought, and to certain interveners, and this judgment was affirmed by the circuit court of appeals, 131 C. C. A. 476, 215 Fed. 334. The contentions presented are: (1) That the action was instituted prematurely; (2) that the amendment of the complaint was improperly allowed; (3) that there was no right of action at law; and (4) that the court erred in giving judgment for the Carolina Electrical Company, one of the subcontractors.

1. The statute provides: "If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit . . . be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States . . . against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, That . . . it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later." In United States ex rel. Texas Portland Cement Co. v. McCord, [1] 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550, we said that this act created a new right of action upon terms named; and hence that an action brought by creditors before six months had expired from the time of the "completion and final settlement of the contract" could not be sustained. In the present case, the plaintiff in error insists that there was no final settlement within the meaning of the statute prior to the issue of the check [218] for payment to the contractor on September 11, 1912, and that in this view the action was brought too soon.

It was evidently the purpose of the act of 1905 to remedy the defect in the act of 1894 by assuring to the United States adequate opportunity to enforce its demand against the contractor's surety, and priority with respect to such demand. Mankin v. United States, 215 U. S. 533, 538, 54 L. ed. 315, 317, 30 Sup. Ct. Rep. 174; United States ex rel. Brown-Ketcham Iron Works v. Robinson, 130 C. C. A. 432, 214 Fed. 38, 39, 40. Accordingly it was provided that if the United States sued upon the bond, the described creditors should be allowed to intervene, and be made parties to the action, but subject "to the priority of the claim and judgment of the United States." And it was only in case the United States did not sue within the specified period that the creditors could bring their action. With this object in view,—to protect the priority of the United States, and at the same time to give a remedy to materialmen and laborers on the contractor's bond and a reasonable time to prosecute it (United States use of Alexander Bryant Co. v. New York Steam Fitting Co. 235 U. S. 327, 337, 59 L. ed. 253, 257, 35 Sup. Ct. Rep. 108),—it was natural that the time allowed exclusively for action by the government should begin to run when the contract had been completed, and the government, in its final adjustment and settlement according to established administrative methods, had determined what amount, if any, was due. Then the government would have ascertained the amount of its claim, if it had one, and could bring suit if it desired. As such determinations are regularly made in the course of administration, nothing would seem to be gained by postponing the date, from which to reckon the six months, to the time of payment. Indeed, if an amount were found to be due from the contractor, and he was insolvent, there might be no payment, and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed.

The pivotal words are not "final payment," but "final [219] settlement," and in view of the significance of the latter term in administrative practice, it is hardly likely that it would have been used had it been intended to denote payment. See United States v. Illinois Surety Co. 195 Fed. 306, 309; United States use of Chief All Over v. Bailey, 207 Fed. 782, 784; United States ex rel. Brown-Ketcham Iron Works v. Robinson (C. C. A. 2d C.) supra; United States

[1] The statute is set forth in full in the margin of the opinion in the case cited.

use of Starrett-Fields Co. v. Massachusetts Bonding & Ins. Co. 215 Fed. 241, 244; United States use of John Davis Co. v. Illinois Surety Co. (C. C. A. 7th C.) 226 Fed. 653, 662. The word "settlement," in connection with public transactions and accounts, has been used from the beginning to describe administrative determination of the amount due. By the act of September 2, 1789, chap. 12 (1 Stat. at L. 65, Comp. Stat. 1913, § 235), establishing the Treasury Department, the Comptroller was charged with the duty of examining "all accounts *settled* by the auditor." (§ 3.) And it was made the duty of the auditor to receive "all public accounts and after examination to certify the balance," subject to the provision that any person whose account should be so audited might appeal to the Comptroller "against such *settlement*." The act of March 3, 1809, chap. 28, § 2 (2 Stat. at L. 536, Comp. Stat. 1913, § 406), gave authority to the Comptroller to direct the auditor forthwith "to *audit and settle* any particular account" which he was authorized to audit and settle, and "to report such *settlement*" for his revision and final decision. (See Rev. Stat. § 271.) By the act of March 3, 1817, chap. 45, § 2) 3 Stat. at L. 366, Comp. Stat. 1913, § 368), it was provided that "all claims and demands whatever, by the United States or against them, and all accounts whatever, in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Treasury Department." This provision was carried into § 236 of the Revised Statutes (Comp. Stat. 1913, § 368). The words "settled and adjusted" were taken to mean the determination in the Treasury Department for administrative purposes of the state of the account and the amount due. See 2 Ops. Atty. Gen. 518, 625, 629, 630. Referring [220] to this provision, it was said by Mr. Chief Justice Waite, in delivering the opinion of the court in Cooke v. United States, 91 U. S. 389, 399, 23 L. ed. 237, 243: "Thus it is seen that all claims against the United States are to be settled and adjusted 'in the Treasury Department;' and that is located 'at the seat of government.' The assistant-treasurer in New York is a custodian of the public money, which he may pay out or transfer upon the order of the proper department or officer; but he has no authority *to settle and adjust, that is to say, to determine upon the validity of, any claim against the government*. He can pay only after the adjustment has been made 'in the Treasury Department,' and then upon drafts drawn for that purpose by the treasurer." Again, the act of July 31, 1894, chap. 174 (28 Stat. at L. 162, 206-208, Comp. Stat. 1913, §§ 57, 425), relating to the examination of accounts by auditors, and revisions of accounts, etc., provides, in § 8, that "the balances which may from time to time be certified by the auditors to the Division of Bookkeeping and Warrants or to the Postmaster General upon the *settlements* of public accounts shall be final and conclusive upon the executive branch of the government," except that any person whose accounts may have been "*settled*," the head of the executive department, etc., to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision in the manner stated; also that "any person accepting payment under a *settlement* by an auditor shall be thereby precluded from obtaining a revision of such settlement as to any items from which payment is accepted;" and, further, that "when suspended items are *finally settled* a revision may be had as in the case of the original settlement." By the act of May 28, 1896, chap. 252, § 4 (29 Stat. at L. 140, 179, Comp. Stat. 1913, § 390), the Secretary of the Treasury was directed to make report annually to Congress of such officers as were found "upon *final settlement* of their accounts" to have been indebted to the government, [221] and to have failed to pay the amount of their indebtedness into the Treasury.

We should not say, of course, that instances may not be found in which the word "settlement" has been used in acts of Congress in other senses, or in the sense of "payment." But it is apparent that the word "settlement" in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well-defined meaning as denoting the appropriate administrative determination with respect to the amount due. We think that the words "final settlement" in the act of 1905 had reference to the time of this determination when, so far as the government was concerned, the amount which it was finally bound to pay or entitled to receive was fixed administratively by the proper authority. It is manifestly of the utmost importance that there should be no uncertainty in the time from which the six months' period runs. The time of the final administrative determination of the amount due is a definite time, fixed by public record and readily ascertained. As an administrative matter, it does not depend upon the consent or agreement of the other party to the contract or account. The authority to make it may not be suspended, or held in abeyance, by refusal to agree. Whether the amount so fixed is due, in law and fact, un-

doubtedly remains a question to be adjudicated, if properly raised in judicial proceedings, but this does not affect the running of the time for bringing action under the statutory provision.

In the present case, the construction of the building was in charge of the Secretary of the Treasury and under the general supervision of the supervising architect. The Secretary of the Treasury was authorized to remit the whole or any part of the stipulated liquidated damages as in his discretion might be just and equitable. [222] Act of June 6, 1902, 32 Stat. at L. 326, chap. 1036, Comp. Stat. 1913, § 6922. On August 21, 1912, the supervising architect having received the certificate of the chief of the technical division of the office that all work embraced in the contract had been satisfactorily completed, made his statement of the amount finally due, recommending that only the actual damage (as stated) be charged against the contractor, and that the proper voucher should be issued in favor of the contractor for the balance, to wit, $3,999.01. And, on the same date, this recommendation was approved and actual damages charged accordingly by direction of the Secretary of the Treasury. This, in our judgment, was the "final settlement" of the contract within the meaning of the act. We understand that the administrative construction of the act has been to the same effect. The regulation of the Treasury Department, as it appears from its circular issued for the information of persons interested in claims for material and labor supplied in the prosecution of work on buildings under the control of that Department (Dept. Circ. No. 45, Sept. 12, 1912), is as follows: "The Department treats as the date of final settlement mentioned in said acts" (referring to the Acts of 1894 and 1905, supra), "the date on which the Department approves the basis of settlement under such contract recommended by the supervising architect, and orders payment accordingly."

We conclude that the action was not brought prematurely.

2. With respect to the amendment of the complaint, it is apparent that, as there was an existing right of action under the statute at the time the suit was brought, the case was not within the decision in United States ex rel. Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550. No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, [223] and in this there was no error. Rev. Stat. § 954, Comp. Stat. 1913, § 1591; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

3. It is contended that the right given by the statute to the described creditors is of an equitable nature, and that the court erred in permitting recovery at law. The objection in the present case is merely technical, as the parties stipulated to waive trial by jury, and the case was heard and decided by the district judge upon facts about which there is no dispute. The question has not been raised heretofore in this court, but it has been assumed in many cases that the action to be brought under the statute upon the contractor's bond, whether the action were instituted by the United States (United States v. Congress Constr. Co. 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44), or by creditors in the name of the United States, was an action at law. United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537; Mankin v. United States, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 35, 55 L. ed. 72, 77, 31 Sup. Ct. Rep. 140; United States ex rel. Alexander Bryant Co. v. New York Steam Fitting Co. 235 U. S. 327, 59 L. ed. 253, 35 Sup. Ct. Rep. 108. In Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 35, 55 L. ed. 72, 77, 31 Sup. Ct. Rep. 140, a question arose as to the propriety of allowing a docket fee to each claimant. Section 824 of the Revised Statutes (Comp. Stat. 1913, § 1378), provides for a docket fee of $10 "in cases at law, when judgment is rendered without a jury." The court said: "The allowance of a docket fee of $10 to each claimant appears to us to be correct. Rev. Stat. § 824. The claims are several and represent distinct causes of action in different parties, although consolidated in a single suit." In the circuit and district courts and in the circuit courts of appeals, while it seems that objection has rarely been made, there has been almost complete uniformity in treating the creditors' action under the act of 1905 as one at law. See United States use of Watson-Flagg Engineering Co. v. Winkler, 162 Fed. 397; Stitzer v. United States (C. C. A. 3d C.) 105 C. C. A. 51, 182 Fed. 513; United States use of Gibson Lumber Co. v. Boomer (C. C. A. 8th C.) 106 C. C. A. 164, 183 Fed. 726; United States ex rel. James B. Clow & Sons v. Illinois Surety Co. 195 Fed. 306; Baker Contr. Co. v. [224] United States (C. C. A. 4th C.) 122 C. C. A. 560, 204 Fed. 390; Eberhart v. United States (C. C. A. 8th C.) 123 C. C. A. 180, 204 Fed. 884; United States use of Chief All Over v. Bailey, 207 Fed. 783; Vermont Marble Co. v.

National Surety Co. (C. C. A. 3d C.) 130 C. C. A. 65, 213 Fed. 429; United States ex rel. Brown-Ketcham Iron Works v. Robinson (C. C. A. 2d C.) 130 C. C. A. 432, 214 Fed. 38; United States use of Starrett-Fields Co. v. Massachusetts Bonding & T. Co. 215 Fed. 241; United States use of Fowden v. Emery, 225 Fed. 287; United States use of John Davis Co. v. Illinois Surety Co. (C. C. A. 7th C.) 226 Fed. 653. It was expressly held to be an action at law in United States ex rel. Proctor Mfg. Co. v. Stannard (D. C. N. D. N. Y.) 207 Fed. 198, 202. The contrary conclusion was reached in United States use of Brading-Marshal Lumber Co. v. Wells (D. C. E. D. Tenn.), 203 Fed. 146, 147; Illinois Surety Co. v. United States (C. C. A. 2d. C.) 129 C. C. A. 584, 212 Fed. 136, 139, and United States use of Pittsburg Planing Mill Co. v. Scheurman (D. C. Idaho) 218 Fed. 915, 919. The point was raised on rehearing in United States use of John Davis Co. v. Illinois Surety Co. (C. C. A. 7th C.) 226 Fed. pp. 663, 664, but, as it came too late, it was not decided.

The statute provides that the bond shall have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." In this respect, the provision is substantially the same as that contained in the act of 1894, and the obligation in favor of the materialmen and laborers has been held to be a distinct obligation. United States Fidelity & G. Co. v. Golden Pressed Brick & Fire Co. (United States Fidelity & G. Co. v. United States) 191 U. S. 416, 423, 425, 48 L. ed. 242, 245, 246, 24 Sup. Ct. Rep. 142; United States use of Hill v. American Surety Co. 200 U. S. 197, 201, 202, 50 L. ed. 437, 439, 440, 26 Sup. Ct. Rep. 168. It is an obligation for the payment of money to the persons described, which they are entitled to enforce. The nature of the obligation is not changed by the fact that there is to be but one action. If the United States brings the action, the persons described are entitled to be made parties, and "to have their rights and claims adjudicated in such action, and judgment rendered [225] thereon." If the United States does not sue within the time specified, they may bring action on the bond in the name of the United States, and "prosecute the same to final judgment and execution." Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action. Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 35, 55 L. ed. 72, 77, 31 Sup. Ct. Rep. 140. The obligation of the surety thus enforced in a single action is a legal obligation to the United States for the use and benefit of the several claimants. We do not regard the requirements that "the claim and judgment of the United States" shall have priority, and that the aggregate recovery shall not exceed the penalty on the bond, as insuperable obstacles to proceeding at law. It is the case of an undertaking for the payment of many claims, not to exceed the specified penalty. If the total amount due exceeds the penalty of the bond, it is provided that "judgment shall be given to each creditor *pro rata* of the amount of the recovery." This, however, merely requires an arithmetical calculation after the different causes of action have been passed upon, and the amount due upon each determined. We see no ground upon which the conclusion can be justified that the liability of the surety on its bond is to be determined in equity. The contrary has been the generally accepted, and we think, the correct, practice.

It should be added that a different situation would arise if the surety, availing itself of the statutory privilege, should pay into court the full amount of its liability, to wit, the penalty on the bond, for distribution. In that case the legal obligation of the surety would be discharged by the express terms of the statute, and the proceeding would be simply for the distribution of a fund in court.

4. The plaintiff in error contends that the court erred in giving judgment in favor of the Carolina Electrical Company. The record shows that among those named as the persons instituting the action was the "Electrical [226] Engineering & Contracting Company, assignee of Joseph B. Cheshire, Jr., receiver of the Carolina Electrical Company." The complaint set forth that the Carolina Electrical Company (a North Carolina corporation) had furnished to the contractor certain material and labor for which there remained unpaid the sum of $498.69; that on October 4, 1912, Joseph B. Cheshire, Jr., was appointed receiver of that company; and that on March 1, 1913, its claim had been "assigned and transferred for value" to the above-named plaintiff by the receiver, and that the plaintiff was the sole owner of the account, and had succeeded to all the rights incident thereto which had belonged to the Carolina Electrical Company. The alleged transfer was denied. Evidence was introduced to show the incorporation, and the appointment of the receiver. The district judge found that the order proved was insufficient to establish the authority of the receiver to assign the claim, but held that the proceeding in the case was a sufficient filing of the claim on behalf of

the Carolina Electrical Company. Judgment was awarded in favor of that company, with direction that it should be paid "only to such person as may be authorized by law to receive it for said Carolina Electrical Company," and the judgment to this effect was affirmed.

In this, we think, the court erred. The Carolina Electrical Company was not one of the plaintiffs and there was no intervention on its behalf. The trial court in its findings sets forth the interventions of certain other parties, and states that no more interventions appear to have been filed in the cause. It is true, of course, that the real party in interest who is entitled to enforce the cause of action may be substituted as plaintiff. See McDonald v. Nebraska, 41 C. C. A. 278, 101 Fed. 171, 178. But the present case is not one of misnomer, or of a nominal plaintiff for whom the real party in interest is substituted, or indeed of any proper substitution. The plaintiff, the Electrical Engineering & [227] Contracting Company, was not a nominal party, nor was action in any sense brought for the benefit of the Carolina Electrical Company. The record shows that it was brought, so far as this claim is concerned, solely for the benefit of the Electrical Engineering & Contracting Company upon the allegation that the claim had been assigned to it for value, and that it was the exclusive and beneficial owner. According to the record, the Carolina Electrical Company was not made a party at any stage of the action unless this was accomplished by the decision and the judgment. But at the time of the decision, November 10, 1913, by reason of the express limitation of the statute, it was too late for that company to intervene.

The judgment is modified by striking out the provision in favor of the Carolina Electrical Company, and as thus modified is affirmed.

Judgment affirmed.

KANSAS CITY, FORT SCOTT, & MEMPHIS RAILWAY COMPANY, Plff. in Err.,

v.

J. T. BOTKIN, Secretary of State of the State of Kansas.

(See S. C. Reporter's ed. 227–235.)

Commerce — state privilege tax — interstate railway.

1. The annual tax, graduated according to paid-up capital stock, imposed upon domestic corporations under Kan. Laws 1913, chap. 135, on the privilege of being a corporation, the maximum charge being $2,500 in the case of all corporations having a paid-up capital of $5,000,000 or more, does not offend against the commerce clause of the Federal Constitution as applied to a railway company with a paid-up capital exceeding $30,000,000, whose lines extend into other states.

[For other cases, see Commerce, III. d, 5; III. d, 7, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — privilege tax.

2. A domestic railway company whose lines extend into other states is not taxed upon its property outside the jurisdiction of the state, contrary to the Federal Constitution, by the exaction, under Kan. Laws 1913, chap. 135, of the annual tax graduated according to paid-up capital stock, imposed by that statute upon domestic corporations for the privilege of being a corporation, since such tax is not a property tax.

[For other cases, see Constitutional Law, 536–540, in Digest Sup. Ct. 1908.]

[No. 450.]

Submitted January 7, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Shawnee County, in that state, in favor of defendant in a suit by a domestic railway corporation to recover back the amount of a privilege tax paid by it. Affirmed.

See same case below, 95 Kan. 261, 147 Pac. 791.

The facts are stated in the opinion.

NOTE.—State licenses or taxes, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On the taxation of corporate capital stock, generally—see note to State Bd. of Equalization v. People, 58 L.R.A. 513.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Messrs. R. B. Vermilion and W. F. Evans submitted the cause for plaintiff in error:

The statute imposes a burden on interstate commerce, and seeks to tax property beyond the jurisdiction of the state of Kansas.

Western U. Teleg. Co. v. Kansas, 216 U. S. 31, 54 L. ed. 367, 30 Sup. Ct. Rep. 190; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423; 30 Sup. Ct. Rep. 280; Crane Co. v. Looney, 218 Fed. 260.

Mr. James P. Coleman submitted the cause for defendant in error. Mr. S. M. Brewster, Attorney General of Kansas, and Messrs. W. P. Montgomery and J. L. Hunt were on the brief:

Chapter 135, Session Laws of Kansas of 1913, imposes an excise tax upon the right or privilege of the plaintiff in error to exist as a corporation under the laws of the state of Kansas.

Kansas City, Ft. S. & M. R. Co. v. Sessions, 95 Kan. 261, 147 Pac. 791; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

The state has full power to impose such a privilege tax.

Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904; Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 888.

Such a franchise tax, if otherwise valid, may be computed or measured in amount by the amount of the capital stock of the corporation employed in part in carrying on interstate commerce.

Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, L.R.A. —, —, 34 Sup. Ct. Rep. 15.

The statute imposing the tax provides that the amount to be paid for the privilege for which it is required shall be determined by reference to the capital employed in exercising that privilege, and such capital, or the property in which such capital is invested, is not itself taxed.

Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; New York ex rel. Cornell v. Sohmer, 235 U. S. 549, 59 L. ed. 355, 35 Sup. Ct. Rep. 162.

The statute in question, as applied to domestic railway corporations, does not burden interstate commerce.

Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 888; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678.

The question involved is not within the rule of law determined in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232. See also Kansas City Ft. S. & M. R. Co. v. Sessions, 95 Kan. 261, 147 Pac. 791.

Mr. Justice Hughes delivered the opinion of the court:

By chapter 135 of the Laws of 1913, of Kansas, every domestic corporation is required to pay to the secretary of state an annual fee which is graduated according to the amount of its paid-up capital stock. When this capital stock does not exceed $10,000, the fee is $10; when it exceeds $10,000, but is not over $25,000, the fee is $25; and there are further increases, graduated as stated, until the maximum fee of $2,500 is reached, that sum [231] being payable in all cases where the paid-up capital stock exceeds $5,000,000. The plaintiff in error is a railroad corporation organized under the laws of Kansas, and its road extends into several states. It has a paid-up capital stock of $31,660,000. On March 31, 1914, it paid to the secretary of state, under protest, the required fee of $2,500, and brought this action to recover the amount, insisting that the tax is a direct burden upon interstate commerce and is laid upon property outside the state, and hence is invalid under the Federal Constitution. The supreme court of Kansas sustained the tax,

thus defining its nature: "The fee collected is a tax upon the right of corporate existence—the franchise granted by the state to be a corporation—to do business with the advantages associated with that form of organization." 95 Kan 261, 147 Pac. 791.

It must be assumed, in accordance with repeated decisions, that the state cannot lay a tax on interstate commerce "in any form," by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it. State Freight Tax Case, 15 Wall. 232, 21 L. ed. 146; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 344, 30 L. ed. 1200, 1201, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; Lyng v. Michigan, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 228, 52 L. ed. 1031, 1038, 28 Sup. Ct. Rep. 638; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 36, 37, 54 L. ed. 355, 369, 370, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232; Meyer v. Wells F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, L.R.A.—, —, 34 Sup. Ct. Rep. 15. And, further, in determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction,—its operation and effect as enforced,—and cannot depend upon the manner in which the taxing scheme has been characterized. Galveston, H. & S. A. R. Co. v. [232] Texas, 210 U. S. 217, 228, 52 L. ed. 1031, 1038, 28 Sup. Ct. Rep. 638; United States Exp. Co. v. Minnesota, 223 U. S. 335, 346, 56 L. ed. 459, 465, 32 Sup. Ct. Rep. 211; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99.

Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the state court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the state. The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power. Thus, in Society for Savings v. Coite, 6 Wall. 594, 606, 607, 18 L. ed. 897, 902, 903, the power to levy the franchise tax was deemed to be "wholly unaffected" by the fact that the corporation had invested in Federal securities; and in Home Ins. Co. v. New York, 134 U. S. 594, 599, 600, 33 L. ed. 1025, 1029, 1030, 10 Sup. Ct. Rep. 593, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in Flint v. Stone Tracy Co. 220 U. S. 107, 165, 55 L. ed. 389, 419, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312. It is also manifest that the state is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. Delaware R. Tax, 18 Wall. 206, 231, 232, 21 L. ed. 888, 896; State R. Tax Cases, 92 U. S. 575, 603, 23 L. ed. 663, 669; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 344, 30 L. ed. 1200, 1201, 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Ashley v. Ryan, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; New York ex rel. Cornell S. B. Co. v. Sohmer, 235 U. S. 549, 559, 560, 59 L. ed. 355, 359, 360, 35 Sup. Ct. Rep. 162. And, agreeably to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant [233] to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, L.R.A.—, —, 34 Sup. Ct. Rep. 15) to emphasize the necessary caution that "every case involving the validity of a tax must be decided upon its own facts;" and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction.

In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 344, 30 L. ed. 1200, 1201, 1204, 1 Inters. Com. Rep.

368, 7 Sup. Ct. Rep. 1118, the state had laid "a tax of $\frac{1}{10}$ of 1 per centum upon the gross receipts of said company for tolls and transportation." As the court said: "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose." It was necessarily concluded that the tax was imposed upon interstate commerce. In Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 228, 52 L. ed. 1031, 1038, 28 Sup. Ct. Rep. 638, the tax upon the railroad company was "equal to 1 per centum of its gross receipts." The court held that this was "merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" By the statute which was under review in Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 36, 37, 54 L. ed. 355, 369, 370, 30 Sup. Ct. Rep. 190,—as was said in Flint v. Stone Tracy Co. supra, summarizing that case,—the state "undertook to levy a graded charter fee upon the entire capital stock of one hundred millions of dollars on the Western Union Telegraph Company, a foreign corporation, and engaged in [234] commerce among the states, as a condition of doing local business within the state of Kansas. This court held, looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate business within the state, and an undertaking to tax property beyond the limits of the state; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the state, and it was therefore invalid." To the same effect were Pullman Co. v. Kansas, 216 U. S. 56, 65, 54 L. ed. 378, 385, 30 Sup. Ct. Rep. 232, and Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280. The act before the court in Meyer v. Wells F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218, which provided for what was called a "gross revenue tax," was deemed to be "so similar to the Texas statute held bad" in the case of Galveston, H. & S. A. R. Co. v. Texas, as to deserve a similar condemnation. On the other hand, in United States Exp. Co. v. Minnesota, 223 U. S. 335, 346, 56 L. ed. 459, 465, 32 Sup. Ct. Rep. 211, it appeared that the reference to gross receipts was only intended fairly to measure a tax upon a subject within the taxing power of the state, and the tax was sustained. And, in the case of Baltic Min. Co. v. Massachusetts, supra, where a tax on foreign corporations was measured by the authorized capital stock and was limited to $2,000, the court also reached the conclusion "that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce," and that hence the legislation was within the authority of the state. It is true that in that case it was pointed out that the taxing act did not apply to corporations engaged in railroad, telegraph, etc., business, or to those corporations whose business is interstate commerce; but it was also distinctly stated that the products of the corporations before the court were "sold and shipped in interstate commerce," and that to that extent they were "engaged [235] in the business of carrying on interstate commerce," and were "entitled to the protection of the Federal Constitution against laws burdening commerce of that character." It was because the tax, although measured by authorized capital stock, could not, in view of its limitations, be regarded as imposing a direct burden upon interstate commerce, that the tax was upheld. 231 U. S. pp. 86, 87.

In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce, either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax,—on the privilege granted by the state of being a corporation,—and while it is graduated according to the amount of paid-up capital stock, the maximum charge is $2,500 in the case of all corporations having a paid-up capital of $5,000,000 or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce.

For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the state. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all.

Judgment affirmed.

[236] JAMES W. LUSK, William C. Nixon, and William B. Biddle, Receivers of the Railroads and Property of St. Louis & San Francisco Railroad Company, Plffs. in Err.,

v.

J. T. BOTKIN, Secretary of State of the State of Kansas.

(See S. C. Reporter's ed. 236–239.)

Appeal — judgment — affirmance — sustaining privilege tax on foreign corporation.

A decision upholding the validity of the annual tax imposed by Kan. Laws 1913, chap. 135, upon a foreign railway company doing business in Kansas, measured by that proportion of its capital stock which is devoted to its Kansas business, must be affirmed by the Federal Supreme Court, where that court had upheld the validity of the tax imposed by the same statute upon domestic corporations, and the sole basis of the attack upon the statute as applied to foreign corporations is the asserted discrimination against such corporations, resulting from the supposed invalidity of the tax on domestic corporations.

[For other cases, see Appeal and Error, IX. e, in Digest Sup. Ct. 1908.]

[No. 451.]

Submitted January 7, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Shawnee County, in that state, in favor of defendant in a suit by a foreign corporation to recover a privilege tax paid by it. Affirmed.

See same case below, 95 Kan. 271, 147 Pac. 794.

The facts are stated in the opinion.

Messrs. **R. R. Vermillion** and **W. F. Evans** submitted the cause for plaintiffs in error.

Mr. **James P. Coleman** submitted the cause for defendant in error. Mr. S. M. Brewster, Attorney General of Kansas, and Messrs. W. P. Montgomery and J. L. Hunt were on the brief.

Mr. **Paul E. Walker**, as *amicus curiæ*, filed a brief for the Chicago, Rock Island, & Pacific Railway Company.

[237] Mr. Justice **Hughes** delivered the opinion of the court:

The plaintiffs in error, the receivers of a railroad corporation organized under the laws of the state of Missouri, brought this action to recover the sum of $2,500, alleged to have been paid under protest to the secretary of state of the state of Kansas as a tax upon foreign corporations imposed by chapter 135 of the Laws of 1913. A general demurrer to the petition was sustained, and, as the plaintiff declined to plead further, judgment was rendered in favor of the defendant. This judgment was affirmed by the supreme court of the state. 95 Kan. 271, 147 Pac. 794.

The act above mentioned (§ 2) requires "every foreign corporation, for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital in this state, and subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas" to make annual report, setting forth certain facts, to the secretary of state. It is further provided that "upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the issued capital stock of the company represented by its property and business in Kansas, and shall charge and collect from such company, in addition to the initial fees, for the privilege of exercising its franchise in Kansas, an annual fee upon that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business." The amount of the fee is graduated according to the amount of the issued capital stock "used in Kansas." The minimum annual fee is $10, when the issued capital stock so used does not exceed $10,000; and the maximum annual fee is $2,500, when the issued capital stock so used exceeds $5,000,000.

[238] Construing these provisions of the act, and answering the objection that, as to a railroad company, and other foreign corporations, doing both a local and interstate

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NOTE.—State license or taxes, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; 60 L. ed. Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

On corporate taxation and the commerce clause—see note to Sandford v. Poe, 60 L.R.A. 641.

On the taxatoin of corporate capital stock, generally—see note to State Bd. of Equalization v. People, 58 L.R.A. 513.

business, the act was invalid because it undertook to regulate interstate commerce, the supreme court of Kansas said in State ex rel. Dawson v. Sessions, 95 Kan. 272, 275, 147 Pac. 789:

"The requirements of the statute are imposed on such foreign corporations doing business in this state as are 'subject to compliance with the laws relating to the admission of foreign corporations to do business in Kansas.' (§ 2.) Corporations which are engaged solely in interstate commerce are therefore wholly exempt from all its provisions, and those which do both an interstate and an intrastate business are exempt so far as concerns the former. The phrases 'that proportion of such foreign corporation's issued capital stock as is devoted to its Kansas business' (§ 2), and 'the issued capital stock used in Kansas,' refer to the amount of capital invested in doing a purely local business. The total capital of the company is involved only as a basis for arriving at a reasonable estimate of the capital devoted to transportation originating and ending in Kansas."

In the instant case, the objections to the tax upon the foreign corporation rest entirely upon the asserted invalidity of the tax imposed by the same statute upon domestic corporations; it is insisted that the foreign corporation had complied with statutory conditions entitling it to be treated not less favorably, and that, if the tax laid by the statute upon domestic corporations is invalid, the tax laid upon the foreign corporation cannot be sustained. Apparently, no other contention was presented to the supreme court of the state (95 Kan. 271). And, accordingly, in the brief of the plaintiffs in error in this court, the questions involved are stated to be: (a) that the act under which the tax was demanded is unconstitutional because "when applied to railroad [239] companies organized under the laws of the state of Kansas," owning lines extending into other states, the act places a burden upon interstate commerce and undertakes to tax property outside the state; (b) that the act seeks "to place a tax upon the entire capital stock of domestic corporations owning and operating railroads in Kansas and other states," that it thereby attempts to tax property outside the state, in contravention of the 14th Amendment, and that it "is therefore void as to domestic corporations;" and (c) that the compliance by the Missouri corporation (of which the plaintiffs in error are receivers) with the terms of chapter 186 of the Laws of 1887, of Kansas, "constituted a contract between the railroad company and the state, by which the state bound *itself* not to subject the railroad company or the plaintiffs in error to any greater liabilities than those imposed upon railroad corporations organized under the laws of Kansas, and conferred upon such foreign corporation complying with said act 'all the rights, privileges, and franchises' of Kansas railroad corporations;" and that it follows that, if the tax act is unconstitutional as to domestic corporations, the imposition of the tax in question upon the Missouri corporation "would violate the obligations of the contract" and would deny to it "the equal protection of the laws."

In the case of Kansas City, Ft. S. & M. R. Co. v. Botkin, decided this day [240 U. S. 227, ante, 617, 36 Sup. Ct. Rep. 261], we have considered the arguments against the tax imposed by the statute upon domestic corporations, and we have found the objections to be untenable. Thus, the sole basis for the attack made by the plaintiffs in error upon the statute fails, and the judgment must be affirmed.

Judgment affirmed.

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[240] ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,
v.
H. B. SHEPHERD.

(See S. C. Reporter's ed. 240-242.)

Error to state court — Federal question — when raised in time.

1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

Error to state court — frivolous Federal question.

2. The contention that due effect was

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

not given, in an action for damages resulting from alleged unreasonable delay in the transportation of cattle, to the provisions of the act of June 29, 1906 (34 Stat. at L. 607, chap. 3594, Comp. Stat. 1913, § 8651), limiting the time that cattle in interstate transit may be confined in cars without being unloaded, is too devoid of merit to serve as the basis of a writ of error from the Federal Supreme Court to a state court, where the question whether the transportation reasonably could have been completed within the maximum time—thirty-six hours—was the subject of direct and conflicting testimony, and was submitted to the jury as one of fact, with instructions that, under the Federal law, the carrier could not keep the stock in the cars longer than thirty-six hours, and that if the jury finds from the evidence that it was not reasonably possible for the shipment to reach its destination within that limit, it is not liable for the delay caused by the unloading, and no exception was reserved to this instruction, no modification of it was suggested, and no other instruction upon the subject was requested.

[For other cases, see Appeal and Error, 1110–1137, in Digest Sup. Ct. 1908.]

[No. 160.]

Submitted January 12, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the County Court of Murray County, in that state, in favor of plaintiff in an action against a carrier for damages due to unreasonable delay in transporting an interstate shipment of cattle. Dismissed for want of jurisdiction.

See same case below, 40 Okla. 589, 139 Pac. 833.

The facts are stated in the opinion.

Mr. W. F. Evans submitted the cause for plaintiff in error. Messrs. R. A. Kleinschmidt and E. H. Foster were on the brief:

The rights and remedies afforded a shipper in interstate commerce by the provisions of the interstate commerce act and its amendments are exclusive of all others, except such as are given by existing Federal law.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 57 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556.

The stipulation that the live stock was not to be transported within any specific time, etc., is valid.

Smith v. Chicago, R. I. & P. R. Co. 112 Mo. App. 610, 87 S. W. 9; Fulbright v. Wabash R. Co. 118 Mo. App. 482, 94 S. W. 992; Gilbert v. Chicago, R. I. & P. R. Co. 132 Mo. App. 697, 112 S. W. 1002; St. Louis, I. M. & S. R. Co. v. Jones, 93 Ark. 537, 137 Am. St. Rep. 99, 125 S. W. 1025; Cleveland, C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198.

No duty of a common carrier to transport and deliver live stock in season for a particular market exists at common law, in the absence of an express undertaking to that effect.

5 Am. & Eng. Enc. Law, 451.

If plaintiff in error had undertaken by express contract to deliver this live stock in season for the market of May 15th, that contract would have been void.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

The provision of the contract requiring notice is valid.

St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470; St. Louis & S. F. R. Co. v. Cake, 25 Okla. 227, 105 Pac. 322; Missouri, K. & T. R. Co. v. Hancock, 26 Okla. 265, 109 Pac. 223; Midland Valley R. Co. v. Ezell, 29 Okla. 40, 116 Pac. 163; Chicago, R. I. & P. R. Co. v. Conway, 34 Okla. 356, 125 Pac. 1110; St. Louis & S. F. R. Co. v. Bilby, 35 Okla. 589, 130 Pac. 1089; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; Chicago, R. I. & P. R. Co. v. Bruce, — Okla. —, 150 Pac. 880; St. Louis & S. F. R. Co. v. Pickens, — Okla. —, 151 Pac. 1055; St. Louis & S. F. R. Co. v. Waggoner, — Okla. —, 152 Pac. 448.

The provision of the contract limiting the time in which to bring suit is valid.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Missouri, K. & T. R. Co. v. Hancock, 26 Okla. 265, 109 Pac. 223; St. Louis & S. F. R. Co. v. Pickens, — Okla. —, 151 Pac. 1055.

The contract stipulations do not exempt the carrier from liability for negligence.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; St. Louis & S. F. R. Co. v. Phillips, 17 Okla. 264, 87 Pac. 470; Missouri, K. & T. R. Co. v. Hancock, 26 Okla. 265, 109 Pac. 223; Midland Valley R. Co. v. Ezell, 29 Okla. 40, 116 Pac. 163; Chicago, R. I. & P. R. Co. v. Conway, 34 Okla. 365, 125 Pac. 1110; St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The effect of the decision of the supreme court of Oklahoma is to render plaintiff in error liable for delay incident to compliance with an act of Congress.

Galveston, H. & S. A. R. Co. v. Warnken, 12 Tex. Civ. App. 645, 35 S. W. 72; St. Louis, I. M. & S. R. Co. v. Davenport, 97 Ark. 82, 133 S. W. 186; St. Louis, I. M. & S. R. Co. v. Smith, — Tex. Civ. App. —, 135 S. W. 597; St. Louis, I. M. & S. R. Co. v. West Bros. — Tex. Civ. App. —, 159 S. W. 142.

Mr. J. B. Thompson filed a brief for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court:

This was an action for damages resulting, as was alleged, from unreasonable delay in transporting cattle from Fort [241] Worth, Texas, to Kansas City, Missouri, in May, 1909. The plaintiff had a verdict and judgment, and the latter was affirmed. 40 Okla. 589, 139 Pac. 833. The errors assigned are that due effect was not given to certain provisions of the Carmack amendment to the interstate commerce act (§ 7, chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592), or to the act limiting the time that cattle in interstate transit may be confined in cars without being unloaded for rest, water, and feed. Chap. 3594, 34 Stat. at L. 607, Comp. Stat. 1913, § 8651.

The claim under the Carmack amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the supreme court of the state. The petition was not entertained, but was denied without passing upon the Federal question thus tardily raised. That question, therefore, is not open to consideration here. Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; McCorquodale v. Texas, 211 U. S. 432, 437, 53 L. ed. 269, 270, 29 Sup. Ct. Rep. 146; Forbes v. State Council, 216 U. S. 396, 399, 54 L. ed. 534, 535, 30 Sup. Ct. Rep. 295; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510.

The claim made under the other act was, that part of the delay was excusable, because the transportation reasonably could not have been completed within the maximum time—thirty-six hours—during which the cattle could be confined in the cars, and it therefore became necessary under the act to unload them for rest, water, and feed for at least five hours, as was done. Whether the transportation reasonably could have been completed within thirty-six hours was the subject of direct and conflicting testimony, and was committed to the jury as a question of fact. In that connection the court said to the jury: "You are instructed that under the laws of the United States the defendant company could not keep the stock in this shipment in the cars longer than thirty-six hours, and if you find from the evidence that it was not reasonably possible that the shipment should reach Kansas City [242] within the thirty-six-hour limit, then it is not liable for the delay caused by the unloading of the stock." No exception was reserved to this instruction, no modification of it was suggested, and no other instruction upon the subject was requested. It therefore is apparent that the assignments based upon this statute are so devoid of merit as to be frivolous.

Writ of error dismissed.

W. S. EMBREE et al., Plffs. in Err.,
v.
KANSAS CITY & LIBERTY BOULEVARD ROAD DISTRICT et al.

(See S. C. Reporter's ed. 242-251.)

Constitutional law — due process of law — notice and hearing — public improvements.

1. Landowners within a road district as established by an order of a county court conformably to Mo. Rev. Stat. 1909, chap. 102, art. 7, and Mo. Laws 1911, p. 373, were accorded the opportunity to be heard upon the question whether their lands would be benefited by its creation, which is essential to satisfy the due process of law clause of U. S. Const. 14th Amend., where

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman

the statute, which was fully complied with in this regard, requires that adequate public notice be given of the presentation of the petition for the creation of the district, and the time when it will be considered, makes provision for the presentation of remonstrances by owners of land within the proposed district, and directs that the petition and remonstrances be heard by the county court, that the court make such change in the boundaries "as the public good may require," and that the boundaries be not enlarged unless the owners of the lands not before included consent in writing or appear at the hearing and be given an opportunity to present objections.

[For other cases, see Constitutional Law, 745-763, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing — public improvements.

2. The opportunity of landowners within a proposed road district to be heard upon the question whether their lands will be benefited by its creation, which is accorded by Mo. Rev. Stat. 1909, chap. 102, art. 7, and Mo. Laws 1911, p. 373, is no less sufficient to satisfy the requirements of due process of law because the particular road to be improved is yet to be selected.

[For other cases, see Constitutional Law, 745-763, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing — public improvements.

3. Due process of law does not require that landowners within a road district as established by an order of a county court conformably to Mo. Rev. Stat. 1909, chap. 102, art. 7, and Mo. Laws 1911, p. 373, be afforded a hearing upon the question whether the benefits from the improvement of the road selected to the lands in the different zones will be in accord with the graduated ratings fixed by the statute itself, which provides that the cost is to be apportioned by rating the lands without the buildings thereon at their full fair value where lying within 1 mile from the road, at 75 per cent of such value where lying between 1 and 2 miles from the road, and at 50 per cent of such value where lying more than 2 miles therefrom, and then charging each tract with a share of the entire cost corresponding to its proportion of the value of all the lands as so rated.

[For other cases, see Constitutional Law, 745-763, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — hearing — public improvements.

4. A sufficient opportunity to be heard on the question of the value of their lands is accorded to landowners within a road district established by a county court conformably to a general law so as to satisfy the due process of law requirement of U. S. Const., 14th Amend., although no hearing is given when the lands are appraised, where the mode of enforcement of the tax assessed to meet the cost of the road improvement is by a suit in court, when owners aggrieved by the valuations may have a full hearing on that question.

[For other cases, see Constitutional Law, 745-763, in Digest Sup. Ct. 1908.]

[No. 187.]

Argued and submitted January 18 and 19, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Missouri to review a decree which affirmed a decree of the Circuit Court of Clay County, in that state, in favor of defendants in a suit to restrain the issue and sale of road district bonds. Affirmed.

See same case below, 257 Mo. 593, 166 S. W. 282.

The facts are stated in the opinion.

Mr. Harris L. Moore argued the cause, and, with Messrs. W. A. Craven, Ernest Simrall, James F. Simrall, and John M. Cleary, filed a brief for plaintiffs in error:

Where the power to determine the boundaries of the benefit district, that is to say, what property shall be assessed to pay for an improvement, is delegated to a nonlegislative body, due process of law demands notice and a hearing on whether the property so marked out for taxation is, in fact, benefited.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 170, 41 L. ed. 392, 17 Sup. Ct. Rep. 56; Argyle v. Johnson, 39 Utah, 500, 118 Pac. 487; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Soliah v. Heskin, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Re Kissel Ave. 81 Misc. 541, 143 N. Y. Supp. 467; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

While it is true that ordinarily a benefit assessment that must be collected by suit cannot be said to be wanting in due process of law, yet if, in such suit, the property owner cannot have tried the question of whether his property is benefited, then such suit does not constitute due process of law as to that question, or supply the lack of a hearing thereon.

Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Everington v. Park Comrs. 119 Minn. 334,

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v. Tucker, 13 L.R.A. 304; Pearson v. Yewdell, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required, generally, to constitute due process of law—see notes to Kunt v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

On landowner's right to notice and hearing on assessment for public improvement—see note to Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1201.

138 N. W. 426; Argyle v. Johnson, 39 Utah, 500, 118 Pac. 487; Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The decision of the supreme court of Missouri, in so far as it construes the statute in question, is conclusive; and where it has held that the statute contains a legislative determination of the benefit district, then that is a conclusive decision that there is no hearing on that question, when suit is brought to collect.

Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463.

While the fact that a benefit assessment is to be collected by suit ordinarily constitutes due process of law, yet when a benefit assessment has become a final lien, divided into twenty instalments, recorded in the public records as a lien on the land, and sold for cash, even if it is a fact that each property owner may defend each of the twenty suits required to be brought against each separate piece of property, being subject to heavy penalties and attorneys' fees in case of failure to make good the defense in whole or in part, there is neither such timely nor adequate hearing as is necessary to constitute due process of law.

Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Everington v. Park Comrs. 119 Minn. 354, 138 N. W. 426; Argyle v. Johnson, 39 Utah, 500, 118 Pac. 487; Central of Georgia R. Co. v. Wright, supra; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

Mr. William M. Williams submitted the cause for defendants in error. Mr. Claude Hardwicke was on the brief:

This court will adopt and follow the construction given by the supreme court of Missouri to the statute of that state under consideration in this case.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Weightman v. Clark, 103 U. S. 256, 260, 26 L. ed. 392, 393; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592.

The supreme court of Missouri, in construing the statute of that state under review in this case, held that the only method provided for the collection of taxes assessed for the benefits to the lands in the road district is by suit upon tax bills in the ordinary courts of justice, and that in said suit all the defenses the landowner may have, from the inception of the proceedings to the judgment upon the tax bill, may be interposed.

Embree v. Kansas City & L. Boulevard Road Dist. 257 Mo. 611, 166 S. W. 282.

The supreme court of Missouri, having construed Mo. Rev. Stat. 1909, chap. 102, art. 7, as amended in 1911, providing for the organization of special benefit assessment road districts, to require the enforcement of the tax assessed upon lands in the district, by suit upon a tax bill in a court of competent jurisdiction, with proper service of process upon the landowner, as in ordinary actions, with all defenses against the tax open to the landowner, such statute does not deny due process of law, and is not in conflict with the 14th Amendment of the Federal Constitution.

Embree v. Kansas City & L. Boulevard Road Dist. 257 Mo. 593, 166 S. W. 282; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; St. Louis v. Richeson, 76 Mo. 486.

While the supreme court of Missouri, after holding that the landowner is entitled under the statute to make any and all defenses he may have in a suit upon the tax bill, did not go further and decide his right to be heard in the first instance in opposition to the organization of the district, and to the inclusion of his land in the territory to be assessed for benefits for road improvements therein, the statute clearly provides for notice to the landowners and an opportunity for a preliminary hearing upon these issues before the county court, and such hearing was, in fact, accorded to the plaintiffs in error in this case, as provided by the statute.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to restrain the issue and sale of road district bonds and the levy and recordation of special taxes to pay them. A trial of the issues resulted in a judgment for the defendants, which at first was reversed and on a rehearing was affirmed. 257 Mo. 593, 166 S. W. 282. The plaintiffs prosecute this writ of error.

When the suit was begun the road dis-

trict had been organized, a road had been selected for improvement, and preliminary steps had been taken for issuing the bonds and levying the special taxes,—all conformably to the local statute. Rev. Stat. (Mo.) 1909, chap. 102, art. 7; Mo. Laws 1911, 373. The district is about 7 miles in length and 3 in width, and is bounded on the greater part of one side by the Missouri river. The road selected for improvement extends through the district in the direction of its length. The cost of the improvement is to be met temporarily by the issue and sale of bonds, and ultimately by the levy and collection of special taxes upon all the lands in the district. The cost is to be apportioned by rating the lands—without the buildings thereon—at their full fair value where lying within 1 mile of the road, at 75 per cent of such value where lying between 1 and 2 miles from the road, and at 50 per cent of such value where lying more than 2 miles therefrom (all seem to be within 2 miles here), and then charging each tract with a share of the entire cost corresponding to its proportion of the value of all the lands as so rated. The lands are appraised by the district commissioners and the cost of the improvement is apportioned by the county clerk.

[246] The plaintiffs own lands within the district and object to the issue of the bonds and to the levy of the special taxes, upon the ground that the scheme for subjecting the lands to the payment of the cost is repugnant to the due process clause of the 14th Amendment to the Constitution of the United States in that the landlord is not afforded any opportunity to be heard on the questions whether his lands will be benefited by the improvement, whether, if benefited, the benefits in the different zones will be in accord with the graduated ratings before indicated, and whether the appraisement of his lands for the purposes of the apportionment is fair.

The district was not established or defined by the legislature, but by an order of the county court, made under a general law. Whether there was need for the district, and, if so, what lands should be included and what excluded, was committed to the judgment and discretion of that court, subject to these qualifications: First, that the district should contain at least 640 acres of contiguous land and be wholly within the county; second, that the court's action should be invoked by a petition signed by the owners of a majority of the acres in the proposed district; and, third, that public notice—conceded to be adequate—should be given, by the clerk of the court, of the presentation of the petition and the date when it would be considered, and that owners of land within the proposed district should be accorded an opportunity to appear, either collectively or separately, and oppose its formation. In this connection the statute says: "The court shall hear such petition and remonstrance, and shall make such change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land within the district as so changed, the court shall make a preliminary [247] order establishing such public road district, and such order shall set out the boundaries of such district as established . . . but the boundaries of no district shall be so changed as to embrace any land not included in the notice made by the clerk unless the owner thereof shall in writing consent thereto, or shall appear at the hearing, and is notified in open court of such fact and given an opportunity to file or join in a remonstrance." The order actually made shows that four of the present plaintiffs, with three others, appeared in opposition to the petition, recites that "the court, after hearing and considering said petition and said protests and remonstrances and all evidence offered in support thereof, finds that the public good requires and makes necessary the organization, formation, and creation of such proposed public road district . . . with boundaries as stated in said petition," and sets out the boundaries of the district as established.

The sole purpose in creating the district, as the statute shows, was to accomplish the improvement of public roads therein,—the particular roads to be designated by the district commissioners and an approving vote of the landowners.

As the district was not established by the legislature, but by an exercise of delegated authority, there was no legislative decision that its location, boundaries, and needs were such that the lands therein would be benefited by its creation and what it was intended to accomplish, and, this being so, it was essential to due process of law that the landowners be accorded an opportunity to be heard upon the question whether their lands would be thus benefited. If the statute provided for such a hearing, the decision of the designated tribunal would be sufficient, unless made fraudulently or in bad faith. Fallbrook Irrig Dist. v. Bradley, 164 U. S. 112, 167, 174, 175, 41 L. ed. 369, 391, 394, 17 Sup. Ct. Rep. 56.

Did the statute contemplate such a hearing? We have [248] seen that it required that adequate public notice be given of the presentation of the petition for the creation

of the district and the time when it would be considered, made provision for the presentation of remonstrances by owners of lands within the proposed district, and directed that the petition and remonstrances be heard by the county court, that the court make such change in the boundaries "as the public good may require" and that the boundaries be not enlarged unless the owners of the lands not before included consent in writing or appear at the hearing and be given an opportunity to present objections. That a hearing of some kind was contemplated is obvious, and is conceded. But it is insisted that it was not to be directed to the question whether the lands included would be benefited by the creation of the district and what it was intended to accomplish. If that were so, there would be little purpose in the hearing and no real necessity for it.

True, the statute does not in terms say that lands which will not be benefited shall be excluded, or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries "as the public good may require." In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads, and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten.

Of course, the nature and extent of the hearing contemplated by the statute is a question of local law, and if it were clear that the supreme court of the state had settled it, we should accept and follow that ruling. Whether [249] the question has been settled is at least uncertain. In the principal opinion delivered on the original hearing that court said: "We hold that the general assembly, in granting to landowners of a proposed road district the privilege of being heard by remonstrance, intended that such landowners should have the right in such remonstrance to urge against the organization of the district or the inclusion of their lands therein any statutory or constitutional grounds which such landowners may possess; and that if such grounds be valid the court may exclude the lands of the remonstrants or refuse to incorporate the proposed district. This ruling is rendered necessary to avoid the conclusion that the general assembly directed a hearing without intending that any relief might thereby be obtained." That opinion, although copied into the record, does not appear in the Missouri Reports. They contain only the opinion delivered on the rehearing. The former may have been entirely recalled. If so, the question dealt with in the quotation made from it has not been settled, for the later opinion is silent upon the subject. But whether the question be settled or open is not of much importance, for, as before indicated, our view of the statute accords with that expressed by the state court in the excerpt from the first opinion.

We conclude therefore that the statute did provide for according the landowners an opportunity to be heard, when the district was created, upon the question whether their lands would be benefited, and also that the order establishing the district shows that the statute was complied with in that regard.

But in opposition to this conclusion it is urged that an adequate hearing could not be had at that time because the road to be improved had not been selected and no one could say what lands would be benefited. We are not impressed with this contention. As was well understood, [250] the purpose in creating the district was to bring about the improvement of its roads. Their number, location, and condition were known, as was also the extent and nature of their use. The district was of limited area and the proximity or relation of every part to each road was patent. As applied to such a situation, we perceive no serious obstacle to determining with approximate certainty and satisfaction whether the improvement of any one or more of the roads—even though no particular one was as yet selected—would be of benefit throughout the district. We say with approximate certainty and satisfaction, because this is all that is required. At best the question is one of opinion and degree, even where the improvement to be made has been definitely determined. The boundaries of drainage, irrigation, and other benefit districts are often defined in this way. Indeed, it is conceded that had the legislature created this particular district, the present objection would be untenable. If such a body can obtain the requisite information and exercise the requisite judgment, it is not easy to believe that the task would be more difficult for a county court sitting in the vicinity.

The claim that the landowners are entitled to a hearing on the question whether the benefits in the different zones will be in accord with the graduated ratings of their lands is not seriously pressed upon our attention and requires but brief notice. The ratings are not fixed in the exercise of dele-

gated authority, but by the statute itself, which must be taken as a legislative decision that in a district lawfully constituted, in the manner before indicated, the benefits to the lands in the different zones will be in approximate accord with the ratings named. This being so, no hearing is essential to give effect to this feature of the apportionment. A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and [251] an abuse of power (Wagner v. Leser, 239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66; Houck v. Little River Drainage Dist. 239 U. S. 254, ante, 266, 36 Sup. Ct. Rep. 58; Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, ante, 392, 36 Sup. Ct. Rep. 204; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, ante, 523, 36 Sup. Ct. Rep. 254. And see Bi-Metallic Invest. Co. v. State Bd. of Equalization, 239 U. S. 441, 445, 446, ante, 372, 375, 36 Sup. Ct. Rep. 141), which obviously is not the case here.

The claim that the landowners are not afforded an opportunity to be heard in respect of the value of their lands is also untenable. While no hearing is given when the lands are appraised, one is accorded when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice, when, as the supreme court of the state holds, owners aggrieved by the valuation may have a full hearing upon that question. This is due process. Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; Hagar v. Reclamation Dist. 111 U. S. 701, 711, 28 L. ed. 569, 573, 4 Sup. Ct. Rep. 663.

Judgment affirmed.

HAMILTON-BROWN SHOE COMPANY, Petitioner,
v.
WOLF BROTHERS & COMPANY.

(See S. C. Reporter's ed. 251-263.)

Appeal — harmless error — measure of damages.

1. The adoption by the master of a measure of recovery which might be erroneous, if the suit could be regarded as one of unfair competition without trademark infringement, does not require the reversal by the Federal Supreme Court of a decree for complainant, as recommended by the master, where a claim of trademark right, which that court finds to be well founded, was asserted in the bill and has not been abandoned, and the proofs adduced before the master, and his findings thereon, are as applicable to a claim of compensation for infringement of the trademark as to a claim of compensation for unfair competition in the absence of a trademark.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Trademark — geographical or descriptive term — "American Girl."

2. The words "The American Girl" are neither geographical nor descriptive as applied to women's shoes made and sold in the United States, and are therefore the subject of exclusive appropriation as a trademark for such product.

[For other cases, see Trademark, II., in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — scope of review — effect of prior refusal of writ.

3. The refusal of the Federal Supreme Court to review by certiorari a decree of a circuit court of appeals in a trademark suit which, though interlocutory, has been treated as settling the law of the case so as to furnish the rule for the guidance of the referee, the district court, and the circuit court of appeals itself upon the second appeal, does not preclude the Supreme Court, when reviewing on certiorari the final decree of the circuit court of appeals, rendered on the second appeal, from noticing and rectifying any errors that may have occurred in the interlocutory proceedings.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

Damages — lost profits — trademark suit.

4. The owner of a valid trademark is entitled to recover the profits acquired by an infringer from infringing sales.

[For other cases, see Damages, VI. t, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — trademark case — separation of profits.

5. The inherent impossibility of an apportionment between the profits attributable to the use of a simulated trademark and those attributable to the intrinsic merit of the infringer's product is a sufficient reason for not charging the owner of a trademark, when suing the infringer, with the burden of showing what part of the latter's profits were attributable to the use of the infringing mark,—especially where the infringement was not innocent.

[For other cases, see Evidence, II. k, 1, in Digest Sup. Ct. 1908.]

[No. 37.]

NOTE.—On trademark in geographical name—see notes to Dyment v. Lewis, 26 L.R.A.(N.S.) 73; and Elgin Nat. Watch Co. v. Illinois Watch Case Co. 45 L. ed. U. S. 365.

On damages for infringement of trademark as affected by loss of profits—see Rose v. Hirsh, 51 L.R.A. 823.

On certiorari from Federal Supreme Court to circuit courts of appeals—see notes to United States v. Dickinson, 53 L. ed. U. S. 711.

Argued October 28 and 29, 1915. Decided February 21, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, on a second appeal, reversed a decree of the District Court for the Eastern District of Missouri, awarding nominal damages in a suit to restrain infringement of a trademark and unfair competition, with directions to enter a decree against defendant for the damages recommended by the master. Affirmed.

See same case below, on first appeal, 91 C. C. A. 363, 165 Fed. 413; on second appeal, 124 C. C. A. 409, 206 Fed. 611.

The facts are stated in the opinion.

Messrs. **Luke E. Hart** and **Joseph W. Bailey** argued the cause, and, with Messrs. H. S. Priest, Morton Jourdan, and Charles B. Howry, filed a brief for petitioner:

Unfair competition consists in the sale of the goods of one manufacturer or vendor for the goods of another; and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.

Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 140, 49 L. ed. 986, 25 Sup. Ct. Rep. 609; Standard Paint Co. v Trinidad Asphalt Mfg. Co. 220 U. S. 461, 55 L. ed. 543, 3 Sup. Ct. Rep. 456; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Brown Chemical Co. v. Meyer, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Baker v. Baker, 53 C. C. A. 157, 115 Fed. 299; J. G. Rowley Co. v. Rowlet, 113 C. C. A. 386, 193 Fed. 390; Rathbone, S. & Co. v. Champion Steel Range Co. 37 L.R.A.(N.S.) 258, 110 C. C. A. 596, 189 Fed. 26; G. & C. Merriam Co. v. Ogilvie, 95 C. C. A. 423, 170 Fed. 167; Apollo Bros. v. Perkins, 125 C. C. A. 192, 207 Fed. 530; Rushmore v. Badger Brass Mfg. Co. 117 C. C. A. 255, 198 Fed. 379. See also John T. Dyer Quarry Co. v. Schuylkill Stone Co. 185 Fed. 557; N. K. Fairbank Co. v. Windsor, 61 C. C. A. 233, 124 Fed. 200; Dr. A. Reed Cushion Shoe Co. v. Frew, 158 Fed. 552; Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621.

This is a case of alleged unfair competition in business. It is an action on account of alleged fraudulent conduct on the part of defendant to plaintiff's injury; it is not a trademark or a patent case. The plaintiff can recover such damages only as it shows it has sustained, or such profits as defendant has made by reason of the alleged unfair competition. It must show: (a) that it has lost trade which it otherwise could have had but for defendant's alleged wrongful acts; or (b) that defendant sold its goods to the trade as and for the plaintiff's with the belief at the time of the purchase on the part of the trade that it was purchasing plaintiff's goods, and not those of defendant.

Elizabeth v. American Nicholson Pav. Co. 97 U. S. 126, 24 L. ed. 1000; Baker v. Baker, 53 C. C. A. 157, 115 Fed. 297; Newcomer v. Scriven Co. 94 C. C. A. 77, 168 Fed. 621; Kann v. Diamond Steel Co. 32 C. C. A. 324, 61 U. S. App. 22, 89 Fed. 712; New Orleans Coffee Co. v. American Coffee Co. 124 La. 19, 49 So. 730; Dr. A. Reed Cushion Shoe Co. v. Frew, 158 Fed. 552, on appeal, 89 C. C. A. 577, 162 Fed. 887; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 549, 34 L. ed. 1004, 11 Sup. Ct. Rep. 396; G. & C. Merriam Co. v. Ogilvie, 95 C. C. A. 423, 170 Fed. 169.

Under the analogy of the patent cases, plaintiff would not be entitled to recover the "entire profits" made by the defendant from the manufacture and sale of American Lady shoes, but only that part of the "entire profits" which was due and attributable to the use of the offending mark.

Walker, Patents, 4th ed. §§ 555, 711; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295; Dobson v. Hartford Carpet Co. 114 U. S. 444, 446, 29 L. ed. 178, 179, 5 Sup. Ct. Rep. 945; Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604, 620, 56 L. ed. 1222, 1228, 41 L.R.A.(N.S.) 653, 32 Sup. Ct. Rep. 691; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 235 U. S. 641, 59 L. ed. 398, 35 Sup. Ct. Rep. 221; Elizabeth v. American Nicholson Pav. Co. 97 U. S. 126, 24 L. ed. 1000; Mowry v. Whitney, 14 Wall. 620, 20 L. ed. 860.

The American Lady shoes sold by the defendant "since the commencement of this suit" were "accompanied with other matter clearly indicating" that they were the product of the Hamilton-Brown Shoe Company, and therefore the defendant cannot be required to account for them.

Delaware & H. Canal Co. v. Clark, 13 Wall. 327, 20 L. ed. 584; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 49 L. ed. 972, 986, 25 Sup. Ct. Rep. 609; Dr. A. Reed Cushion Shoe Co. v. Frew, 89 C. C. A. 577, 162 Fed. 887; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; Standard Paint Co. v. Trinidad Asphalt Mfg. Co. 220 U. S. 461, 55 L. ed. 543, 3 Sup. Ct. Rep. 456; Brown Chemical Co. v. Meyer, 139 U. S. 547, 35 L. ed. 250, 11 Sup. Ct. Rep. 625; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S.

598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Saxlehner v. Wagner, 216 U. S. 375, 54 L. ed. 525, 30 Sup. Ct. Rep. 298; J. F. Rowley Co. v. Rowlet, 113 C. C. A. 386, 193 Fed. 390; G. & C. Merriam Co. v. Ogilvie, 95 C. C. A. 423, 170 Fed. 169; Trinidad Asphalt Mfg. Co. v. Standard Paint Co. 90 C. C. A. 195, 163 Fed. 977; Walter Baker & Co. v. Gray, 52 L.R.A.(N.S.) 899, 113 C. C. A. 417, 192 Fed. 921; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Coats v. Merrick Thread Co. 149 U. S. 569, 37 L. ed. 851, 13 Sup. Ct. Rep. 966; Proctor & G. Co. v. Globe Ref. Co. 34 C. C. A. 405, 92 Fed. 362; Samson Cordage Works v. Puritan Cordage Mills, 197 Fed. 205; Centaur Co. v. Marshall, 38 C. C. A. 413, 97 Fed. 785; Allen B. Wrisley Co. v. Iowa Soap Co. 59 C. C. A. 54, 122 Fed. 796.

The amount of the defendant's profit is the amount that is left after every item which the manufacture and sale cost the defendant has been deducted; and if the defendant made no profit, plaintiff is entitled to none.

Keystone Mfg. Co. v. Adams, 151 U. S. 139, 148, 38 L. ed. 103, 105, 14 Sup. Ct. Rep. 295.

The action of the master and of the court of appeals in refusing to allow the defendant, as an element of the cost of manufacturing and selling American Lady shoes, interest on its capital, which was devoted exclusively to the American Lady line of shoes, over and above borrowed moneys, is erroneous.

Gould's Mfg. Co. v. Cowing, 105 U. S. 253, 257, 26 L. ed. 987, 988; Seabury & Johnson v. Am Ende, 152 U. S. 561, 570, 38 L. ed. 553, 556, 14 Sup. Ct. Rep. 683; Troy Iron & Nail Factory v. Corning, 6 Blatchf. 328, Fed. Cas. No. 14,196; Steam Stone Cutter Co. v. Windsor Mfg. Co. 17 Blatchf. 24, Fed. Cas. No. 13,335.

Mr. Lawrence Maxwell argued the cause, and, with Messrs. Simeon M. Johnson and Percy Werner, filed a brief for respondent:

The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser.

Scheuer v. Muller, 20 C. C. A. 161, 45 U. S. App. 184, 26 U. S. App. 784, 74 Fed. 225; Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 651; National Biscuit Co. v. Baker, 95 Fed. 135; N. K. Fairbank Co. v. R. W. Bell Mfg. Co. 23 C. C. A. 554, 49 U. S. App. 190, 77 Fed. 869; Revere Rubber Co. v. Consolidated Hoof Pad Co. 139 Fed. 151; Lever v. Goodwin, L. R. 36 Ch. Div. 1, 57 L. T. N. S. 583, 36 Week. Rep. 177; Gulden v. Chance, 105 C. C. A. 16, 182 Fed. 303.

It was evidently for the purpose of facilitating such fraud that defendant left its name off the shoe where it would be seen by the ultimate purchaser, and placed it inconspicuously on cartons, where it would not be seen by her until after she had bought the shoes, if at all.

Herring-Hall-Marvin Safe Co. v. Hall's Safe Co. 208 U. S. 554, 559, 52 L. ed. 616, 620, 28 Sup. Ct. Rep. 350; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 177, 41 L. ed. 121, 16 Sup. Ct. Rep. 1002; George G. Fox Co. v. Hathaway, 199 Mass. 99, 24 L.R.A. (N.S.) 900, 85 N. E. 417.

Plaintiff was entitled to an account of defendant's profits.

Regis v. Jaynes, 191 Mass. 249, 77 N. E. 774; Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 207, 26 L. ed. 975, 981; Tilghman v. Proctor, 125 U. S. 136, 148, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Herring-Hall-Marvin Safe Co. v. Hall's Safe, 208 U. S. 554, 52 L. ed. 616, 28 Sup. Ct. Rep. 350.

Defendant has infringed a "property" right.

G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369; Secondary Rights in Trade-Mark Cases, 18 Yale L. J. 571; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Wotherspoon v. Currie, L. R. 5 H. L. 508, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393; Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 188, 41 L. ed. 118, 125, 16 Sup. Ct. Rep. 1002; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Edelsten v. Edelsten, 1 DeG. J. & S. 185, 9 Jur. N. S. 479, 7 L. T. N. S. 768, 11 Week. Rep. 328; Lever v. Goodwin, L. R. 36 Ch. Div. 1, 57 L. T. N. S. 583, 36 Week. Rep. 177; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 100 Me. 461, 4 L.R.A.(N.S.) 960, 62 Atl. 499; Avery v. Meikle, 85 Ky. 448, 7 Am. St. Rep. 604, 3 S. W. 609; Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774; Forster Mfg. Co. v. Cutter-Tower Co. 211 Mass. 219, 97 N. E. 749; Paul, Trade-Mark, § 326; Notaseme Hosiery Co. v. Straus, 209 Fed. 495, 131 C. C. A. 503, 215 Fed. 361; P. E. Sharpless Co. v. Lawrence, 130 C. C. A. 59, 213 Fed. 423.

Plaintiff has sustained the burden of proof.

Avery v. Meikle, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. E. 609; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 538, 546, 34 L. ed. 998, 1003, 11 Sup. Ct. Rep. 396; Forster Mfg. Co. v. Cutter-Tower Co. 211 Mass. 219, 97 N. E. 749; National Biscuit Co. v. Baker, 95 Fed. 135.

"American Girl" is a valid trademark.

Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E.

476; Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 653; Joseph Banigan Rubber Co. v. Bloomingdale, 89 Off. Gaz. 1670.

Plaintiff is entitled to interest on the amount awarded from March 9, 1910, the date as of which the master stated the account.

Tilghman v. Proctor, 125 U. S. 136, 160, 31 L. ed. 664, 672, 8 Sup. Ct. Rep. 894.

Mr. Justice Pitney delivered the opinion of the court:

Respondent, an Ohio corporation engaged in the manufacture of shoes, filed its bill of complaint on January 29, 1906, in the circuit court of the United States for the eastern district of Missouri, eastern division, against petitioner, a Missouri corporation engaged in the same business, seeking an injunction to restrain infringement of an alleged trademark for shoes consisting of the words "The American Girl," by the use of the words "American Lady" as a colorable imitation, and also unfair competition in trade, carried on by means that included the use of the latter words; and praying an accounting of damages and profits. On final hearing the circuit court dismissed the bill. Upon appeal, the circuit court of appeals (91 C. C. A. 363, 165 Fed. 413) held that "The American Girl" was a geographical name, and, as applied to women's shoes, was descriptive merely of shoes manufactured in America and to be worn by women, and not an arbitrary or fanciful name to indicate the maker, and hence that the term [254] as applied to shoes was not the subject of a valid trademark. But the court held that complainant was entitled to be protected against unfair trade; that the record disclosed that it and its predecessors in business had employed the words "The American Girl" as a trademark continuously since the year 1896, had extensively advertised their shoes under that name, with the catch phrase "A shoe as good as its name," in trade journals and newspapers throughout the United States, and largely throughout the southern states, and thus established an extensive trade therefor; and that defendant, by adopting in the year 1900 and thereafter using the name "The American Lady," with certain catch phrases, in connection with shoes made by it, and this with full knowledge of complainant's rights, was guilty of unfair competition, tending to and resulting in confusion in the trade, and that complainant was entitled to relief. The decree of the circuit court was therefore reversed, with directions to decree an injunction and an accounting limited to the time since the commencement of the suit.

Complainant petitioned this court for a writ of certiorari to review that decision, but this was denied. 214 U. S. 514, 53 L. ed. 1063, 29 Sup. Ct. Rep. 696.

Thereafter the circuit court, pursuant to the mandate of the court of appeals, made a decree granting an injunction in accordance with the opinion of that court, and referring to a master an accounting of the damages and profits for which defendant might be liable, "limited to shoes sold by the defendant since the filing of the bill in this case, and which were marked with the name 'American Lady,' and not accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company." An accounting was had, extending from the date of the commencement of the suit to March 10, 1910. Complainant made no attempt to introduce substantial proof as to the amount of [255] its damages, declaring that they were practically incapable of exact computation. All the testimony was directed to the question of defendant's profits.

The master reported that during the period covered by the accounting defendant sold "American Lady" shoes, which, because of differences in marking, he divided into three classes:

Class 1. 974,016 pairs of shoes bearing the words "American Lady" stamped upon the sole, and bearing no other impression or distinguishing mark. The profits upon these were found to be $254,401.72.

Class 2. 961,607 pairs of shoes marked "American Lady," with the words "Hamilton-Brown Shoe Co.," but without the word "Makers," or other matter indicating that the shoes were of defendant's manufacture. The profits upon these were found to be $190,909.83.

Class 3. 593,872 pairs of shoes marked "American Lady," but bearing also the marks "Hamilton-Brown Shoe Co., Makers." The profits upon these were found to be $132,740.77.

The master recommended that a judgment be entered for the profits accruing from the first two classes, aggregating $445,311.55. The profits accruing from the third class he held complainant was not entitled to recover under the opinion of the court of appeals and the decree of the circuit court, entered in accordance with it. Both parties having filed exceptions, the district court (successor of the circuit court), overruled those of complainant, sustained those of defendant, and adjudged a recovery of $1 nominal damages. 192 Fed. 930.

Complainant appealed to the circuit court of appeals, contending that a decree should have been rendered in its favor for the profits upon the first two classes of shoes, in ac-

cordance with the master's recommendation, and that it should have included the profits upon the third class, which were denied by the master. The court of appeals [256] reversed the decree, with directions that defendant's exceptions to the master's report be overruled, that the report be confirmed, and that a decree be entered against defendant for the amount recommended by him, with costs. 124 C. C. A. 409, 206 Fed. 611.

This writ of certiorari having been allowed, we proceed to deal with the questions presented by the record.

Regarding the case as one of unfair competition without trademark infringement, it is insisted by petitioner that the normal recovery does not include the gains and profits of defendant, according to the rule admittedly applicable in equity to trademark cases, but that the injured party is limited to such damages as it shows it has sustained; and that the present case is devoid of circumstances to take it out of the ordinary rule.

If, however, complainant was and is entitled to the use of the words "The American Girl" as a trademark, in the strict sense of the term, and if the proofs adduced before the master, and his findings thereon, are as applicable to a claim of compensation for infringement of the trademark as to a claim of compensation for unfair competition in the absence of trademark, it will not be necessary to pass upon the question of the proper measure of recovery in a non-trademark case. As above pointed out, a claim of trademark right was asserted in the bill, and it has not been abandoned. It was overruled by the circuit court of appeals on the first appeal, upon reasoning with which we are unable to concur. We do not regard the words "The American Girl," adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's [257] predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims.

The cases cited to the contrary are distinguishable. In Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 324, 20 L. ed. 581, 583, the word "Lackawanna" was rejected as a trademark for coal because it designated the district in which the coal was produced. In Columbia Mill Co. v. Alcorn, 150 U. S. 460, 466, 37 L. ed. 1144, 1147, 14 Sup. Ct. Rep. 151, it was held that "Columbia" could not be appropriated for exclusive use as a trademark because it was a geographical name. So, with respect to "Elgin," as designating watches (Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 673, 45 L. ed. 365, 378, 21 Sup. Ct. Rep. 270); "Genesee," claimed as a trademark for salt (Genesee Salt Co. v. Burnap, 20 C. C. A. 27, 43 U. S. App. 243, 73 Fed. 818); "Old Country," as a mark for soap (Allen B. Wrisley Co. v. Iowa Soap Co. 59 C. C. A. 54, 122 Fed. 796). If the mark here in controversy were "American Shoes," these cases would be quite in point. (And see Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 821, 826.) But "The American Girl" would be as descriptive of almost any article of manufacture as of shoes; that is to say, not descriptive at all. The phrase is quite analogous to "American Express," held to be properly the subject of exclusive appropriation as a trademark for sealing wax in Dennison Mfg. Co. v. Thomas Mfg. Co. 94 Fed. 651, 653.

It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the circuit court of [258] appeals by certiorari under § 240, Judicial Code [36 Stat. at L. 1157, chap. 231], derived from § 6 of the Evarts act of March 3, 1891, 26 Stat. at L. 828, chap. 517, Comp. Stat. 1913, § 1217. As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. Re Lau Ow Bew, 141 U. S. 583, 587, 35 L. ed. 868, 869, 12 Sup. Ct. Rep. 43; Re Woods, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 383, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758; Forsyth v. Hammond, 166 U. S. 506, 514, 41 L. ed. 1095, 1098, 17 Sup. Ct. Rep. 665; Fields v. United States, 205 U. S. 292, 296, 51 L. ed. 807, 810, 27 Sup. Ct. Rep. 543. And, except in extraordinary cases, the writ is not issued until final decree. American Constr. Co. v. Jacksonville, T. &

K. W. R. Co. 148 U. S. 372, 378, 384, 37 L. ed. 486, 489, 491, 13 Sup. Ct. Rep. 758; The Three Friends, 166 U. S. 1, 49, 41 L. ed. 897, 913, 17 Sup. Ct. Rep. 495; The Conqueror, 166 U. S. 110, 113, 41 L. ed. 937, 939, 17 Sup. Ct. Rep. 510; Denver v. New York Trust Co. 229 U. S. 123, 133, 57 L. ed. 1101, 1120, 33 Sup. Ct. Rep. 657. The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling "the law of the case" so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings. Panama R. Co. v. [259] Napier Shipping Co. 166 U. S. 280, 284, 41 L. ed. 1004, 1005, 17 Sup. Ct. Rep. 572; United States v. Denver & R. G. R. Co. 191 U. S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 267, 54 L. ed. 757, 761, 30 Sup. Ct. Rep. 505; Messenger v. Anderson, 225 U. S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739.

Having reached the conclusion that complainant is entitled to the use of the words "The American Girl" as a trademark, it results that it is entitled to the profits acquired by defendant from the manifestly infringing sales under the label "American Lady,"—at least to the extent that such profits are awarded in the decree under review. The right to use a trademark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has been actually used. McLean v. Fleming, 96 U. S. 245, 252, 24 L. ed. 828, 831; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 224, 27 L. ed. 706, 708, 2 Sup. Ct. Rep. 436. The infringer is required in equity to account for and yield up his gains to the true owner, upon a principle analogous to that which charges a trustee with the profits acquired by wrongful use of the property of the *cestui que trust*. Not that equity assumes jurisdiction upon the ground that a trust exists. As pointed out in Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 214, 26 L. ed. 975, 984; and Tilghman v. Proctor, 125 U. S. 136, 148, 31 L. ed. 664, 668, 8 Sup. Ct. Rep. 894 (patent cases), the jurisdiction must be rested upon some other equitable ground, —in ordinary cases, as in the present, the right to an injunction,—but the court of equity, having acquired jurisdiction upon such a ground, retains it for the purpose of administering complete relief, rather than send the injured party to a court of law for his damages. And profits are then allowed as an equitable measure of compensation, on the theory of a trust *ex maleficio*. In the courts of England, the rule seems to be that a party aggrieved must elect between damages and profits, and cannot have both. In this country, it is generally held that in a proper case both damages and profits may be awarded. As already observed, the decree under review allows profits only, confines the allowance to such as accrued [260] after the commencement of the suit, and excludes all sales where the term "American Lady" was accompanied with any other matter clearly indicating that such shoes were of the manufacture of the Hamilton-Brown Shoe Company. It was construed to exclude all shoes bearing in addition to "American Lady" the marks "Hamilton-Brown Shoe Co., Makers." The account was based upon undisputed data, and no reason is suggested why, if otherwise accurate, it is not as properly applicable upon the theory of trademark as upon that of unfair competition aside from trademark infringement,—at least, so far as defendant is entitled to criticize it; complainant is not attacking the decree.

It is, however, insisted by defendant (petitioner) that whether the recovery be based upon the theory of trademark, or upon that of unfair competition, the profits recoverable should be limited to such amount as may be shown by direct and positive evidence to be the increment of defendant's income by reason of the infringement, and that the burden of proof is upon complainant to show what part of defendant's profits were attributable to the use of the infringing mark. It is said the true rule is strictly analogous to that applied in patent cases, and Mowry v. Whitney, 14 Wall. 620, 650, 20 L. ed. 860, 865; Elizabeth v. American Nicholson Pav. Co. 97 U. S. 126, 139, 24 L. ed. 1000, 1006; Garretson v. Clark, 111 U. S. 120, 121, 28 L. ed. 371, 372, 4 Sup. Ct. Rep. 291; Dobson v. Hartford Carpet Co. 114 U. S. 439, 444, 29 L. ed. 177,

178, 5 Sup. Ct. Rep. 945; Tilghman v. Proctor, 125 U. S. 136, 146, 31 L. ed. 664, 667, 8 Sup. Ct. Rep. 894; Keystone Mfg. Co. v. Adams, 151 U. S. 139, 147, 38 L. ed. 103, 105, 14 Sup. Ct. Rep. 295; Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co. 225 U. S. 604, 615, 56 L. ed. 1222, 1226, 32 Sup. Ct. Rep. 691; and Dowagiac Mfg. Co. v. Minnesota Moline Plow Co. 235 U. S. 641, 59 L. ed. 398, 35 Sup. Ct. Rep. 221, are relied upon. The rule invoked is that which, as pointed out in the last two of these cases, is applicable where plaintiff's patent relates to a part only of a machine or combination or process, or to particular improvements in a machine or other device. In such case, where the invention is used in combination with other elements of value not covered by the patent, [261] so that plaintiff's patent creates only a part of the profits, he is entitled to recover only that part, and must give evidence tending to apportion the profits between the patented and unpatented features. But, as pointed out in the Westinghouse Case (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, "on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong."

Assuming the asserted analogy to patent cases to exist, a sufficient reason for not requiring complainant in the present case to make an apportionment between the profits attributable to defendant's use of the offending mark and those attributable to the intrinsic merit of defendant's shoes is that such an apportionment is inherently impossible. Certainly, no formula is suggested by which it could be accomplished. The result of acceding to defendant's contention, therefore, would be to deny all compensation to complainant. And it is to be remembered that defendant does not stand as an innocent infringer. Not only do the findings of the court of appeals, supported by abundant evidence, show that the imitation of complainant's mark was fraudulent, but the profits included in the decree are confined to such as accrued to defendant through its persistence in the unlawful simulation in the face of the very plain notice of complainant's rights that is contained in its bill. As was said by the supreme court of California in a similar case, Graham v. Plate, 40 Cal. 593, 598, 6 Am. Rep. 639, 640: "In sales made under a simulated trademark it is impossible to decide how much of the profit resulted from the intrinsic value of [262] the commodity in the market, and how much from the credit given to it by the trademark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales and at what prices except for the use of the trademark. No one will deny that on every principle of reason and justice the owner of the trademark is entitled to so much of the profit as resulted from the use of the trademark. The difficulty lies in ascertaining what proportion of the profit is due to the trademark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty, it is more consonant with reason and justice that the owner of the trademark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party, who in no degree contributed to the wrong." To the same effect are Avery v. Meikle, 85 Ky. 435, 448, 7 Am. St. Rep. 604, 610, 3 S. W. 609; El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 915, 6 L.R.A. 823, 829, 23 Am. St. Rep. 537, 544, 7 So. 23; Regis v. Jaynes, 191 Mass. 245, 249, 251, 77 N. E. 774; W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. 100 Me. 461, 479, 4 L.R.A.(N.S.) 960, 62 Atl. 499; Saxlehner v. Eisner & M. Co. 70 C. C. A. 452, 138 Fed. 22, 24.

Finally, it is contended that the account, as stated by the master and confirmed by the circuit court of appeals, failed to make due allowance for certain items entering into the cost of manufacturing and selling the shoes in diminution of defendant's profits, including interest on capital, depreciation of real estate, taxes, insurance, advertising, and trade discounts. These are matters of fact, respecting which we see no sufficient reason for disturbing the decree. One of the points [263] most earnestly insisted upon is that certain overhead charges, appearing on defendant's books as "Advance Boston House, $73,772.03," and "Allowance to Boston, $103,075.14," of which the amount chargeable *pro rata* against "American Lady" shoes not marked "Makers," for the period covered by the accounting, was $10,271.69, ought to have been deducted in computing defendant's profits. The only explanation of these charges is in a stipulation of the parties that they "represent allowances made by the wholesale house of Hamilton-

Brown Shoe Company on goods shipped by it to what is known as the 'Boston House', being a separate and distinct corporation from the defendant company, and the amount received by the Hamilton-Brown Shoe Company from the 'Boston House' for goods shipped to it was $73,772.03 and $103,075.14 less than the price at which the goods were billed to that house, and those items do not represent moneys paid by the Hamilton-Brown Shoe Company to the 'Boston House,' or advances by the Hamilton-Brown Shoe Company to the 'Boston House.'" If, in the master's calculation of the profits, defendant had been charged with sales of the goods at the prices at which they were billed to the Boston House, the insistence that a deduction of $10,271.69 ought to be allowed as being in the nature of a trade discount would seem correct. But that is not made to appear, and we cannot conclude that the master erred in overruling this allowance.

Decree affirmed.

The CHIEF JUSTICE and Mr. Justice Van Devanter are of opinion that the term "The American Girl," as applied to women's shoes made and sold in America, is geographical and descriptive, and not subject to exclusive appropriation as a trademark, and that upon this record a recovery of the entire profits is not admissible. They therefore dissent.

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[264] GUERINI STONE COMPANY, Plff. in Err.,
v.
P. J. CARLIN CONSTRUCTION COMPANY.

(See S. C. Reporter's ed. 264–283.)

Contracts — construction — reference to extrinsic agreement.

1. A reference in a subcontract to the general contract for a particular purpose makes it a part of the subcontract only for the purpose specified.

[For other cases, see Contracts, II. a, in Digest Sup. Ct. 1908.]

Contracts — construction of subcontract — controlling effect of general contract.

2. The subcontractor for a part of the work called for by a general contract with the United States for the construction of a public building was not bound by the provisions of the general contract so as to be obliged to submit to delays resulting from the action of the government, where the subcontract, although referring to the drawings and specifications for the purpose of indicating what work was to be done by the subcontractor and in what manner, and making the supervising architect of the Treasury the architect or referee, contains no clause incorporating into itself the provisions of the general contract, or even in general terms referring to that instrument, and expressly places upon the general contractor the obligation to provide all labor and material not included in the subcontract in such manner as not to delay the material progress of the work.

[For other cases, see Contracts, II. a, in Digest Sup. Ct. 1908.]

Contracts — breach of subcontract — delay by general contractor — reimbursement of subcontractor.

3. A provision in a subcontract which extends the time for completion in case the subcontractor is delayed by the fault of the general contractor, and thus relieves the subcontractor from the liability to liquidated damages imposed by the contract in case of failure to complete his work within a specified time, cannot be so construed as to deprive the subcontractor of his right under another provision of the subcontract to reimbursement for any loss attributable to any delay resulting from the general contractor's failure to provide materials not included in the subcontract.

[For other cases, see Contracts, V. f, in Digest Sup. Ct. 1908.]

Contracts — breach of contract — delay by general contractor — reimbursement of subcontractor.

4. The failure to furnish a foundation upon which a subcontractor's work could be superimposed was a failure to provide labor and materials not included within the subcontract, within the meaning of such contract binding the general contractor to reimburse the subcontractor for any loss caused by delay resulting from the general contractor's failure to provide such labor and materials.

[For other cases, see Contracts, V. f, in Digest Sup. Ct. 1908.]

Contracts — breach of contract — delay by general contractor — reimbursement of subcontractor.

5. Delays attributable to action by the government were among those intended to be safeguarded by a provision in a subcontract for a part of the work called for by a general contract with the United States for the construction of a public building, that "the general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the subcontractor, agree that they will reimburse the subcontractor for such loss."

[For other cases, see Contracts, V. f, in Digest Sup. Ct. 1908.]

Trial — question for jury — lost profits.

6. The profits which a subcontractor probably would have gained if the contract had been proceeded with in the ordinary manner should not have been excluded from

NOTE.—On loss of profits as an element of damages for breach of contract—see note to Wells v. National Life Asso. 53 L.R.A. 34.

the jury as contingent and speculative in an action by him against the general contractors for the latter's breach of the contract, where there was testimony from an experienced witness as to the probable cost to the subcontractor of furnishing the materials and doing the work called for by the subcontract.

[For other cases, see Trial, VI. c, in Digest Sup. Ct. 1908.]

Trial — request for instructions — breach of contract.

7. The refusal of a requested instruction that if the general contractor failed to make payments as called for by the subcontract on account of work done by the subcontractor in accordance with the contract, such failure constitutes a breach of the contract on the part of the general contractor, is not error, where the subcontract does not specify the amount of the advance payments, or indicate how they are to be ascertained, merely providing that the contract price is to be paid "in monthly payments on account, not to exceed in amount 85 per cent of the cost of the work actually erected in the building" on condition that the subcontractor furnish a written requisition not less than twelve days before payment is required, and the evidence fails to show that the requisitions were based upon the cost of the work, or that any clear statement of such cost was submitted with them.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

Trial — requested instructions — damages.

8. It is not error to refuse a requested instruction as to damages which contains elements that would not properly be applicable if recovery should be based solely upon some of the grounds of action declared upon.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

[No. 78.]

Argued and submitted November 12, 1915.
Decided February 21, 1916.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment for a part of the damages sought by a subcontractor in an action against the general contractor for a breach of contract. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. Edward S. Paine argued the cause and filed a brief for plaintiff in error:

The terms of the contract between the government and the general contractor are not to be incorporated in the contract between plaintiff and defendant, and they furnish no defense to the defendant under the circumstances here alleged and proven.

Noyes v. Butler Bros. 98 Minn. 448, 108 N. W. 839; Modern Steel Structural Co. v. English Constr. Co. 129 Wis. 31, 108 N. W. 70; Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Moreing v. Weber, 3 Cal. App. 14, 84 Pac. 220; 2 Page, Contr. p. 1736.

The court erred in charging that prospective future profits could not be recovered.

United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Ironton v. Harrison Constr. Co. 129 C. C. A. 29, 212 Fed. 353; Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876, 18 Mor. Min. Rep. 98; Pennsylvania Steel Co. v. New York City R. Co. 117 C. C. A. 503, 198 Fed. 721; Kenney v. Knight, 127 Fed. 403.

The court erred in charging that the defendant could not be liable in money damages for delay in furnishing the granite, or for delays other than failure to provide labor and material.

Nelson v. Pickwick Associated Co. 30 Ill. App. 333; Del Genovese v. 3d Ave. R. Co. 13 App. Div. 424, affirmed in 162 N. Y. 614, 57 N. E. 1127; O'Heron v. American Bridge Co. 177 Ill. App. 405.

The court erred in admitting in evidence an unaccepted bid as proof of the cost of completing the work covered by plaintiff's contract.

Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; Hine v. Manhattan R. Co. 132 N. Y. 481, 15 L.R.A. 591, 30 N. E. 985.

Mr. Francis H. Dexter submitted the cause for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

We have here under review a judgment for damages in favor of plaintiff in error against defendant in error, reversal being asked upon the ground that, through erroneous rulings made by the trial judge, the recovery was unduly limited. The writ of error was sued out under § 244, Jud. Code (act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1157, Comp. Stat. 1913, §§ 968, 1221), prior to the act of January 28, 1915 (38 Stat. at L. 804, chap. 22, §§ 3 and 6).

Defendant, a corporation of the state of New York, on December 12, 1910, secured a contract with the government of the United States for the construction of a postoffice and court building at San Juan, Porto Rico. A few days later it entered into a subcontract in writing with one Guerini, by the first paragraph of which he agreed: "To furnish and set in position, including the concrete backing, all the imitation of sandstone, and to construct the interior concrete walls, concrete floors, con-

crete roof, backing the granite construction, enclosing all the I beams . . . agreeable to the drawings and specifications made by the said architect (copies of which have been delivered to the subcontractor), and to the dimensions and explanations thereon, therein and herein [266] contained, according to the true intent and meaning of said drawings and specifications," etc.; it being agreed that the work should be done "under the direction and to the satisfaction of the general contractors and James Knox Taylor, architect (acting as agents of the owner) or his or its representative."

A subsequent paragraph reads as follows:

"25th. The subcontractor further agrees to furnish the material and build the concrete footing complete to the basement floor for the sum of $6.70 a cubic foot.

"Also to furnish the materials and build all the sidewalks for the sum of $1.85 a square yard.

"Also set in position all the granite walls, steps, balusters, buttresses, and curbing, and all other granite work for the sum of 40 cents a square foot surface. The three above items to be at the option of the general contractor. . . ."

Thereafter the plaintiff corporation was formed under the laws of Massachusetts, and Guerini transferred the contract to it. Defendant was notified of this, expressed satisfaction in writing under date February 20, 1911, and thereafter dealt with plaintiff as subcontractor.

At a later time, defendant exercised the third only of the options given to it by the 25th paragraph.

The plan of the building contemplated a foundation of concrete and piles, which was to be constructed by defendant complete to the basement floor; above this a basement story, surfaced with granite blocks to be furnished by defendant (as a practical matter, to be sent from the United States) and to be set in position by plaintiff under the accepted option. The blocks were to be backed with concrete, to be furnished and set by plaintiff. Above the basement story, the exterior walls were to be faced with imitation sandstone, backed with concrete, which, together with interior walls, floors, and roof of concrete, were to be constructed by plaintiff.

[267] The contract contained the following clauses that bear upon the matters in dispute:

"6th. The subcontractor shall and will proceed with the said work and every part and detail thereof in a prompt and diligent manner, . . . and shall and will wholly finish the said work according to the said drawings and specifications and this contract in 300 days from the date upon which the building is ready to receive his work and after he has been notified to proceed by general contractors, and in default thereof, the subcontractor shall pay the general contractors the sum of $20 for every day thereafter that the said work shall remain unfinished as and for liquidated damages. The subcontractor further agrees to begin work at the building within three days from the time that he is notified by the general contractors that the building is ready to receive such work.

"7th. . . . Should the subcontractor be obstructed or delayed in the prosecution or completion of the work by neglect, delay, or default of the owner, the architect, the general contractors, or of any other contractors employed by them upon the work, or by alterations which may be required in said work, or by any damage which might happen by fire, lightning, earthquake, or cyclone, or by the abandonment of the work by the employees through no fault of the subcontractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid," etc.

"11th. The general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the subcontractor, agree that they will reimburse the subcontractor for such loss; and the subcontractor agrees that if he shall delay the material progress of the work so [268] as to cause any damage for which the general contractors shall become liable, then he shall make good to the general contractors any such damage over and above any damage for general delay, herein otherwise provided; the amount of such loss or damage in either case, to be fixed and determined by the architect, or by arbitration, as provided in article 3d in this contract.

"12th. It is hereby mutually agreed by the parties hereto that the sum to be paid by the general contractors to the subcontractor for said work and materials shall be sixty-four thousand seven hundred and fifty dollars ($64,750), subject to additions or deductions as hereinbefore provided, and that such sum shall be paid in current funds by the general contractors to the subcontractor in monthly payments on account, not to exceed in amount 85 per cent of the cost of the work actually erected in the building, provided that the subcontractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required, . . ."

The action was commenced in June, 1912. The complaint, besides the jurisdictional averments, alleged the making of the contract between Guerini and defendant, the assignment to plaintiff, and defendant's consent and recognition of plaintiff as the contracting party; averred that thereafter and during the month of February, 1911, at defendant's request and in pursuance of the terms of the contract, plaintiff employed and sent to Porto Rico its representatives, brought laborers from the United States and employed others in Porto Rico, organized its working forces, purchased and supplied the necessary tools and materials, and prepared itself and was ready and willing to perform its obligations under the contract, but that thereafter until the 16th day of October, 1911, plaintiff was not permitted by defendant to proceed with the work, owing to defendant's failure to provide the necessary [269] granite blocks; that on that day plaintiff did proceed with all possible diligence and performed all the work provided for by the contract as fast as defendant, in the course of construction work, permitted plaintiff to do so; that nevertheless during the period from October 16, 1911, until March 9, 1912, the work was unreasonably and unjustifiably delayed by the failure of defendant to provide necessary materials and carry on its part of the construction work so as to permit plaintiff to perform the work required of it under the contract, and that plaintiff was thereby greatly damaged; that on March 9, 1912, all work of every nature was stopped on the building, and plaintiff was prevented by defendant from continuing with any work; that said stoppage "has continued ever since, is still continuing, and . . . will continue for a period of at least several months hereafter," and that defendant has accordingly committed a breach of its obligations under the contract, the result of which has been and is to cause great damage and loss to plaintiff, which has been obliged to keep its labor force on hand during all of said period at great loss and expense; that by the terms of the contract payment of not more than 85 per cent of the amount of the work actually done was due and payable by defendant monthly on twelve days' notice from plaintiff to defendant, and that plaintiff during the months of December, 1911, and January and February, 1912, duly notified and demanded of defendant payment of the sums due for the work actually performed, but that defendant continuously and repeatedly failed and refused to make said payments; that because of said repeated violation and breach of the contract on the part of defendant, plaintiff, under date of May 22, 1912, notified defendant in writing of its election to terminate the contract and bring its action for damages for breach thereof; and that plaintiff has offered to defendant to arbitrate their differences, but that defendant has refused. Plaintiff claimed damages to the amount of $45,797.45 [270] for work and labor performed, materials furnished, and moneys expended in and about the performance of the contract, and for lost profits. In a separate paragraph an indebtedness of about $40,000 was alleged, for the reasonable value of work, labor, and materials supplied.

Defendant answered, admitting some of the averments of the complaint, but denying that plaintiff had complied with the terms of the contract or had been prevented by defendant from proceeding with and carrying on its work; admitting that plaintiff notified defendant of its election to cancel or rescind the contract and bring its action for damages for the alleged breach thereof, but denying that there was cause for rescission, and denying that plaintiff had sustained damages as claimed by it. The answer further set up that the subcontract was subject to all the terms and conditions of the principal contract made between defendant and the government of the United States; that defendant had at all times proceeded strictly in accordance with the terms and conditions of the latter contract, that during the course of the construction of the building the representatives of the government found it desirable or necessary to change the manner of constructing the foundations, and that this action of the government was within its rights under the original contract, and plaintiff was bound thereby equally with defendant.

The case was tried before the judge of the district court and a jury. Plaintiff introduced evidence tending to support the material averments of its complaint. It appeared that in January, 1911, defendant notified plaintiff's predecessor that "work must start at once," and that in February plaintiff sent its representatives to Porto Rico; that upon their arrival so little work had been done upon the foundations that they were unable to do anything upon the building itself, but preliminary work was done in the way of getting tools and machinery to the Island, building [271] workshops and an office, and preparing moulds for the casting of the artificial stone; that during the spring and summer delay was occasioned by the failure of defendant to construct the foundations; that this continued until about the first week in October, when the foundation work and the grading inside the foundation walls had proceeded to a point that would admit of the commencement of the course of granite, and enough granite was upon the

ground to allow a start to be made of setting it. In August or September plaintiff was notified of defendant's acceptance of the option to call upon plaintiff to set the granite at 40 cents per square foot, but the granite was slow in arriving, and some of the stones were misfits, so that the work of laying was considerably interrupted. There was difficulty also with the derrick equipment, defendant having, under the contract, furnished two derricks and an engine, but with insufficient power to admit of operating both derricks at the same time. This was remedied, some time in December, by the provision of additional power. The granite setting proceeded from the middle of October to the 12th of February, 1912, plaintiff's evidence being to the effect that it was set as fast as delivered, but that because the granite came in separate shipments, a little at a time, sometimes with needed blocks missing, the work of setting it could not be speeded. On or about February 12, 1912, plaintiff stopped setting granite, with defendant's consent.

The evidence tended to show that much of the delay during the spring and summer of 1911 was occasioned by a change made by arrangement between defendant and the government in the provisions of the general contract respecting the mode of constructing the foundations. The pleader would seem to have limited the complaint respecting delay prior to October 16, 1911, to such as was due to defendant's failure to provide granite blocks, but the evidence was not thus limited.

In February, 1912, when the granite work had been [272] practically finished, it was ascertained that the foundations had settled, and that there were variations in the foundation work from the specifications as agreed upon between the government and defendant. On March 9th work was suspended by order of the government, pending an investigation which resulted in showing that practically the entire building would have to be underpinned in order to secure a safe foundation. This result was officially communicated to defendant under date March 25, 1912, and a few days later, pursuant to an order of the Assistant Secretary of the Treasury, all work upon the building was stopped "pending the settlement of responsibility for deviations from contract requirements regarding foundations." The question of responsibility lay between defendant and the representatives of the government; plaintiff having had nothing to do with the foundations. Leaving the question undetermined, the government, in the month of May, 1912, entered into an agreement with defendant for underpinning *the entire* building. It perhaps does not clearly appear when this work was commenced, but it was in progress when the action was begun, and Mr. Berryman, the government's superintendent of construction then in charge of the building, testified: "This work is now [November, 1912] about 85 per cent completed." The same witness testified that from March 9th, 1912, until the time of the trial, "conditions were such that it was impossible for the Guerini Stone Company to continue with their work under the contract."

On March 9, 1912, plaintiff's agent at San Juan was notified by defendant's representative there that the Federal authorities had ordered all work upon the building suspended pending investigation of the foundations. On the same day he wrote defendant's San Juan office asking whether plaintiff's men should be discharged and sent back to the United States, but got no satisfactory reply. Further correspondence upon the same topic led to no result.

[273] Meanwhile, the parties had been in disagreement about payments on account. The contract (¶ 12) provided for payment of the contract price "in monthly payments on account, not to exceed in amount 85 per cent of the cost of the work actually erected in the building, provided that the subcontractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how the cost of the work other than the granite setting should be ascertained. For the concrete backing and other concrete work and the imitation sand-stone covered by the subcontract, no "unit prices" were specified. The price of "6.70 a cubic foot," mentioned in the 25th paragraph as the optional price for concrete footings, was treated by the parties as if intended to read $6.70 per cubic *yard*,—approximately 25 cents per cubic foot. This, however, had reference to work that plaintiff was not called upon to do, and obviously did not furnish a unit price for the concreting actually done by plaintiff.

In December, 1911, and January, 1912, plaintiff made written requisitions for payments on account, based upon statements of the "amount of work completed to date." They were not complied with, and the parties soon realized the practical importance of agreeing upon a unit price to be employed in estimating the amounts payable. According to the testimony of Mr. Converse, President and Treasurer of the Guerini Company, he went from Boston to New York city on February 2, 1912, by appointment, and conferred with Mr. Carlin, defendant's representative, upon the subject

of unit prices, and it was then agreed that plaintiff should make its applications and receive its payments upon the basis of a certain written schedule of units, produced by Mr. Carlin, which specified (*inter alia*): "Exterior and interior concrete walls, arches, and cement [274] work, $1.07 per cu. ft.; concrete floors and casings, 45½c. per sq. ft." Mr. Carlin, in his testimony, denied that such an agreement was made, but admitted that the schedule had been agreed upon between defendant and the government's superintendent of construction, and used as a basis for payments by the government to defendant, including payments for the work done by plaintiff under the subcontract. At the interview of February 2d, Mr. Converse received a check for $3,765.50 on account, as against $12,750 previously called for. Under date of March 9th a requisition for $11,735.95 was made, and against this a payment of $674 was made about two weeks thereafter. No other payments were made to plaintiff. It appeared, however, that for the work theretofore done by plaintiff, defendant had received from the government at least $13,871.25 (a witness called by defendant said "about $19,000"), based upon the price of $1.07 per cubic foot for concrete. It was explained that this unit price was fixed by the first superintendent of construction, who had charge during the year 1911 and the first month of the following year, and that his successor, who took charge on February 1, 1912, employed a lower unit price, on the basis of which the Carlin Company had been overpaid about $8,000.

Enough has been said to indicate the situation as it stood on May 22, 1912, on which date plaintiff wrote to defendant, reciting briefly its complaints respecting defendant's previous conduct and the stoppage of the work, and concluding as follows:

"Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with [275] us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

Defendant acknowledged receipt and replied May 31, 1912: "Said letter is a breach of contract on your part, and we shall immediately proceed to have the work done by other parties, and shall charge you with the additional expense, if any, above your contract price."

Plaintiff further produced evidence tending to show that the moneys expended by it in and about the performance of the contract amounted to upwards of $30,000; that if permitted to complete the contract under ordinary conditions, its estimated profits would have been about $9,700; and that defendant had taken over machinery, tools, etc., belonging to plaintiff, estimated to be worth from $3,300 to $3,800.

Defendant to some extent disputed the facts recounted in and inferable from plaintiff's evidence, but based its defense principally upon the provisions of the contract between defendant and the government, which it was insisted must be read into the contract between plaintiff and defendant. Among those provisions was this:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the supervising architect, it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the [276] supervising architect; and a similar allowance of extra time will be made for such other delays as the supervising architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within ten days of the occurrence of such delays; provided, further, that no claim shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States."

And among the "General Conditions" prefacing the specifications was this:

"The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract whenever, in its opinion, it would be inexpedient to carry on said work."

Other contentions were made which are not now material.

The jury rendered a verdict somewhat special in form, finding for the plaintiff and assessing its damages at $6,609.25, "including the value of tools inventoried at $3,000." The judge had instructed them that for certain material and appliances used by plaintiff in carrying out its contract, and which

were placed in the custody and charge of defendant, "credit must be given, in whatever decision you arrive at, to the plaintiff company, and in the uncontradicted sum of $3,000." Just how the residue of the verdict was made up we have no means of determining, nor is it now important.

The chief controversy here is over the admission in evidence of the general contract, and the effect given to it in the rulings of the trial judge, which were in substance that the provisions of that contract, including those above quoted, were to be read into the subcontract, and that for any delays which resulted from the action of the representatives of the government in changing the foundations or plans of the building, in suspending or stopping the work, or otherwise, defendant was not [277] responsible to plaintiff. To these rulings exceptions were duly taken.

From what was said by the trial judge it would seem that he labored under the impression that the supervising architect of the treasury was a party to the subcontract. This is not the case; he did not sign the agreement, and his name was inserted solely in the capacity of architect or referee. And although the subcontract very plainly imports that it covers only a part of the work of constructing the building, and that the Carlin Company was the general contractor, it contains no clause incorporating into itself the provisions of the principal contract, or even in terms referring to that instrument. The subcontractor's work was agreed to be done according to drawings and specifications, "copies of which have been delivered to the subcontractor." These copies were not produced, nor was their nonproduction accounted for. The parties seem to have assumed that the drawings and specifications of which copies were to have been delivered wth the subcontract were identical with those that formed a part of the general contract; and we adopt that assumption.

The reference in the subcontract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the subcontractor. Notwithstanding occasional expressions of a different view (see Shaw v. First Baptist Church, 44 Minn. 22, 24, 46 N. W. 146; Avery v. Ionia County, 71 Mich. 538, 546, 547, 39 N. W. 742; Stein v. McCarthy, 120 Wis. 288, 295, 97 N. W. 912), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified. Woodruff v. Hough, 91 U. S. 596, 602, 23 L. ed. 332, 335; [278] Neuval v. Cowell, 36 Cal. 648, 650; Mannix v. Tryon, 152 Cal. 31, 39, 91 Pac. 983; Moreing v. Weber, 3 Cal. App. 14, 20, 84 Pac. 220; Short v. Van Dyke, 50 Minn. 286, 289, 52 N. W. 643; Noyes v. Butler Bros. 98 Minn. 448, 450, 108 N. W. 839; Modern Steel Structural Co. v. English Constr. Co. 129 Wis. 31, 40, 41, 108 N. W. 70.

In the present case, not only was the reference to the drawings and specifications for a limited purpose, but the subcontract, by the express terms of its 11th paragraph, placed upon the general contractor (defendant) the obligation to "provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work." Applying this to the facts of the case, defendant agreed to furnish the foundation in such manner that plaintiff might build upon it without delay. This is inconsistent with any implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless.

We therefore hold that the general contract was not admissible in evidence against plaintiff, unless for the purpose of showing (if, indeed, it did show) what drawings and specifications were referred to in the subcontract; and that the rulings of the trial judge holding plaintiff bound by the provisions of the general contract, so as to be obliged to submit to delays resulting from the action of the government, were erroneous.

Another point that may conveniently be dealt with here is raised by an exception taken to the instruction that "even if there was delay in furnishing granite, there could have been no liability under the subcontract for such delay, in money, but such a condition was to be remedied by an extension of time for completion, as therein provided." This was clearly erroneous. Paragraph 11 binds defendant to reimburse plaintiff for any loss caused by delay resulting from defendant's failure to provide materials not included in the subcontract. The [279] granite was in this category. The trial court misapplied ¶ 7. The extension of time therein provided for was intended as a dispensation, under given circumstances, of the liability to liquidated damages imposed upon the subcontractor by ¶ 6 for failure to complete his work within the time therein limited. The purpose of ¶ 7 is to relieve the subcontractor. It cannot properly be construed to deprive him of his right under ¶ 11 to reimbursement for losses attributable to delays assumed by the general con-

tractor. Nelson v. Pickwick Associated Co. 30 Ill. App. 333.

What has been said indicates the disposition that must be made of another exception taken by plaintiff, which was to the instruction that under ¶ 7 plaintiff was not entitled to recover damages or money compensation from defendant even though it should appear that plaintiff "was obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of the government of the United States, the supervising architect, or his representatives, or by defendant, or by alterations required in the work, since by the provisions of that paragraph the only remedy of plaintiff in such cases is the time allowance therein provided for; unless, however, you should believe from the evidence that the defendant failed to provide labor and materials not included in the subcontract, in such manner as to delay the material progress of the work."

As we have shown, the failure to furnish a foundation upon which plaintiff's work could be superimposed was a failure to provide "labor and materials not included in this contract," within the meaning of ¶ 11. To furnish the foundation defendant assumed an obligation not conditioned by the question whether it was at fault, or whether the delay was involuntary on its part because attributable to a stoppage of work by the owner, in the exercise of a right conferred upon it by the principal contract. [280] Defendant, of course, had notice of the government's right to suspend the work, and could easily have safeguarded itself against responsibility to the subcontractor for delays attributable to the exercise of that right by an appropriate modification of ¶ 11 of the subcontract, for which presumably an allowance would have been made to the subcontractor in the form of an increased price for its work or otherwise. This not having been done, ¶ 11 must be enforced as it is written. It matters not whether plaintiff or its predecessor had notice of the provision of the general contract respecting suspension of the work, since that provision was not incorporated into the subcontract. It must be presumed that delays attributable to action by the government were among those intended to be safeguarded by ¶ 11.

There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the subcontract. This amounted to $53,012. The contract price was $64,750. The witness testified that a profit of $9,700 would have been made. Whether he intended to say $11,700 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted than to deduct from the contract price the probable cost of furnishing the materials and doing the work. Philadelphia, W. & B. R. Co. v. Howard, 13 How. 307, 344, 14 L. ed. 157, 173; Hinckley v. Pittsburgh Bessemer Steel Co. 121 U. S. 264, 275, 30 L. ed. 967, 970, 7 Sup. Ct. Rep. 875; Anvil Min. Co. v. Humble, 153 U. S. 540, 549, 38 L. ed. 814, 817, 14 Sup. Ct. Rep. 876.

Error is assigned to the refusal of the trial judge to give the following instruction:

[281] "If you find that the defendant failed to make payments as called for by the contract, on account of work done by the plaintiff in accordance with the terms of the contract, such failure constitutes a breach of the contract on the part of the defendant, and justified the plaintiff in stopping work under the contract, and entitles it to recovery from the defendant of such damages as may be proper on the evidence and under the instructions which the court will give you in that regard."

The request was evidently based upon the doctrine illustrated in South Fork Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894; Phillips & C. Constr. Co. v. Seymour, 91 U. S. 646, 649, 23 L. ed. 341, 342; Norrington v. Wright, 115 U. S. 188, 205, 29 L. ed. 366, 369, 6 Sup. Ct. Rep. 12. There is a difficulty, however, in applying that doctrine to this case, due to the fact that the contract does not either specify the amount of the advance payments or indicate how they are to be ascertained. The language of ¶ 12 is that the contract price is to be paid "in monthly payments on account not to exceed in amount 85 per cent of the cost of the work actually erected in the building, provided," etc There is no clause, such as is frequently found in contracts of this character, that the amounts payable from time to time shall be ascertained and certified by the architect. The language cannot be construed to oblige the general contractor to pay precisely 85 per cent of the cost of the work done; the use of the words "not to exceed" forbids this. The paragraph must receive a reasonable construction, and undoubtedly required the general contractor to make substantial payments monthly, fairly approximating, but not exceeding, 85 per cent of the cost of the work. But the proviso requiring the subcontractor to fur-

mish to the general contractor a written requisition did not entitle the subcontractor to be the sole judge of the amount it was entitled to receive. On the contrary, the provision that the requisition should be submitted "not less than twelve days before payment is required" evidently contemplated [282] that the general contractor was to be afforded an opportunity to verify the propriety of the demand made. But the evidence fails to show that the requisitions were based upon the cost of the work, or that any clear statement of such cost was submitted with them. As already pointed out, the parties endeavored to arrive at an agreement about unit prices, in order that these might be employed in making up the requisitions. Whether they did so agree the evidence left in dispute. If the agreement was made, it was at the interview of February 2, 1912. A letter is in evidence, written by plaintiff to defendant under date of February 6, saying: "In accordance with your instruction to Mr. Converse we have made our January requisition in the units and unit prices used by the government engineer. . . . We inclose formal requisition for $9,012.50 due us under contract." But the requisition itself was not introduced. The next and last requisition appears to have been made under date March 9, 1912, and this stated: "Amount of work completed to date, $18,237." But such details as were furnished do not seem to bear out this estimate. In the state of the record, we cannot say that there was error in the refusal of the requested instruction.

Error is assigned because of the refusal to instruct the jury as follows:

"In estimating the recovery to which the plaintiff is entitled, if you find he is entitled to recover, you should consider the reasonable expenditures incurred, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract."

Had the requested application of these elements of damage been confined to the case of plaintiff being found entitled to recover upon the theory that the contract was [283] rightfully terminated by the notice of May 22, 1912, we assume it ought to have been granted. United States v. Behan, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; Anvil Min. Co. v. Humble, 153 U. S. 540, 551, 552, 38 L. ed. 814, 817, 818, 14 Sup. Ct. Rep. 876; Roehm v. Horst, 178 U. S. 1, 21, 44 L. ed. 953, 961, 20 Sup. Ct. Rep. 780. But, as already pointed out, other grounds of action were declared upon: (a) defendant's failure to provide granite blocks prior to October 16, 1911; (b) its failure between that date and March 19, 1912, to provide necessary materials and carry on its part of the construction work; and (c) a quantum meruit for labor performed and materials furnished. In the event of plaintiff's recovery being based upon these grounds only, some of the elements indicated in the request would not be properly applicable. The form of the request was such that compliance with it might have misled the jury, and hence there was not error in refusing it.

Exceptions were taken to the refusal of certain other instructions requested by plaintiff with the object of basing a recovery of damages, including profits, upon the ground of plaintiff having been prevented by defendant's acts from performing its contract within the time specified or a reasonable extension thereof, or on the ground that defendant's refusal to make payments and other breaches of contract were so unreasonable and inexcusable as to indicate an inability or unwillingness on its part to carry out the contract, or to amount to a refusal to perform it in the future, such as to justify plaintiff in stopping work. But these exceptions have not been fully argued, and the requests are perhaps wanting in accuracy; hence, we pass them without consideration.

Judgment reversed, and the cause remanded for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[284] UNION NAVAL STORES COMPANY, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 284–293.)

Evidence — variance.

1. Evidence that it was the crude, and not the manufactured, product that was taken, supports the claim of the complaint in an action brought by the United States for conversion that spirits of turpentine and rosin were taken from certain government lands.

[For other cases, see Evidence, XIII. b, in Digest Sup. Ct. 1908.]

Note.—On the right to cut timber on public land—see note to King-Ryder Lumber Co. v. Scott, 70 L.R.A. 873.

On title by accession to crops, fruit, and timber wrongfully severed—see note to Carpenter v. Lingenfelter, 32 L.R.A. 422.

On confusion of goods —see note to Peters v. Bain, 33 L. ed. U. S. 696.

Pleading — conversion — turpentine taken from government land — description of lands.

2. Error in the particular description of the lands in the complaint in an action by the United States for the conversion of spirits of turpentine and rosin, alleged to have been taken from government lands, is of no serious consequence where they were otherwise described as a certain homestead, and there was uncontradicted evidence that the lands referred to and no others were known by this description.

[For other cases, see Pleading, II., in Digest Sup. Ct. 1908.]

Trial — taking case from jury — nominal damages — conversion.

3. The failure of the evidence in an action by the United States for the conversion of spirits of turpentine and rosin alleged to have been taken from certain government lands to show precisely what quantities of such products of crude turpentine taken from the public lands were received by the defendant was not ground for a peremptory instruction to find in the latter's favor or to limit the recovery to nominal damages, where there was evidence from which the jury could form a reasonably certain estimate of the amount of crude turpentine taken from such lands during the years in question, and the amount of spirits and rosin that this probably yielded.

[For other cases, see Trial, VI. b; Damages, VI. n, in Digest Sup. Ct. 1908.]

Public lands — taking turpentine from — ignorance of illegality of act.

4. The boxing and chipping of pine trees on public lands covered by an unperfected homestead entry by any person who knew the character of the land, and the extracting of crude turpentine therefrom for sale and profit, constituted a wilful trespass, although he may have acted without knowledge of the illegality of the act.

[For other cases, see Public Lands, I. b; Trespass, in Digest Sup. Ct. 1908.]

Public lands — taking turpentine from — following converted property.

5. The value of the distilled product of crude turpentine taken by the distiller from land which he knew was covered by an unperfected homestead entry may be recovered by the United States from any person into whose possession such product may pass.

[For other cases, see Public Lands, I. b; Trover, in Digest Sup. Ct. 1908.]

Public lands — taking turpentine from — continuing trespass.

6. The distillation by the trespasser of the crude turpentine taken by him from government lands is a continuing act of trespass that did not devest the United States of its property, but left it still entitled to the manufactured product.

[For other cases, see Public Lands, I. b; Trover, in Digest Sup. Ct. 1908.]

Accession of goods — knowledge of ownership.

7. One who knowingly takes the property of another cannot by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession.

[For other cases, see Accession and Confusion, in Digest Sup. Ct. 1908.]

Public lands — taking turpentine from — accession — conversion.

8. The mortgagee in a mortgage given to secure advances and the faithful performance by the mortgagor of his agreement to extract crude turpentine from certain lands and to manufacture the same into spirits of turpentine and rosin, and to ship the manufactured products to the mortgagee, to be sold for the mortgagor's account, cannot, under the doctrine of accession, escape the obligation to answer to the United States for the value of the manufactured product of the government property which came into its possession through the practice of the mortgagor in his distilling operations to mix with crude gum to which he had an unquestioned title a small but substantial quantity of gum knowingly taken by him from government land.

[For other cases, see Public Lands, I. b; Accession and Confusion; Trover, in Digest Sup. Ct. 1908.]

Mortgage — after-acquired property — turpentine taken from public lands.

9. An after-acquired-property clause in a mortgage given to secure advances and the faithful performance by the mortgagor of his agreement to extract crude turpentine from certain lands and to manufacture the same into spirits of turpentine and rosin, and ship the manufactured products to the mortgagee, to be sold for the mortgagor's account, will not confer title upon the mortgagee to property of the United States which came into its possession through the practice of the mortgagor in his distilling operations to mix with crude gum to which he had an unquestioned title a small but substantial quantity of gum knowingly taken by him from government lands, since property in such product could not be acquired by the mortgagor without the consent of the United States.

[For other cases, see Mortgage, I. d, 2, in Digest Sup. Ct. 1908.]

Trover — necessity of demand for possession.

10. A demand by the United States for the spirits of turpentine and rosin manufactured from crude gum unlawfully taken from public lands is futile and therefore unnecessary in order to support an action of conversion against a corporation which has received the same from the trespasser mixed with a much greater quantity to which he had unquestioned title, where the corporation sold the entire product soon after its receipt, and accounted to such trespasser for the proceeds.

[For other cases, see Trover; Public Lands, I. b, in Digest Sup. Ct. 1908.]

[No. 80.]

Submitted November 11, 1916. Decided February 21, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which modified, and affirmed as modified, a judgment of the District Court for the Southern District of Alabama in favor of the United States in an action for the conversion of turpentine and rosin from public lands. Affirmed.

See same case below, 123 C. C. A. 1, 202 Fed. 491.

The facts are stated in the opinion.

Mr. Richard William Stoutz submitted the cause for plaintiff in error:

When personalty is attached to realty, as bricks, lumber, or machinery, when built into a house, these things cease to be personalty, and become merged into the realty. In that case the identity is considered lost, and the right to follow the same ceases and the doctrine of accession applies. This doctrine goes even to the extent of holding that the rights of the owner and the rights of a chattel mortgagee thereof may be thus annihilated through the doctrine of accession, and merged into the realty.

Peirce v. Goddard, 22 Pick. 559, 33 Am. Dec. 764; Fryatt v. Sullivan Co. 5 Hill, 117; Ricketts v. Dorrell, 55 Ind. 473; Millar v. Humphries, 2 A. K. Marsh. 447.

Nor is this principle unconstitutional. It existed before our Constitutions were written, and was applied both by the ancient civil and common law. It is deemed to be recognized by the Contsitution as an existing principle, and the Constitution is to be construed in the light of its existence.

Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216.

Personal property may become merged into other personal property under the doctrine of accession, and thereby cease to exist in its prior character, in the eye of the law, as completely as if it were attached to realty.

Aborn v. Mason, 14 Blatchf. 405, Fed. Cas. No. 19; Woodruff & B. Iron Works v. Adams, 37 Conn. 239; Merritt v. Johnson, 7 Johns. 473, 5 Am. Dec. 289; Davis v. Easley, 13 Ill. 198; Dunn v. Oneal, 1 Sneed, 106, 60 Am. Dec. 140; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582; Arnott v. Kansas P. R. Co. 19 Kan. 109; Atchison, T. & S. F. R. Co. v. Schriver, 72 Kan. 550, 4 L.R.A. (N.S.) 1059, 84 Pac. 119; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Brown v. Sax, 7 Cow. 95; Worth v. Northam, 26 N. C. (4 Ired. L.) 102; Carpenter v. Lingenfelter, 42 Neb. 728, 32 L.R.A. 430, 60 N. W. 1022; Ex parte Ames, 1 Low. Dec. 561, Fed. Cas. No. 323.

There is no tenancy in common if there is a difference in quality and grade of goods mixed.

Lupton v. White, 15 Ves. Jr. 442, 10 Revised Rep. 94, 2 Mor. Min. Rep. 430; Jenkins v. Steanka, 19 Wis. 126, 88 Am. Dec. 675; Reid v. King, 89 Ky. 388, 12 S. W. 772.

There can be no recovery by one supposed tenant in common against the other in trover, conversion, or replevin, unless the goods contributed by each to a common mass are identical in quality, kind, and value, so that a portion by measurement would be practicable and just.

Piazzek v. White, 23 Kan. 621, 33 Am. Rep. 211; Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Grimes v. Cannell, 23 Neb. 187, 36 N. W. 479; Young v. Miles, 20 Wis. 623; Weeks v. Hackett, 104 Me. 271, 19 L.R.A.(N.S.) 1201, 129 Am. St. Rep. 390, 71 Atl. 858, 15 Ann. Cas. 1158; Kaufmann v. Schilling, 58 Mo. 219.

In case of the bestowal of labor by even a wrongdoer upon the goods of another, so as to impart extraordinary value to the goods, the goods would belong to the party who put the labor upon them, and not to the former owner.

Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653.

Where goods have been changed in character by being put through a process so that the original identity is lost, the original owner loses his property by reason of the change.

Ibid.; Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 105.

The doctrine of accession to property is not confined to cases of innocent taking.

United States v. Detroit Timber & Lumber Co. 100 U. S. 331, 332, 50 L. ed. 503, 504, 26 Sup. Ct. Rep. 282.

Every man is presumed to know the law to such an extent that he may be held responsible for, and required to compensate another for, an injury done such other, and as against this measure of responsibility no plea of ignorance of the law will avail. But this maxim has never been applied to punish him beyond that measure for not knowing the law. Nor should it be applied to punish third parties innocent of conduct meriting punishment.

Morgan v. United States, 94 C. C. A. 518, 169 Fed. 249; Gentry v. United States, 41 C. C. A. 185, 101 Fed. 51, 55 C. C. A. 658, 119 Fed. 70; United States v. Van Winkle, 51 C. C. A. 533, 113 Fed. 903, 22 Mor. Min. Rep. 56; United States v. Homestake Min. Co. 54 C. C. A. 303, 117 Fed. 481, 22 Mor. Min. Rep. 365.

The doctrine which entitles the government to recover the increased value in manufactured rosin and turpentine over the crude is based entirely upon the idea of punishing a wilful wrongdoer, and this doc-

trine can have no reference to the man who acts upon an honest belief as to his legal rights, even though he may be mistaken as to the law.

United States v. Homestake Min. Co. supra.

The forfeiting doctrine of confusion of goods does not apply against mortgagees who are innocent third parties.

Smith v. Au Gres Twp. 9 L.R.A.(N.S.) 876, 80 C. C. A. 145, 150 Fed. 257; Merchants' Nat. Bank v. McLaughlin, 2 Fed. 128; Ex parte Ames, 1 Low. Dec. 561, Fed. Cas. No. 323; Weaver v. Neal, 61 W. Va. 57, 123 Am. St. Rep. 972, 55 S. E. 909; Putnam v. Cushing, 10 Gray, 335; Willard v. Rice, 11 Met. 493, 45 Am. Dec. 226; Parker v. Williams, 77 Me. 138, 1 Atl. 138; Wells v. Batts, 112 N. C. 283, 34 Am. St. Rep. 506, 17 S. E. 417; Tippett v. Barham, 37 L.R.A.(N.S.) 119, 103 C. C. A. 430, 180 Fed. 81; Union Trust Co. v. Southern Saw Mills & Lumber Co. 92 C. C. A. 101, 166 Fed. 199; Detroit Steel Cooperage Co. v. Sistersville Brewing Co. 115 C. C. A. 349, 195 Fed. 450.

Before the passage of the criminal statute of June 4, 1906, it was not prima facie unlawful to box and work trees for turpentine.

Bryant v. United States, 45 C. C. A. 145, 105 Fed. 941; Orrell v. Bay Mfg. Co. 83 Miss. 800, 70 L.R.A. 881, 36 So. 561; Millikin v. Carmichael, 139 Atl. 226, 101 Am. St. Rep. 29, 35 So. 706; United States v. Waters-Pierce Oil Co. 116 C. C. A. 391, 196 Fed. 767.

To show conversion by a tenant in common there must be either a demand for possession and a refusal thereof (Bond v. Ward, 7 Mass. 123, 5 Am. Dec. 30; Burnham v. Marshall, 56 Vt. 365; Gibson v. McIntire, 110 Iowa, 417, 81 N. W. 699; Smith v. Welch, 10 Wis. 94; Kewaunee County v. Decker, 30 Wis. 636), or a showing that some disposition was made thereof that was inconsistent with and destructive of the rights of the cotenant.

One who effects a substantial change in the form or nature of property without the knowledge or consent of the owner is liable for a conversion, and trover will lie for the new product if the owner has not lost title thereto under the doctrine of accession.

38 Cyc. 2026; Riddle v. Driver, 12 Ala. 590; Curtis v. Groat, 6 Johns. 168, 5 Am. Dec. 204; Brown v. Sax, 7 Cow. 95.

While the actual wrongdoer (in this case, Rayford) may be liable for the highest value up to time of judgment, an innocent purchaser, from even such an one, can only be held liable as of the time of the purchase or other inception of his rights.

Fisher v. Brown, 17 C. C. A. 225, 37 U. S. App. 407, 70 Fed. 571; Powers v. United States, 56 C. C. A. 128, 119 Fed. 562; E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398; Potter v. United States, 58 C. C. A. 231, 122 Fed. 53.

Assistant Attorney General Knaebel submitted the cause for defendant in error:

The boxing of trees upon the lands in question was a trespass.

Shiver v. United States, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54.

The owner has a right to insist that the land remain as it is—the trees untouched—except in so far as his license or demise authorized changes.

Taylor, Land. & T. 5th ed. §§ 345, 348, 350, 351; Underhill, Land. & T. 1909, pp. 707, 714; McAdam, Land. & T. 4th ed. pp. 1286, 1291; Livingston v. Reynolds, 26 Wend. 115; McGregor v. Brown, 10 N. Y. 114.

Boxing and chipping trees for turpentine is decidedly not cultivation in the sense of the homestead act (Re Wooten, 5 Land. Dec. 389; Re McKenzie, 36 Land. Dec. 302; United States v. Waters-Pierce Oil Co. 116 C. C. A. 391, 196 Fed. 767), or in any sense whatever.

The hypothesis of innocence seems quite too absurd for serious consideration.

Re Cromartie, 1 Land Dec. 607; Acting Secretary's Letter of July 1, 1885, 4 Land Dec. 1; Re Wooten, 5 Land Dec. 389; Re McKenzie, 36 Land Dec. 302; Parish v. United States, 106 C. C. A. 570, 184 Fed. 590; McKenzie v. United States, 106 C. C. A. 666, 184 Fed. 988; United States v. Taylor, 35 Fed. 484.

The trespass being proved, wilfulness is presumed.

United States v. Ute Coal & Coke Co. 85 C. C. A. 302, 158 Fed. 23; Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co. 122 C. C. A. 113, 203 Fed. 802, 231 U. S. 747, 58 L. ed. 464, 34 Sup. Ct. Rep. 320; Central Coal & Coke Co. v. Penny, 97 C. C. A. 600, 173 Fed. 344.

The burden of proving the trespass innocent was on the defendant.

Dartmouth College v. International Paper Co. 132 Fed. 92; E. G. Beechwood Ice Co. v. American Ice Co. 176 Fed. 435; United States v. Ute Coal & Coke Co. 85 C. C. A. 302, 158 Fed. 23; Liberty Bell Gold Min. Co. v. Smuggler-Union Min. Co. 122 C. C. A. 113, 203 Fed. 802, 231 U. S. 747, 58 L. ed. 464, 34 Sup. Ct. Rep. 320; E. E. Bolles Woodenware Co. v. United States, 106 U. S. 432, 435, 27 L. ed. 230, 231, 1 Sup. Ct. Rep. 398; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 293, 46 L. ed. 1164, 1171, 22 Sup. Ct. Rep. 920; Northern P. R. Co. v. Lewis, 162 U. S. 366, 374, 40

L. ed. 1002, 1005, 16 Sup. Ct. Rep. 831; St. Louis Stave Co. v. United States, 100 C. C. A. 640, 177 Fed. 178; 1 C. J. 388.

The evidence introduced proves wilfulness, not innocence.

Liberty Bell Gold Min. Co. v. Smuggler, Union Min. Co. 122 C. C. A. 113, 203 Fed. 802, 231 U. S. 747, 54 L. ed. 464, 34 Sup. Ct. Rep. 320.

The action being an ambulatory one for the conversion of the manufactured products, it was not necessary to allege the place of conversion. Nor was it necessary to aver the source of plaintiff's title to the goods converted.

38 Cyc. 2069; Melrose Mfg. Co. v. Kennedy, 59 Fla. 312, 51 So. 595.

There is no such vagueness or uncertainty in the evidence concerning the amount and value of the goods converted as would warrant an attack upon the verdict.

Sauntry v. United States, 55 C. C. A. 148, 117 Fed. 132.

Leaving the mortgage aside, it is plain that the government's right to recovery was not affected by the mixtures and alterations wrought by the guilty trespasser.

6 Am. & Eng. Enc. Law, pp. 594, 596; The Idaho, 93 U. S. 575, 585, 23 L. ed. 978, 981; 1 C. J. 387, 388; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Lampton v. Preston, 1 J. J. Marsh. 455, 19 Am. Dec. 104; Curtis v. Groat, 6 Johns. 169, 5 Am. Dec. 204; Eaton v. Langley, 65 Ark. 448, 42 L.R.A. 474, 47 S. W. 123; Tuttle v. White, 46 Mich. 485, 4 Am. Rep. 175, 9 N. W. 528; Rockwell v. Saunders, 19 Barb. 473; Potter v. Mardre, 74 N. C. 36; Newton v. Porter, 69 N. Y. 137, 25 Am. Rep. 152; Strubbee v. Cincinnati R. Co. 78 Ky. 481; Carpenter v. Lingenfelter, 32 L.R.A. 422, note; Distilled Spirits (Harrington v. United States) 11 Wall. 356, 368, 20 L. ed. 167, 171; E. E. Bolles Wooden-ware Co. v. United States, 106 U. S. 432, 27 L. ed. 230, 1 Sup. Ct. Rep. 398.

While it is true that a mortgagee who, under authority of a recording act, has left the mortgagor in possession, may follow the goods if wrongfully sold, and, if confused with other goods of the mortgagor, may seize upon all for the satisfaction of his mortgage, we have yet to find an authority for the proposition that an innocent third party, bearing no relationship whatever to the parties to the mortgage, may be deprived of his goods in this way for the enrichment of the mortgagee.

Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

Even if the goods were affected by a lien, the conversion would not be excused or the damages diminished.

Cooley, Torts, 3d ed. pp. 69, 875; 8 Cyc. 574; 6 Am. & Eng. Enc. Law, 594; Ryder v. Hathaway, 21 Pick. 305; Hesseltine v. Stockwell, 30 Me. 242, 50 Am. Dec. 627; D. M. Osborne & Co. v. Cargill Elevator Co. 62 Minn. 400, 64 N. W. 1135; 38 Cyc. 2010, 2024, 2028.

If there was a lien, its existence was made immaterial by the sale of the goods.

Saltus v. Everett, 20 Wend. 273, 32 Am. Dec. 541; Galvin v. Galvin Brass & Iron Works, 81 Mich. 16, 45 N. W. 654.

Mr. Justice **Pitney** delivered the opinion of the court:

This was an action by the United States against the Union Naval Stores Company for the conversion during the years 1904 and 1905 of spirits of turpentine and rosin, alleged to have been taken by defendant from certain government lands in the county of Mobile, in the state of Alabama, known as the Freeland homestead, and thus and otherwise more particularly described in the complaint.

The facts, as they appeared at the trial, were as follows: Freeland had made an application for a homestead entry under § 2289, Rev. Stat. (Comp. Stat. 1913, § 4530), but never perfected it. Being the owner of other lands in the same neighborhood, Freeland agreed with one Rayford to give him a turpentine lease for a lump sum upon all of his timber, not including the homestead. A third party having been employed to reduce the agreement to writing, Freeland discovered that the homestead had been included, and he called Rayford's attention to this and tendered back the [286] check given for the consideration money, on the ground that if the homestead was included in the lease he would be in danger of losing his entry. Rayford replied: "There is no law against turpentining a piece of homestead land as long as you are on it." And so Freeland made no further objection.

Rayford, during the years in question, conducted turpentining operations upon the Freeland homestead and a large number of other tracts in its vicinity. Under date December 21, 1903, he had entered into a "shipping contract" with the Union Naval Stores Company, by which he undertook to cut and box at least 10 crops of 10,500 boxes each from lands described in a deed of trust or mortgage of even date given by him to one Wade as trustee of the company, and to manufacture the crude turpentine into spirits of turpentine and rosin, and deliver the manufactured product at Mobile, Alabama, or other points selected by it. By the same agreement plaintiff in error undertook to advance moneys to be used by Rayford, and that it would receive the manufactured turpentine and rosin and sell it

for Rayford's account at stipulated charges and commissions. The mortgage was given to secure the advances and the performance of the shipping agreement. It covered Rayford's turpentine leases, and also all crude and manufactured spirits of turpentine, and other products owned or in any manner secured by Rayford during the continuance of the contract. The crude turpentine taken by Rayford from the homestead was mixed with that taken from his other properties at or before it reached the still; and the manufactured products were shipped from time to time to plaintiff in error at Mobile, bills of lading being sent by mail, and accounts of sales being returned by plaintiff in error to Rayford.

It was admitted that, during the years 1904 and 1905, spirits of turpentine and rosin were received by plaintiff in error from Rayford, under the contract and mortgage referred [287] to, in quantities greater than those claimed for in the suit. There was evidence as to the market values of these products during the period in question, but none as to the market value of crude turpentine. A verdict and judgment having gone in favor of the United States for $2,447.55, defendant appealed to the circuit court of appeals, where it was directed that so much of this as represented interest prior to the commencement of the action should be remitted, and the judgment otherwise affirmed. 123 C. C. A. 1, 202 Fed. 491.

There are numerous assignments of error, based upon exceptions taken at the trial, one of them to the refusal to direct a verdict in favor of defendant, the others to instructions given or refused to be given. Without reciting these in detail, we will express our views upon the principal questions of law that are raised.

Neither the complaint nor the evidence is fatally defective or uncertain. The claim is for spirits of turpentine and rosin taken from certain described lands. That it was the crude, and not the manufactured, product that was in a literal sense taken from the land, is of no consequence. The land is referred to only to identify the chattels, conversion of which is alleged. Whether there was an error in the particular description of the lands, as is insisted, is a matter of no serious consequence, for they were otherwise described as the "Louis I. Freeland Homestead," and there was uncontradicted evidence that the lands referred to, and no others, were known by this description. That the evidence did not show precisely what quantities of turpentine spirits and rosin, manufactured from the crude turpentine taken from the homestead, were received by the plaintiff in error, was not ground for a peremptory instruction to find for defendant, or to limit the recovery to nominal damages, since there was evidence from which the jury could form a reasonably certain estimate of the amount of crude taken from the homestead during the [288] years in question, and the amount of spirits and rosin that this probably yielded.

There was no error in charging that "the boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed." This refers, of course, as other parts of the charge clearly show, to a manufacture by Rayford, who was himself the trespasser.

The rights and privileges of an entryman with reference to standing timber were considered and discussed in Shiver v. United States, 159 U. S. 491, 497, 498, 40 L. ed. 231-233, 16 Sup. Ct. Rep. 54, where, after reviewing the pertinent sections of the Revised Statutes, it was said: "From this *résumé* of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; . . . third, that meantime such settler has the right to treat the land as his own so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation. . . . It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law [289] contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. . . . By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuild-

ings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation."

There is nothing in the letter or policy of the homestead act that permits the boxing and chipping of pine trees for the purpose of extracting turpentine for sale and profit. It cannot be regarded as cultivation within the meaning of the act; it affects the value of the inheritance too seriously for that. As is well known, the process requires the cutting of a deep gash or "box" into the side of the tree, so shaped as to catch and retain a considerable quantity of the crude gum, and repeated chippings thereafter, by each of which an additional portion of the bark is cut through to the wood so as to expose a fresh bleeding surface. It not only saps the vital strength of the tree and lessens its power to resist the force of the wind, but exposes the wood to decay and to wood-boring grubs and beetles; while the waste gum, being highly inflammable, increases the danger of forest fires. Government publications have repeatedly pointed out the ill effects of the practice.[1]

The recognition of these evils led Congress to pass the [290] act of June 4, 1906, chap. 2571, 34 Stat. at L. 208, now found in Crim. Code, § 51 (act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, 1098, Comp. Stat. 1913, §§ 10,165, 10,218). It is true that in Bryant v. United States (1901) 45 C. C. A. 145, 105 Fed. 941, the circuit court of appeals for the fifth circuit, in holding that boxing for turpentine was not a criminal offense within the meaning of § 2461, Rev. Stat. (Comp. Stat. 1913, § 4980), said, *obiter*, "We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroy the value of the trees as timber, or that it has a tendency even to retard the growth of the trees," and that this view was made the basis of a decision by the circuit court of appeals from the eighth circuit that, prior to the act of 1906, the boxing of trees for turpentine on public lands was not actionable. United States v. Waters Pierce Oil Co. 116 C. C. A. 391, 196 Fed. 767, 769. We are clear, however, that the act of 1906 only rendered criminal that which before was actionable because not included in any right or privilege expressly or by implication conferred upon the homesteader by the act of Congress. So the circuit court of appeals for the fifth circuit held in Parish v. United States, 106 C. C. A. 570, 184 Fed. 590. And see United States v. Taylor, 35 Fed. 484.

Rayford, in conducting his turpentining operations upon the homestead with notice that the land was the property of the United States, became a wilful trespasser, although he may have supposed, as he is said to have declared, that there was "no law against it." He acted with full notice of the facts, and his mistake of law cannot excuse him.

Upon the facts as the jury must have found them, the distillation by Rayford of the gum that was taken from the government's land was a continuing act of trespass that did not devest the United States of its property, but left it still entitled to the manufactured products. Distilled Spirits (Harrington v. United States) 11 Wall. 356, 369, 20 L. ed. 167, 171. If the doctrine of confusion of goods were to be applied, the entire product of the still would belong to the United States. The [291] Idaho, 93 U. S. 575, 586, 23 L. ed. 978, 982. But, by the instructions of the trial judge, recovery was limited to the value of the products manufactured from crude gum taken from the Freeland homestead.

It is ingeniously argued that a different rule must govern as between the United States and the defendant company, because the company had a mortgage upon Rayford's product, both crude and manufactured; that the crude stuff as soon as it reached the still was inextricably mixed with a much greater quantity to which Rayford had an unquestioned title, which passed to defendant at once by virtue of the mortgage, and that the evidence shows such hopeless confusion and admixtures of unknown quantities and varying qualities of gum that no reasonable ascertainment of the rights of the parties as tenants in common is possible; therefore, the government property, being relatively small in value, passed to defendant under the doctrine of accession. It is less confidently argued that the same result would apply even as between the lawful owner and a wilful trespasser; but this we deem clearly untenable. One who knowingly takes the property of another cannot, by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession. Dis-

[1] "A New Method of Turpentine Orcharding," Bulletin No. 40, Bureau of Forestry, 1903, pp. 9-13; "The Naval Stores Industry," Bulletin No. 229, Department of Agriculture, July 28, 1915; "Conservative Turpentining," Senate Doc. 676, 60th Cong., 2d Sess., vol. 11, p. 498. See also Re Cromartie, 1 Land Dec. 607; 4 Land Dec. 1; Re Wooten, 5 Land Dec. 389; Re McKenzie, 36 Land Dec. 302.

tilled Spirits, supra; Silsbury v. McCoon, 3 N. Y. 379, 53 Am. Dec. 307, 315, note.

The argument based upon the mortgage is confronted with this obstacle, to say nothing of others: that the mortgage and the shipping contract alike contemplated that Rayford should manufacture the crude turpentine into spirits and rosin and ship these to defendant, and such was the actual course of dealing thereunder. Defendant at no time asserted any lien upon or property in the crude material by virtue of the mortgage. And even if it were now permitted by a fiction to assert ownership in all that part of the crude gum which was the lawful property [292] of Rayford, as of the time that it reached his still, it must perforce place itself in the position of employing Rayford as its agent for the purpose of distilling the turpentine. Now Rayford, in doing this, placed with it a comparatively small, but still substantial, quantity of crude turpentine that was the property of the United States. Defendant cannot take a benefit from the distilling operations thus conducted by Rayford without at the same time assuming a responsibility for that which he did; and what he did in distilling the government's gum was a continuing trespass, that left the United States entitled to its property in its changed form, the same if the distilling was done by Rayford under an agency from defendant, as if done on his individual account.

And, of course, if defendant's title dates from the time of the delivery to it of the manufactured product, it can take no greater interest than that which Rayford held.

Thus, whether we indulge the fiction, or whether we adhere to the practical fact, which is that Rayford under the contract delivered manufactured products to defendant, the latter can take no credit for the work and labor bestowed upon the turpentine by the wrongdoer, but must answer for its value as manufactured products. E. E. Bolles Wooden-Ware Co. v. United States, 106 U. S. 432, 435, 27 L. ed. 230, 231, 1 Sup. Ct. Rep. 398; Guffey v. Smith, 237 U. S. 101, 119, 59 L. ed. 856, 866, 35 Sup. Ct. Rep. 526.

The after-acquired-property clause in the mortgage does not help matters for defendant. Property in the turpentine could not be acquired by Rayford without the consent of the United States, and this he did not have. See Holt v. Henley, 232 U. S. 637, 640, 58 L. ed. 767, 772, 34 Sup. Ct. Rep. 459; Detroit Steel Cooperage Co. v. Sistersville Brewing Co. 233 U. S. 712, 58 L. ed. 1166, 34 Sup. Ct. Rep. 753.

It is insisted that if a tenancy in common existed in the manufactured product, the possession of it by defendant company was not tortious, and that in order to show a conversion there must be either a demand for possession and refusal thereof, or a showing that some [293] disposition was made of the chattels inconsistent with and destructive of the rights of plaintiff as cotenant. But, taking the shipping contract and the mortgage with the testimony and admissions as to the course of business carried on thereunder, the jury was fully warranted in finding that defendant had converted the manufactured products by selling them soon after they were received, and accounting to Rayford for the proceeds. The question of conversion was submitted to the jury, with a proper instruction that in such event a demand for possession was futile and therefore unnecessary.

The trial court instructed the jury that recovery should be based upon the market value of the spirits and rosin at the time they were received by defendant, and it is insisted that the value at the time of the conversion ought to have been taken instead. As to this it is sufficient to say that, except as it was to be inferred that probably the manufactured products were sold not long after their receipt by defendant, there is nothing to throw light upon the time that intervened between receipt and sale; and while by stipulation the highest and lowest market prices for turpentine and for rosin during the years 1904 and 1905 were shown, it did not appear at what time the prices were high, and at what time low. In short, the evidence contained nothing to aid the jury in distinguishing between the market price at the time of receipt and the market price at the time of sale. Defendant did nothing—if it could—to elucidate the matter by evidence, nor did its exceptions call the attention of the trial judge to the point now insisted upon.

Minor points are raised, but none that seems to call for discussion.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[294] J. D. O'KEEFE, Receiver of New Orleans, Texas, & Mexico Railroad Company, Appt.,

v.

UNITED STATES and the Interstate Commerce Commission.

(See S. C. Reporter's ed. 294-305.)

Interstate Commerce Commission — — powers — division of joint rates — tap lines.

1. To prescribe the maximum allowance out of the joint rates which trunk li-

railways may make to tap lines which are owned by the persons who own the timber and mills which they principally serve cannot be said to be beyond the powers of the Interstate Commerce Commission because no joint rate was fixed either by the Commission or by the carriers, and they had not been afforded an opportunity to agree in respect to the division, since, in addition to the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 15, as amended by the act of June 18, 1910 (36 Stat. at L. 539, 551, chap. 309, Comp. Stat. 1913, §§ 993, 8583), § 12, dealing expressly with the division of rates where carriers fail to agree among themselves as to the division, or where they have refused or neglected voluntarily to establish through routes or joint rates, the section also empowers the Commission, if of the opinion that any individual or joint rates or charges, or classifications, regulations, or practices are unjust, or unlawfully discriminatory, to prescribe others which shall be just and reasonable, and authorizes the Commission to determine the maximum charge which the carrier may pay for services rendered or instrumentalities furnished by the owner of the property transported.

[Powers of Interstate Commerce Commission, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

Carriers — tap line cases — division of joint rates.

2. The division of through rates between trunk line railways and tap lines as prescribed by the Interstate Commerce Commission is not necessarily arbitrary because, while classifying all service rendered by the tap lines for distances up to 3 miles from junction points as switching, and allowing for this a division of $2 and $3 a car, allowances for all distances above 3 miles are based upon mileage.

[For other cases, see Carriers, III., in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — right of carrier to give rebates or bonuses.

3. A trunk line railway has no right protected by the due process of law clause of the Federal Constitution to build up its business by paying tap line railroads bonuses or rebates which have been forbidden by Congress from considerations affecting the public welfare.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 516.]

Argued December 15, 1915. Decided February 21, 1916.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to review a decree which dismissed a bill praying the annulment of an order of the Interstate Commerce Commission prescribing the maximum allowance out of joint rates which trunk line railways may make to tap lines. Affirmed.

The facts are stated in the opinion.

Messrs. H. Generes Dufour and Walter F. Taylor argued the cause, and, with Mr. Morgan M. Mann, filed a brief for appellant:

The Interstate Commerce Commission had no power to make the order of July 29th, 1914, herein complained of.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; Re Transportation of Salt, 10 Inters. Com. Rep. 148; Interstate Commerce Commission v. Stickney, 215 U. S. 98, 54 L. ed. 112, 30 Sup. Ct. Rep. 66; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 298.

The Commission, in making the order complained of, applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element to be taken into account in determining whether a division is just and reasonable, or unlawfully discriminatory and a cloak for a rebate.

Interstate Commerce Commission v. Chicago G. W. R. Co. 141 Fed. 1003, affirmed in 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Phipps v. London & N. W. R. Co. [1892] 2 Q. B. 229, 61 L. J. Q. B. N. S. 379, 66 L. T. N. S. 721, 8 Eng. Ry. & C. Traffic Cas. 83; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 164, 42 L. ed. 414, 422, 18 Sup. Ct. Rep. 45; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Louisville & N. R. Co. 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687; Interstate Commerce Commission v. Western & A. R. Co. 35 C. C. A. 217, 93 Fed. 83; Judson, Interstate Commerce, §§ 175–183.

The order of July 29th, 1914, is arbitrary, and there was no substantial evidence in the record upon which the same could have been based. There was no evidence before the Commission to sustain its finding to the effect that any allowance or division in excess of those which it prescribed would result in undue preference and unjust discrimination.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed.

308, 32 Sup. Ct. Rep. 108; Ft. Dodge Commercial Club v. Illinois C. R. Co. 16 Inters. Com. Rep. 581; Business Men's Asso. v. Chicago, St. P. M. & O. R. Co. 2 Inters. Com. Rep. 41; New York Produce Exch. v. Baltimore & O. R. Co. 7 Inters. Com. Rep. 660; Loup Creek Colliery Co. v. Virginian R. Co. 12 Inters. Com. Rep. 471; Gustin v. Atchison, T. & S. F. R. Co. 8 Inters. Com. Rep. 288; Wilmington Tariff Asso. v. Cincinnati, P. & V. R. Co. 9 Inters. Com. Rep. 157; Corporation Commission v. Norfolk & W. R. Co. 19 Inters. Com. Rep. 309.

The effect of the Commission's order is to deprive complainant of its property without due process of law by denying to complainant the right to contract and compete for traffic originating on the line of the Louisiana & Pacific Railway Company.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

The rights of the complainant have not been foreclosed by the action of the Commission.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 56 L. ed. 308, 32 Sup. Ct. Rep. 108.

Mr. Joseph W. Folk argued the cause and filed a brief for the Interstate Commerce Commission:

In the absence of prior action by the Commission, the courts have no jurisdiction to determine the discriminatory or nondiscriminatory character of any agreement as to divisions.

Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 221, 58 L. ed. 568, 576, 34 Sup. Ct. Rep. 291.

The Commission had power to fix maximum divisions.

Louisiana & P. R. Co. v. United States, 209 Fed. 253, 234 U. S. 1, 29, 58 L. ed. 1185, 1196, 34 Sup. Ct. Rep. 741; Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 Sup. Ct. Rep. 645; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916; Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833; Louisville & N. R. Co. v. United States, 238 U. S. 1, 20, 59 L. ed. 1177, 1184, 35 Sup. Ct. Rep. 696.

The Commission had power to fix the divisions upon a mileage basis.

Ozark Fruit Growers' Asso. v. St. Louis & S. F. R. Co. 16 Inters. Com. Rep. 140; Re Investigation of Alleged Unreasonable Rates on Meats, 22 Inters. Com. Rep. 176; Indianapolis Freight Bureau v. Cleveland, C. C. & St. L. R. Co. 23 Inters. Com. Rep. 198; Re Advances on Fresh Meats & Packing House Products, 23 Inters. Com. Rep. 653; Iowa State Bd. of R. Comrs. v. Arizona Eastern R. Co. 28 Inters. Com. Rep. 193; F. S. Royster Guano Co. v. Atlantic Coast Line R. Co. 31 Inters. Com. Rep. 458; Railroad Commission v. St. Louis Southwestern R. Co. 34 Inters. Com. Rep. 472; Thompson v. Railroad Commission, 198 Fed. 691; Texas & P. R. Co. v. Railroad Commission, 112 C. C. A. 538, 192 Fed. 280.

The Commission having the power to regulate these divisions, it was an administrative question within its province to determine whether they should be regulated upon a mileage basis or otherwise.

Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 550, 56 L. ed. 308, 311, 312, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 494, 54 L. ed. 292, 297, 30 Sup. Ct. Rep. 164; Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 314, 58 L. ed. 1319, 1328, 34 Sup. Ct. Rep. 814; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 103, 54 L. ed. 946, 955, 30 Sup. Ct. Rep. 651; United States v. Louisville & N. R. Co. 235 U. S. 314, 320, 59 L. ed. 245, 250, 35 Sup. Ct. Rep. 113.

Disadvantages in rates due to disadvantageous location do not constitute an undue prejudice or an undue discrimination, either in fact or in law.

United States v. Baltimore & O. R. Co. 231 U. S. 274, 58 L. ed. 218, 34 Sup. Ct. Rep. 75.

It is not the province of the Commission to equalize by rate adjustment dissimilar conditions due to location.

Page Mill Co. v. Norfolk & W. R. Co. 30 Inters. Com. Rep. 612; Railroad Comrs. v. Atchison, T. & S. F. R. Co. 22 Inters. Com. Rep. 410; Wichita Business Asso. v. Atchison, T. & S. F. R. Co. 30 Inters. Com. Rep. 55.

The act to regulate commerce does not

attempt to equalize fortunes, opportunities, or abilities.

Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 298.

Competitive conditions cannot justify the purchase of traffic.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822.

The legality of maximum divisions fixed by the Commission must prevail over any alleged equities of appellant.

Southern P. Co. v. Interstate Commerce Commission, supra.

Any agreement with respect to divisions contrary to the order of the Commission is illegal and void.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

The act to regulate commerce was intended to correct rebating, favoritism, and discrimination, and to bring about justice and equality in the treatment of shippers.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

Assistant Attorney General Underwood argued the cause and filed a brief for the United States:

The discriminations which the Commission found to exist could only be remedied by establishing uniform divisions on a mile age basis.

Ozark Fruit Growers' Asso. v. St. Louis & S. F. R. Co. 16 Inters. Com. Rep. 140; Re Investigation of Alleged Unreasonable Rates on Meats, 22 Inters. Com. Rep. 176; Indianapolis Freight Bureau v. Cleveland, C. C. & St. L. R. Co. 23 Inters. Com. Rep. 198; Sheridan Chamber of Commerce v. Chicago, B. & Q. R. Co. 26 Inters. Com. Rep. 644; Mississippi River Case, 28 Inters. Com. Rep. 61; Arizona Corp. Commission v. Atchison, T. & S. F. R. Co. 28 Inters. Com. Rep. 428; Thompson v. Railroad Commission, 198 Fed. 691; Texas & P. R. Co. v. Railroad Commission, 112 C. C. A. 538, 192 Fed. 280.

The order was within the authority of the Commission, was made after full investigation, is supported by the proof, and is conclusively correct.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Union P. R. Co. 222 U. S. 541, 547, 56 L. ed. 308, 311, 32 Sup. Ct. Rep. 108; United States v. Louisville & N. R. Co. 235 U. S. 314, 320, 321, 59 L. ed. 245, 250, 251, 35 Sup. Ct. Rep. 113; Pennsylvania Co. v. United States, 236 U. S. 351, 59 L. ed. 616, P. U. R. 1915B, 261, 35 Sup. Ct. Rep. 370.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a decree dismissing a bill filed by appellant, as receiver of the New Orleans, Texas, & Mexico Railroad Company, against the United States and the Interstate Commerce Commission, praying the annulment of an order of the Commission, dated July 29, 1914, made in the Tap Line Cases, following the decision of this court reported in 234 U. S. 1, 58 L. ed. 1185, 34 Sup. Ct. Rep. 741. The order required certain trunk line railway companies, including the New Orleans, Texas, & Mexico, to reopen through routes and publish joint rates to interstate destinations with certain tap lines, including Louisiana & Pacific Railway Company, with which appellant's road had and has a connection, and prohibited any of the line carriers from making to any of the tap lines an allowance or division out of the joint rates in excess of maximum amounts prescribed as follows:

"For switching a distance of 1 mile or less from the junction, $2 per car; over 1 mile and up to 3 miles from the junction, $3 per car; on shipments from points over 3 miles, and not more than 6 miles from the junction, 1½ cents per 100 pounds; over 6 miles, and not more than 10 miles from the junction, 2 cents per 100 pounds; over 10 miles, and not more than 20 miles from the junction, 2½ [296] cents per 100 pounds; over 20 miles, and not more than 30 miles from the junction, 3 cents per 100 pounds; over 30 miles, and not more than 40 miles from junction, 3½ cents per 100 pounds; over 40 miles from the junction, 4 cents per 100 pounds." [31 Inters. Com. Rep. 492.]

The following is an outline of the history of the case. After the supplemental report of the Commission in Star Grain & Lumber Co. v. Atchison, T. & S. F. R. Co. 14 Inters. Com. Rep. 364, 372; 17 Inters. Com. Rep. 338, in which the making of allowances and divisions to tap lines for the traffic of proprietary mills was condemned, although no formal order was entered, the trunk lines, including the New Orleans, Texas, & Mexico, filed cancelation of tariffs theretofore filed providing for joint rates with various tap lines, including the Louisiana & Pacific. Certain of the tap lines filed complaints with the Commission, requesting that through routes and joint rates with trunk lines be enforced. The Commission thereupon investigated the tap line situation with reference to lumber operations in the states of Arkansas, Missouri, Louisiana, and Texas. Pending this investigation, the cancelation of joint rates was suspended from time to time. On April 23, 1912, the Commission filed its report, and on May 14, 1912, its supplemental

report (23 Inters. Com. Rep. 277, 549), and in orders dated May 14 and October 30, 1912, based upon these reports, it found that the tracks and equipment of the tap lines with respect to the industry of the proprietary lumber companies were plant facilities, and the service performed for the proprietary companies in moving logs to the mill and mill products to the trunk line was not a transportation service by a common carrier railroad, but a plant service by a plant facility, and that any allowance or division out of the rate on account thereof was unlawful and resulted in undue and unreasonable preferences and unjust discriminations; and the order of October 30 required the trunk lines, including the [297] New Orleans, Texas, & Mexico, to desist and abstain from making any such allowance to any of the tap lines mentioned. Certain of the tap lines, including the Louisiana & Pacific, filed petitions in the commerce court to annul this order. The court granted this relief (209 Fed. 244), and its decision was affirmed by this court (234 U S. 1), the court holding that the Commission exceeded its authority in condemning the tap line railroads, when duly incorporated as common carriers under the state laws, as being a mere attempt to evade the commerce law and secure rebates and preferences for themselves. At the same time the court said (p. 28):

"It is doubtless true, as the Commission amply shows in its full report and supplemental report in these cases, that abuses exist in the conduct and practice of these lines and in their dealings with other carriers which have resulted in unfair advantages to the owners of some tap lines and to discriminations against the owners of others. Because we reach the conclusion that the tap lines involved in these appeals are common carriers, as well of proprietary as nonproprietary traffic, and as such entitled to participate in joint rates with other common carriers, that determination falls far short of deciding, indeed, does not at all decide, that the division of such joint rates may be made at the will of the carriers involved, and without any power of the Commission to control. That body has the authority and it is its duty to reach all unlawful discriminatory practices resulting in favoritism and unfair advantages to particular shippers or carriers. It is not only within its power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear. If the divisions of joint rates are such as to amount to rebates or discriminations in favor of the owners of the tap lines because of their disproportionate amount in view of the [298] service rendered, it is within the province of the Commission to reduce the amount so that a tap line shall receive just compensation only for what it actually does."

After this decision, the Commission, after a rehearing and further argument, but without taking further testimony, and upon the same record on which its orders of May 14 and October 30, 1912, had been entered, made further findings (31 Inters. Com. Rep. 490), upon which was based the order of July 29, 1914, now under attack.

The New Orleans, Texas, & Mexico Railroad Company operates, directly and through stock ownership of other companies, a system of railroad extending from New Orleans across the states of Louisiana and Texas. The Louisiana & Pacific Railway Company, incorporated under the laws of the state of Louisiana, owns and operates a tap line within that state, including approximately 80 miles of main and branch lines, its main line extending from De Ridder southerly to Lake Charles, approximately 45 miles, crossing and forming a junction with the main line of the New Orleans, Texas, & Mexico at Fulton, which is about 25 miles from De Ridder and 19 miles from Lake Charles. The Louisiana & Pacific connects also with the following trunk lines: At De Ridder, with the Gulf, Colorado, & Santa Fe and the Kansas City Southern; at Bon Ami (near De Ridder) with the Kansas City Southern; and at Lake Charles, with the Louisiana & Western (Southern Pacific Company), the Kansas City Southern, and the St. Louis, Iron Mountain, & Southern. Located along the line of the Louisiana & Pacific are certain lumber mills, which are called proprietary mills because controlled by the same interests which own the stock of the Louisiana & Pacific. Some of these are at De Ridder, Bon Ami, and Longville, all of which points are north of Fulton, while one is at Gossport, near Lake Charles. At Bannister and Ragley, on the line of the Louisiana & Pacific, north of Fulton, there are nonproprietary mills.

[299] In the year 1906, before the construction or definite location of the New Orleans, Texas, & Mexico, an agreement was made between that company, then known by another name, on the one hand, and the Louisiana & Pacific and the various companies owning the proprietary mills, on the other, whereby the Louisiana & Pacific and the lumber companies agreed to give a substantial amount of their tonnage to the New Orleans, Texas, & Mexico upon a division of the joint rates approximating 35 per cent, not exceeding, however, in any case, 54 cents per hundred pounds. The lumber

nage which, pursuant to this arrangement, the New Orleans, Texas, & Mexico expected to receive and did, until the order of July 29, 1914, actually receive, was a great inducement for the company to locate its line through the territory where it is located. During the five fiscal years prior to July, 1914, its lumber tonnage amounted to 37.45 per cent of its total gross, and of this the Louisiana & Pacific supplied approximately one third, or about 13 per cent of the total gross tonnage. Since the order of July 29, 1914, the New Orleans, Texas, & Mexico has been deprived of practically all of this tonnage, which has been diverted to the other trunk lines because the Louisiana & Pacific, in order to gain as large a division of the joint rate as possible, moves its lumber tonnage from points near the northerly end of its line across the line of the New Orleans, Texas, & Mexico, and delivers it to the trunk lines at the southerly end of its line; and also takes tonnage originating near the southerly end of its line, carries it across the line of the New Orleans, Texas, & Mexico, and delivers it to trunk lines at or near its northerly terminus. It is said that the practical effect of the Commission's order results always to the disadvantage of the New Orleans, Texas, & Mexico with respect to traffic originating upon the line of the Louisiana & Pacific, and that the disadvantage is in no case less than 1 cent per hundred pounds, or approximately $5 per [300] car. A single illustration will suffice. From the mill at Longville to the junction of the New Orleans, Texas, & Mexico the distance is 8.2 miles, so that if the product of this mill were shipped over appellant's road, the Louisiana & Pacific would receive only 2 cents per hundred pounds, or $10 per car; whereas, by carrying the product beyond Fulton to Lake Charles, and there delivering it to a trunk line, the Louisiana & Pacific receives a division of 3 cents per hundred; or by taking the Longville product to De Ridder, the Louisiana & Pacific likewise receives 3 cents per hundred. As the trunk lines all operate under a common blanket rate on lumber for this territory, the through rate is the same in all circumstances, and the proprietary mills route their shipments in such manner as to give to the Louisiana & Pacific the largest possible division, always to the disadvantage of the New Orleans, Texas, & Mexico.

It is insisted by appellant that the Commission was without power to prescribe maximum divisions, as was done by the order of July 29, 1914, because no joint rate was fixed, either by the Commission or by the parties, and they had not been afforded an opportunity to agree in respect to the division. This is based upon the view that § 15 of the Commerce act as amended (act of June 18, 1910, chap. 309, § 12, 36 Stat. at L. 539, 551, Comp. Stat. 1913, §§ 993, 8583), contains only two provisions dealing expressly with the division of rates, the first being applicable where the carriers fail to agree among themselves upon the division, the other where the carriers have refused or neglected to establish through routes or joint rates voluntarily. Without stopping to consider whether the circumstances of this case bring it within either of these provisions, we deem it clear that to regard these only is to take too narrow a view of the scope of the section. The first part of the same section enacts: "That whenever . . . the Commission shall be of opinion that any individual or joint rates [301] or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of . . . property . . . or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers . . . are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist," etc. And a later part of the same section (p. 553) prescribes: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order," etc.

In the case in 234 U. S. 1, this court did not ignore, but fully recognized, the significance of the community of interest between the lumber company and the tap line. It was pointed out (p. 27) that timber and its manufactured products were exempted from the absolute prohibition of the commodity clause of the Hepburn act (of June 29, 1906, chap. 3591, 34 Stat. at L. 584, 585, Comp. Stat. 1913, § 8563). But this was

regarded as one of the circumstances rendering it important that the Commission should deal with the abuses [302] found to exist in the division of joint rates with the tap lines, not by abolishing them altogether, but by "reducing the amount so that a tap line shall receive just compensation only for what it actually does." So, in Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22, the court said: "The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum." Again, in Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 Sup. Ct. Rep. 645, it was said: "The intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by § 15."

We are clear that the Commission had jurisdiction to make the order of July 29, 1914.

Next it is insisted that the Commission applied erroneous principles of law, in that it excluded from consideration competitive conditions as an element in determining whether a division is just and reasonable or unlawfully discriminatory. The order is not open to this criticism. It not only takes competitive conditions into consideration, but establishes the maximum divisions for the very purpose of preventing preferences, discriminations, and rebates, as methods of competition.

It is insisted that there was no evidence before the Commission to sustain its finding to the effect that any allowance or division in excess of the limits prescribed would result in undue preference and unjust discrimination. This, of course, is to be tested by a consideration of the evidence that was before the Commission. The report and supplemental report of April 23 and May 14, and the orders of May 14 and October 30, 1912, and the [303] oral evidence and main exhibits before the Commission from the beginning of the tap line investigation to the making of the order last mentioned were offered in evidence. Appellant, however, has printed only a small part of the testimony, being that which especially relates to the Louisiana & Pacific Railway, its organization, ownership, manner and cost of construction, operating revenue and expenses, accumulated surplus, etc. But, besides these details as to this line, the Commission had before it, as its reports show, a mass of evidence relating to numerous other tap lines, operated under somewhat similar circumstances, including evidence as to the allowances actually made to them out of the joint rate. Evidence of what was allowed on these tap lines had a tendency to show what was reasonable and therefore permissible upon other tap lines, including the Louisiana & Pacific. It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some limitation was called for, and, in general at least, furnished the materials upon which to base it. A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others. Nor can it be said that the Commission's action was arbitrary because, while classifying all the service for distances up to 3 miles from junction as switching, and allowing for this a division of $2 and $3 per car, allowances for all distances above 3 miles are based upon mileage. It is admitted that distance is an element properly to be considered; but appellant insists [304] that terminal service, the origin of traffic, etc., are more important elements. This is an administrative question. The tap line problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

The final contention, which is that the Commission's order in effect deprives the New Orleans, Texas, & Mexico of its property without due process of law, by denying to it the right to contract and compete for traffic originating on the line of the Louisiana & Pacific, is transparently unsound. The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by act of Congress from considerations affecting the public welfare.

We are not to be understood as conceding that appellant is in a legal sense aggrieved by the action of the Commission in limiting the allowance to the tap line. The case is singular, in that neither this tap

line nor any tap line is complaining that the allowance is too small; nor is any trunk line complaining that it is too great. The real basis of appellant's complaint, representing a trunk line carrier, is that the allowance to the tap line is too small. It is questionable whether it lies in the mouth of the line carrier to object on this ground.

We recognize the exceptional situation in which appellant's road is placed, and the hardship that results to it from the application of the order of July 29, 1914, to the traffic originating upon the line of the Louisiana & Pacific. After that order, the New Orleans, Texas, & Mexico and the Louisiana & Pacific undertook to agree upon through routes and joint rates, with divisions not greater than those allowed by the Commission, but said to be equalized so as to enable the New Orleans, Texas, & Mexico to compete [305] on equal terms with the other trunk lines. This agreement, so far as appears, has not been submitted to the Commission for its approval or disapproval, and we intimate no opinion upon the question whether that body ought to approve it.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

CAROLINA GLASS COMPANY, Plff. in Err.,
v.
STATE OF SOUTH CAROLINA. (No. 12.)

CAROLINA GLASS COMPANY, Plff. in Err.,
v.
WILLIAM J. MURRAY, Chairman, John McSween, et al., Constituting the State Dispensary Commission, et al. (No. 9.)

CAROLINA GLASS COMPANY, Plff. in Err.,
v.
WILLIAM J. MURRAY, John McSween, Adolphus N. Wood, Avery Patton, and James S. Brice. (No. 205.)

CAROLINA GLASS COMPANY, Plff. in Err.,
v.
WILLIAM J. MURRAY, John McSween, Adolphus N. Wood, Avery Patton, and James S. Brice. (No. 204.)

(See S. C. Reporter's ed. 305–318.)

Constitutional law — due process of law — confiscation.

1. A claim for goods furnished to the South Carolina dispensary cannot be said to have been confiscated in violation of Federal rights because the State Dispensary Commission, in passing on the claim, found that the claimant was indebted to the state in a specified amount, being the difference between the amount of the claim and the sum which it found that the claimant had previously fraudulently collected from the state, and rendered judgment accordingly, where the state supreme court, in affirming the action of the Dispensary Commission, did so only in so far as the Commission declined to approve the claim, expressly holding that the validity of any possible demand by the state against the claimant remained wholly uncontrolled by the Commission's finding.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — impairing contract obligation — transfer of state funds.

2. The removal by the South Carolina Dispensary Commission, under the authority of S. C. act of February 23, 1910, of funds in the hands of county dispensaries, due to a corporation which the Commission has found to be indebted to the state, does not deprive the corporation of its property without due process of law, nor impair any contract obligations, the state not having consented to be sued.

[For other cases, see Constitutional Law, IV. b, 4; IV. g, in Digest Sup. Ct. 1908.]

State — immunity from suit — suit against state officers.

3. The state's immunity from suit prevents a Federal court from taking jurisdiction of a suit against individual members of the South Carolina Dispensary Commission to recover judgment for moneys due the plaintiff from county dispensaries which the Commission, acting under the authority of state legislation attacked as unconstitutional, had withdrawn from such county dispensaries, upon finding that plaintiff was indebted to the state.

[For other cases, see States, 282–325, in Digest Sup. Ct. 1908.]

Error from circuit court of appeals — constitutional question.

4. A Federal circuit court of appeals has no appellate jurisdiction in an action in which the jurisdiction of the district court was invoked upon the sole ground that the controversy involved the application of the Federal Constitution.

[For other cases, see Appeal and Error, III. c, in Digest Sup. Ct. 1908.]

[Nos. 12, 9, 205, and 204.]

Note.—Generally, on suits against a state—see notes to Murdock Parlor Grate Co. v. Com. 8 L.R.A. 399; Carr v. State, 11 L.R.A. 370; Beers v. Arkansas, 15 L. ed. U. S. 991; Hans v. Louisiana, 33 L. ed. U. S. 842.

On suits against state officers as suits against state—see notes to Sanders v. Saxton, 1 L.R.A.(N.S.) 727; Ex parte Young, 13 L.R.A.(N.S.) 932; Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189; and Beers v. Arkansas, 15 L. ed. U. S. 991.

Argued January 20, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a decision of the State Dispensary Commission, rejecting a claim upon finding that the claimant was indebted to the state. Affirmed. Also

IN ERROR to the Supreme Court of the State of South Carolina to review a decree in an original proceeding in that court, refusing to enjoin the State Dispensary Commission from removing funds from county dispensaries. Affirmed. Also

IN ERROR to the District Court of the United States for the Eastern District of South Carolina to review a decree dismissing, for want of jurisdiction, a suit against individual members of the South Carolina Dispensary Commission to recover judgment for moneys alleged to be due plaintiff from county dispensaries which the Commission has withdrawn upon finding that plaintiff was indebted to the state. Affirmed. Also

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed the judgment of the District Court for the Eastern District of South Carolina, just above mentioned. Reversed and remanded with directions to dismiss the writ of error to the District Court for want of jurisdiction.

See same case below in Nos. 12 and 9, 87 S. C. 270, 69 S. E. 391; No. 205, 197 Fed. 392; No. 204, 124 C. C. A. 423, 206 Fed. 635.

The facts are stated in the opinion.

Mr. William H. Lyles argued the cause, and, with Messrs. David W. Robinson and Jo-Berry S. Lyles, filed a brief for plaintiff in error:

The so-called overjudgment was null and void.

State ex rel. Lyon v. State Dispensary Commission, 79 S. C. 316, 60 S. E. 928; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1147, 12 Sup. Ct. Rep. 336; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Cooley, Const. Lim. 7th ed. 594; Holden v. Hardy, 169 U. S. 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; Re Tyler, 149 U. S. 164, 187, 37 L. ed. 689, 697, 13 Sup. Ct. Rep. 785; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276; Kuhn v. Fairmont Coal Co. 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; State Co. v. Jones, 99 S. C. 218, 82 S. E. 1048; United States v. Freeman, 3 How. 556, 11 L. ed. 724; United States v. Gilmore, 8 Wall. 330, 19 L. ed. 396; State v. Pacific Guano Co. 22 S. C. 74; Witte v. Weinberg, 37 S. C. 593, 17 S. E. 681; Sharp v. Kinsman, 18 S. C. 108; Lenhardt v. French, 57 S. C. 493, 35 S. E. 761; Williams v. Irby, 15 S. C. 458; Railroad Comrs. v. Columbia, N. & L. R. Co. 82 S. C. 418, 64 S. E. 240.

The plaintiff in error had contract and property rights in the money due and owing it from the county dispensaries, and the sequestration and confiscation of this money by the defendants, claiming to act by virtue of their office as members and advisers of the State Dispensary Commission by virtue of the so-called overjudgment of November 20th, 1909, and the authority claimed to have been conferred upon them by the act of 1910, impaired the obligation of plaintiff in error's contract rights with reference to such moneys, deprived plaintiff in error of its property without due process of law, and denied to plaintiff in error the equal protection of the laws, in violation of the 14th Amendment.

Curran v. Arkansas, 15 How. 304, 14 L. ed. 705; Dabney v. Bank of State, 3 S. C. 125; Baring v. Dabney, 19 Wall. 1, 9, 22 L. ed. 90, 95; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Green v. Biddle, 8 Wheat. 1, 92, 5 L. ed. 547, 570; Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 448; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; State ex rel. Lyon v. State Dispensary Commission, 79 S. C. 316, 60 S. E. 928; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

The suit was one brought against the defendants, who, claiming to act as officers of the state and under color of unconstitutional statutes, committed acts of wrong and injury to the rights and property of the plaintiff, acquired under contract with the state, and was to request money from such defendants unlawfully taken by them from plaintiff, on behalf of the state, or for compensation in damages, and therefore was not a suit against the state, nor one to which the state was a necessary party.

United States v. Lee, 106 U. S. 196, 211, 27 L. ed. 171, 179, 1 Sup. Ct. Rep. 240; Poindexter v. Greenhow, 114 U. S. 270, 287,

29 L. ed. 185, 192, 5 Sup. Ct. Rep. 903, 962; Re Tyler, 149 U. S. 190, 37 L. ed. 698, 13 Sup. Ct. Rep. 785.

Where the jurisdiction of the district court is first invoked upon a Federal question, the case must be brought direct to this court, and the appellate jurisdiction of this court is exclusive.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; Union & P. Bank v. Memphis, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604.

Mr. Benjamin Lindsey Abney argued the cause, and, with Mr. Thomas H. Peeples, filed a brief for defendants in error:

The act creating county dispensary boards did not change in any way the construction and principles laid down in the cases of State ex rel. Lyon v. State Dispensary Commission, 79 S. C. 316, 60 S. E. 928, and Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458.

The state cannot be sued without its consent, and such consent can be given, as it is a voluntary act, under such conditions as it sees fit to impose.

Beers v. Arkansas, 20 How. 527, 15 L. ed. 991; Smith v. Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; Wisconsin ex rel. Bolens v. Frear, 231 U. S. 616, 58 L. ed. 400, 34 Sup. Ct. Rep. 272.

Mr. Justice McReynolds delivered the opinion of the court:

These suits grew out of the legislation by which South Carolina sought to control traffic in liquors. They involve closely related matters, were heard together, and it will be convenient likewise to dispose of them. In Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265, Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, and Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, the history and general purposes of the legislation are considered.

By act of 1892 the general assembly created a state board of control, with power to supervise the traffic; also provided for a state commissioner charged with the duty of purchasing and distributing liquors through local officers known as dispensers.

The statute of 1896 directed election, by the general assembly, of the board of control, and gave it power to make purchases and to appoint a commissioner who should supply local dispensers selected by and under direction of county boards. By an amending act of 1900 the board then existing was abolished; a board of directors of the state dispensary was created, with power to prescribe rules and regulations to govern dispensaries, [308] both state and county; and provision was made for the election of a dispensary commissioner. The new board was required to purchase liquor for lawful use within the state; and general management and control of the state dispensary was intrusted to the commissioner.

A legislative committee was appointed in 1905 to investigate the state dispensary. In 1907 the statute of 1896 was repealed; control through a state board was abolished and county boards substituted, clothed with authority to purchase "in the name of this state" all liquors to be sold within their several counties, "Provided, That the state shall not be liable upon any contract for the purchase thereof beyond actual assets of the dispensary for which the purchase is made." At the same time another act created a State Dispensary Commission of five, gave it control of all funds, assets, and property other than real estate of the state dispensary, required it to investigate all facts concerning outstanding claims against the state dispensary, and thereafter to pay all just liabilities from dispensary assets which might come into its hands. This second act of 1907 was amended in 1908, and the commission given "full power to pass upon, fix and determine all claims against the state growing out of dealings with the dispensary; and to pay for the state any and all just claims, which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been or may hereafter be collected by said Dispensary Commission: Provided, That each and every person, firm or corporation, presenting a claim or claims to said Commission, shall have the right to appeal to the supreme court, as in cases at law."

By act of February 23d, 1910, findings of the State Dispensary Commission were declared to be final; any sum ascertained to be due the state was required to be deducted from whatever a county dispensary might owe such debtor; and authority was given the Commission to [309] command any county dispensary so indebted to turn over to it an equivalent amount of money. Notices of claims in favor of the state, creation of liens to secure the same, and enforcement of their payment, were also provided for.

Number 12.

The history and disposition of this cause in the state tribunals sufficiently appear from parts of the opinion by the supreme court (87 S. C. 270, 69 S. E. 391) quoted below:

"The investigations of the committee [appointed 1905] resulted in an act, passed in 1907, authorizing the appointment of a commission, to be known as the State Dispensary Commission, whose duty it was to close out the entire business and property of the state dispensary, collect all debts due, and pay 'all just liabilities' of the state growing out of said business. The Commission was given 'full power and authority to investigate the past conduct of the affairs of the dispensary.' It was also clothed with all the power and authority conferred upon the committee which had been appointed under the resolution above referred to. 25 Stat. 835. The act of 1907 was amended in 1908 so as to give the Commission 'full power to pass upon, fix and determine all claims against the state growing out of dealings with the dispensary; and to pay for the state any and all just claims which have been submitted to and determined by it, and no other.' 25 Stat. 1289.

"Appellant presented to the Commission a claim for $23,013.75 as the balance due it by the state for bottles and demijohns furnished to the dispensary under contracts made with the board of directors from and including April, 1906, until the business was closed out by the Commission. Appellant had also furnished the dispensary practically all the bottles and demijohns used since about December, 1902; but all accounts prior to April, 1906, had been settled.

[310] "Upon the filing of this claim, the Commission went into an investigation of all past dealings of appellant with the dispensary; and, after hearing a great deal of testimony and argument thereon, rendered its decision, dated Nov. 17, 1909, which will be set out in the report of the case.

"The conclusion and finding of the Commission was that, in pursuance of a conspiracy between some of the directors of the dispensary and some of the appellant's officers or agents to defraud the state, whereby legitimate competition was destroyed, appellant had a monopoly of the business of furnishing glass to the dispensary from the date of its beginning business, in 1902, until April, 1906; and that the prices paid it for glass during that period exceeded the fair market value thereof by $51,432.99. Therefore, allowing appellant's claim of $23,013.75, the Commission found that appellant was indebted to the state in the sum of $28,419.24, the difference between the amount of its claim and the sum it had fraudulently collected from the state.

"From that decision, this appeal was taken, under the provisions of the statute, giving every claimant the right of appeal to the supreme court, 'as in cases at law.' Appellant concedes that the jurisdiction of this court is limited in such cases to a review of alleged errors of law.

. . . . . .

"The next contention of appellant is that the Commission is not a court, but a special tribunal of limited power, and that it exceeded its authority in undertaking to fix and determine appellant's liability to the state, and then set off its claim against the liability so fixed. It is conceded that the Commission is not a court, though its duties necessarily involve, to some extent, the exercise of judicial functions, as is always the case where judgment and discretion are to be exercised. It was created under § 2 of article 17 of the Constitution, which provides [311] that 'the general assembly may direct by law in what manner claims against the state may be established and adjusted.'"

. . . . . .

"The question, therefore, whether the commission had authority to entertain a 'set-off' or 'counterclaim' in favor of the state against a claimant, in the technical sense in which those terms are used in legal proceedings, is not germane or material to the present inquiry. To what purpose should the Commission investigate, unless it announced the result of its investigation? We see no error, therefore, in the Commission stating its findings as the result of its investigation.

"The findings of the Commission, however, are controlling only in its determination of the nonliability of the state upon appellant's claim. They have not the force or effect of a judgment, concluding appellant in any other proceeding,—such, for instance, as the state might institute in the proper court to recover the amount found by the Commission to be due it by appellant.

. . . . . .

"The judgment of this court is that the decision of the Commission upon plaintiff's claim against the state be affirmed."

Manifestly, we think, the supreme court affirmed the Commission's action only in so far as it declined to approve the glass company's claim,—there was no final determination of the state's right to recover over against the company.

Error is assigned concerning supposed Federal questions upon the theory that

there has been "in practical effect an adjudication of the validity of the alleged claim of the state arising out of the ended transactions prior to April, 1906, and a satisfaction of such a judgment by the confiscation of plaintiff in error's property; that is, its claim against the state for goods furnished since 1906."

[312] This theory is entirely out of harmony with the supreme court's opinion, which holds the validity of possible demands against the glass company remains wholly undetermined,' and that, acting within its plain powers, the state had only refused to recognize and discharge a claim against itself. The argument of counsel proceeds upon a fundamental misconception. We find no error in the judgment below, and it must be affirmed.

Number 9.

By this original proceeding begun in the supreme court of South Carolina, March 4, 1910, the Carolina Glass Company sought to restrain any effort to collect the so-called overjudgment for $28,419.24, pronounced by the Dispensary Commission under circumstances narrated supra (cause No. 12); and also to prevent the Commission from demanding or receiving sums of money alleged to be due the company from certain county dispensaries, or interfering with payment of such indebtedness.

Quotations from the opinion below (87 S. C. 270, 285) will adequately disclose the issues involved.

"These arise principally out of an act approved February 23, 1910, and what was done by the defendants under the provisions of that act, which, it will be noted, was passed subsequent to the decision of the Commission upon the claim of the plaintiff. The provisions of the first five sections of the act pertinent to this case are, in substance: That, in addition to the powers conferred by all previous acts, the Dispensary Commission shall have power to pass upon, fix and determine claims of the state against any person, firm, or corporation heretofore doing business with the state dispensary, and settle and receipt therefor; that the findings of the Commission under its provisions shall be final, and, upon the finding by the Commission that any person, firm, or corporation is indebted to the state, the dispensary auditor and officials [313] having charge of the funds of any county dispensary which may be indebted to such person, firm, or corporation, shall pay to the Commission the amount so found to be due the state, or so much thereof as the funds in their hands due to such person, firm, or corporation will pay, and the receipt of the Commission shall be a sufficient voucher therefor; that the Commission may, by its order, stop the paying out of any funds of any county dispensary by any officer having charge thereof. Sections 7 and 9 of the act are as follows: [They are copied in margin.]

"Within a few days after the approval of the act, to wit, on February 26, 1910, the Commission, by its attorneys, filed in the office of the clerk of the court for Richland county, in which county plaintiff owned real estate, a notice, headed or entitled, The State v. Carolina Glass Co., and signed by the attorney general and other counsel [314] representing the state. The notice was as follows: 'Notice is hereby given to all whom it may concern, that the above stated cause has been instituted, and is now pending before the State Dispensary Commission for the recovery against the Carolina Glass Company of $29,000, the amount which has been found to be due from the said defendant to the state of South Carolina owing to overcharges made by said defendant in selling goods to the state dispensary, and this notice is given in accordance with the terms of an act of the legislature passed in February, 1910, and duly approved by the governor.' About the same time, notice was served on the plaintiff, pursuant to the provisions of the act, that the Commission would proceed to pass

Sec. 7. "The State Dispensary Commission is hereby empowered to pass all orders and judgments and do any and all things necessary to carry out the purposes of this act; and all judgments rendered by them for any claim due the state shall be a lien on the property of the judgment debtor situated within this state, and a transcript of said judgment shall be filed in the office of the clerk of the court of common pleas in each county where any property of such judgment debtor is situated."

Sec. 9. "In all cases pending before the said State Dispensary Commission, upon any claim or claims against any person or persons or any corporation or corporations owning any real estate in any county in this state, the said Commission shall file in the office of the clerk of court in each county where such real estate is situated a notice of the pendency of such cases, and the said notice so filed shall be full notice to all persons whomsoever claiming any title to or lien upon such real estate acquired subsequent to the filing thereof, and the debt found by said Commission to be due the state shall have priority over the claims of all creditors, except creditors secured by mortgage or judgment entered and recorded prior to the filing of such notice, and the said real estate, in the hands of any person or persons whomsoever, shall be liable for the payment of such debt so found to be due the state."

upon, fix, and determine the claim of the state against the plaintiff on account of the overcharges growing out of its dealings with the dispensary. Notice was also served on the county dispensary board of Richland county, requiring that board to pay to the Commission the amount due by said board to the plaintiff.

"Another feature of the case grows out of an agreement alleged to have been made between the attorneys for the plaintiff and the attorney representing the state with regard to payments for shipments of glass made by plaintiff to the county dispensaries after November 20, 1909.

. . . . . .

"Under the provisions of the Constitution (art. 8, § 11) and statutes (25 Stat. 463) the county dispensaries are conducted 'under the authority and in the name of the state.' Therefore, the officers in charge of them are agents of the state and the funds arising from the sale of liquors through them are the funds of the state, and the debts due for goods sold to them are the debts of the state. In exercising the powers conferred upon it by the legislature, the Dispensary Commission is also the agent and representative of the state, 'subject to no interference, [315] except that of the general assembly itself,' and a suit brought against it is, in effect, a suit against the state. State ex rel. Lyon v. State Dispensary Commission, 79 S. C. 316, 329, 60 S. E. 928. As the state cannot be sued without its consent, no court has power to interfere with or direct the disposition of the state's funds in the hands of its agents, unless it appears that they are acting without authority of law, or are refusing to recognize and obey the law to the detriment of private rights. . . . In ordering the funds in the hands of the officers of the county dispensaries due to the plaintiff turned over to itself, the commission acted within the limits of its authority and discretion conferred upon it by the legislature, and this court has no power to interfere. From the foregoing, it will be seen that it is unnecessary to inquire or decide whether there was an agreement between the attorneys for plaintiff and the attorneys for the state as to the collection of the amounts due plaintiff from the county dispensaries for shipments made prior to November 20th, or what the agreement was, or whether it has been violated. The Dispensary Commission is the sole arbiter of the rights of the plaintiff, if it has any, with regard to that matter.

. . . . . .

"So long, therefore, as the action of the Commission was confined to the investigation of all dealings, past and present, with the dispensary, and the determination of the just liabilities of the state growing out of them, it was, as we have seen, based upon constitutional authority, and was valid and binding. But we find no authority in the Constitution for the legislature to provide by law how claims of the state against others shall be established or adjusted, except through the courts. We conclude, therefore, that in so far as the act of 1910 attempts to confer upon the Commission power to pass final judgment upon the claim of the state against the plaintiff, it is unconstitutional, [316] null, and void. And, as the lien which the act attempts to create is based upon the unauthorized act of the Commission, it is likewise null and void."

Defendants were accordingly enjoined from asserting a lien upon the company's property, and the notice filed in Richland county was directed to be canceled; but the Commission's power to remove funds from county dispensaries was upheld.

Plaintiff in error now maintains the so-called overjudgment of November 17, 1909, was void; that by reason of claims against them it had contract and property rights in money held by the county dispensaries; and that removal of funds therefrom by the State Dispensary Commission impaired contract obligations in violation of § 10, article 1, Federal Constitution, and deprived it of property without due process of law.

It was distinctly adjudged by the supreme court that the Dispensary Commission was without power to pronounce the overjudgment; that it was invalid and could not be enforced. In view of repeated holdings by that court and our opinion in Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, it is clear that funds of county dispensaries were state funds, and, as such, subject to control by the Dispensary Commission. Their removal, therefore, violated no right which the glass company could assert,—the state had not consented to be sued. The judgment of the court below must be affirmed.

Number 205.

The Carolina Glass Company instituted this proceeding at law in the United States district court, South Carolina, December 13, 1911, to recover judgment against individual members of the Dispensary Commission for sums of money said to have been unlawfully withdrawn by them from county dispensaries which held the same for plaintiff's benefit. It is alleged that for supplies furnished partly before [317] and partly after February 23, 1910, these county

dispensaries became lawfully indebted to the company for more than $19,000, and that the money in their keeping was held in trust to pay such sum, and further:

"That the said defendants, undertaking to proceed under § 6 of the act entitled, 'An Act to Further Provide for Winding up the Affairs of the State Dispensary,' approved the 23d day of February, 1910 [copied in margin], as this plaintiff is informed and believes, demanded from the county dispensary boards for the county of Clarendon, the county of Richmond, and the county of Georgetown, the sums of money alleged in paragraph six of this complaint, amounting in the aggregate to the sum of nineteen thousand and eighty-four and 38/100 dollars then due to this plaintiff by said several county dispensary boards, as alleged in said paragraph six, and unlawfully and wrongfully received the said sums of money from said several county dispensary boards, claiming that they were entitled to the same on account of the above-mentioned illegal offset found by said State Dispensary Commission to be due by this plaintiff as aforesaid; which action this plaintiff alleges was wholly without authority of law, as the provisions of said § 6 of the act of February 23d, 1910, were unconstitutional, null, and void, as constituting an effort, unwarrantably and without authority, to confiscate the property of this plaintiff without due process of law, the provisions of said section being [318] in violation of § 10 of article 1 of the Constitution of the United States, and also of the 14th Amendment to the Constitution of the United States; and, furthermore, in violation of the express contract and agreement entered into by this plaintiff with the defendants above named as above alleged."

Holding it in effect a suit against the state, the district court dismissed the cause (197 Fed. 392); and it is here upon direct writ of error. We are of opinion that the action of the court below was correct. And in view of what has been said above and our opinion in Murray v. Wilson Distilling Co. further discussion of the questions involved would not be profitable. The judgment is affirmed.

Number 204.

This writ brings up a judgment rendered by the circuit court of appeals, fourth circuit, affirming the same final judgment of the district court considered in No. 205, supra. 124 C. C. A. 423, 206 Fed. 635. There is no allegation of diverse citizenship, and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

In such circumstances the Circuit Court of Appeals is without jurisdiction to review. Union & P. Bank v. Memphis, 189 U. S. 71, 73, 47 L. ed. 712, 713, 23 Sup. Ct. Rep. 604. Its judgment is accordingly reversed and the cause remanded, with directions to dismiss the writ of error improperly entertained.

Judgments in Nos. 12, 9, and 205, affirmed; judgment in No. 204 reversed and remanded to the Circuit Court of Appeals for the Fourth Circuit, with directions to dismiss writ of error for want of jurisdiction.

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[319] FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plff. in Err.,
v.
COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 319-324.)

Taxation — Federal agency — foreign surety company.

A surety company does not, by becoming, conformably to the act of August 13, 1894 (28 Stat. at L. 279, chap. 282, Comp. Stat. 1913, § 3293), surety on bonds required by the United States, act as a Federal instrumentality so as to be exempt from a state tax on the premiums received, exacted from foreign corporations for the privilege of doing business within the state.

[For other cases, see Taxes, I. c, 2, a; I. c, 3, a, in Digest Sup. Ct. 1908.]

[No. 114.]

Argued January 6, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Dauphin County, in that state, enforcing a tax upon the premiums received by a foreign surety company upon bonds required by the United States. Affirmed.

Sec. 6. "In any and all cases where the State Dispensary Commission has heretofore found any amount due the state by any person, firm or corporation on account of dealings with the state dispensary, the several county dispensary boards now existing, and all boards and other officer or officers in charge of any money due any such person, firm or corporation on account of any dealings with any and all county dispensaries heretofore existing, shall, upon demand, pay to the State Dispensary Commission a sufficient amount, or so much thereof as may be on hand, to cover the amount so found to be due the state."

See same case below, 244 Pa. 67, 90 Atl. 437.

The facts are stated in the opinion.

Mr. Charles Markell argued the cause, and, with Mr. Charles F. Patterson, filed a brief for plaintiff in error:

This tax is an occupation or privilege tax on the privilege of carrying on business under the act of Congress; it is not a property tax on property (tangible or intangible) of the defendant.

Equitable Life Assur. Soc. v. Pennsylvania, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829; Com. v. Standard Oil Co. 101 Pa. 145; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 299, 59 L. ed. 234, 237, 35 Sup. Ct. Rep. 27.

Nor is it, either in name or in fact, a commutation tax or just equivalent for the ordinary tax upon property, ascertained by reference thereto.

Equitable Life Assur. Soc. v. Pennsylvania, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 224, 225, 52 L. ed. 1031, 1036, 1037, 28 Sup. Ct. Rep. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 300, 301, 56 L. ed. 445, 447, 448, 32 Sup. Ct. Rep. 218; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 697, 39 L. ed. 311, 315, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; United States Exp. Co. v. Minnesota, 223 U. S. 335, 345, 347, 56 L. ed. 459, 465, 466, 32 Sup. Ct. Rep. 211; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 121, 163, 12 Sup. Ct. Rep. 807; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 226, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133, L.R.A. —, —, 34 Sup. Ct. Rep. 15; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498.

The state of Pennsylvania has for many years been accustomed to taxing occupations, even of individuals, in addition to property.

Continuously since 1864, the state of Pennsylvania has imposed a number of special occupation or privilege taxes on the business of various corporations, domestic or foreign. Most of these occupation or privilege taxes have been imposed in addition to ordinary property taxation. One, at least, was imposed expressly upon the business of foreign corporations beyond the reach of ordinary property taxation. None have been imposed as an equivalent for ordinary property taxation, or have (except the extra capital stock tax on transportation companies under the act of 1874, repealed in 1877) been ascertained or measured with any reference whatever to the taxable property of the corporation taxed.

Three of these occupation or privilege taxes on the business of certain corporations have been held unconstitutional by this court when applied to the Federal business of interstate commerce (State Freight Tax Case, 15 Wall. 232, 271, 21 L. ed. 146, 160; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958), and an occupation tax on an individual in the employ of the Federal government has been similarly stricken down.

Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022.

The business of foreign insurance companies is now subject to the occupation or privilege tax of 2 per cent on gross premiums. The property of foreign insurance companies (if they had any in Pennsylvania) is nominally exempt from the tax on capital stock, and nominally subject to the tax on property (*i. e.*, mortgages, bonds, securities, etc.). Actually foreign insurance companies have normally no property with its situs in Pennsylvania, which could be taxed either as property *eo nomine*, or as constituting capital stock. The Pennsylvania tax on capital stock is a tax on the property and assets of the corporation (Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 353, 49 L. ed. 1077, 1081, 25 Sup. Ct. Rep. 669, citing Com. v. Standard Oil Co. 101 Pa. 145, and Com. v. Delaware, S. & S. R. Co. 165 Pa. 44, 30 Atl. 522, 523), including both tangible and intangible property, the franchises as well as other property of the company (Com. v. Delaware, S. & S. R. Co. supra), but not including any property having its situs outside of the state of Pennsylvania (Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Com. v. Standard Oil Co. 101 Pa. 119). The settled construction of Pennsylvania taxing statutes is that all such intangible personal property of a foreign corporation as investments in bonds or stocks—even stock in Pennsylvania corporations (Com. v. Standard Oil Co. 101 Pa. 145), or de-

posit accounts with Pennsylvania banks, used in the conduct of business in Pennsylvania, or securities physically kept in safe deposit vaults in Pennsylvania (Com. v. Curtis Pub. Co. 237 Pa. 335, 85 Atl. 360)—has its situs at the domicil of the corporation, and is therefore not taxable in Pennsylvania.

This tax cannot be sustained as within the latitude allowed a state in fixing the measure of a tax on non-Federal business.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Galveston, H. & S. A. R Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27.

A tax on the occupation or privilege of carrying on business under the act of Congress, *viz.*, executing bonds to the United States government, required by the laws of the United States, is a tax on a Federal instrumentality acting under congressional authority in the exercise of the governmental functions of the United States.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 521, 522, 58 L. ed. 706, 709, 710, 34 Sup. Ct. Rep. 354; Flint v. Stone Tracy Co. 220 U. S. 108, 155, 55 L. ed. 389, 415, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Ambrosini v. United States, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699; Bettman v. Warwick, 47 C. C. A. 185, 108 Fed. 46; North Dakota ex rel. Flaherty v. Hanson, 215 U. S. 515, 525, 54 L. ed. 307, 310, 30 Sup. Ct. Rep. 179; Dobbins v. Erie County, 16 Pet. 435, 445, 10 L. ed. 1022, 1026; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; United States Fidelity & G. Co. v. United States, 204 U. S. 349, 356, 358, 51 L. ed. 516, 519, 520, 27 Sup. Ct. Rep. 381.

The right of the state to exclude foreign corporations, or to prescribe terms and conditions for their admission within its borders, does not include power to prohibit, or impose terms or conditions upon, the transaction by foreign corporations of Federal business within the state.

Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 14; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 186, 31 L. ed. 650, 652, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; Horn Silver Min. Co. v. New York, 143 U. S. 305, 314, 315, 36 L. ed. 164, 168, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Hooper v. California, 155 U. S. 648, 652, 39 L. ed. 297, 298, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 696, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 68, 71, 54 L. ed. 378, 386, 387, 30 Sup. Ct. Rep. 232.

Mr. William M. Hargest argued the cause, and, with Mr. Francis Shunk Brown, Attorney General of Pennsylvania, filed a brief for defendant in error:

This tax is imposed by the state of Pennsylvania upon foreign insurance companies on the business done within the state of Pennsylvania.

Germania L. Ins. Co. v. Com. 85 Pa. 513; Com. v. Equitable Life Assur. Soc. 239 Pa. 288, 86 Atl. 787, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 46, 49, 54 L. ed. 355, 374, 375, 30 Sup. Ct. Rep. 190; List v. Com. 118 Pa. 322, 1 Inters. Com. Rep. 784, 12 Atl. 277; Thorne v. Travellers' Ins. Co. 80 Pa. 28, 21 Am. Rep. 89; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730.

The plaintiff in error is not operating under any Federal franchise whatever, in respect to this tax.

M'Culloch v. Maryland, 4 Wheat. 415, 4 L. ed. 579; Thomson v. Union P. R. Co. 9 Wall. 579, 19 L. ed. 792; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Central P. R. Co. v. California, 162 U. S. 92, 40 L. ed. 903, 16 Sup. Ct. Rep. 766.

The permission to do business, given by act of Congress, does not constitute a Federal franchise.

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Western U. Teleg. Co. v. Richmond, 224 U. S. 160, 56 L. ed. 710, 32 Sup. Ct. Rep. 449; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

While Congress might have exempted from taxation any premiums on bonds which run to the United States government, it did not do so.

Citizens' Bank v. Parker, 192 U. S. 73, 48

L. ed. 346, 24 Sup. Ct. Rep. 181; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060.

The plaintiff in error is not acting as a Federal agent, or using any government instrumentality, in becoming surety upon the bonds upon which the tax is sought to be imposed.

37 Cyc. 878, and notes; 12 Am. & Eng. Enc. Law, 2d ed. 367, and notes; Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. ed. 242, 25 Sup. Ct. Rep. 50; United States v. Moses, 107 C. C. A. 310, 185 Fed. 90; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Van Brocklin v. Tennessee (Van Brocklin v. Anderson (117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Western U. Teleg. Co. v. Richmond, 26 Gratt. 1; Thomson v. Union P. R. Co. 9 Wall. 579, 19 L. ed. 792; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Western U. Teleg. Co. v. Trapp, 108 C. C. A. 226, 186 Fed. 114; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Swarts v. Hammer, 194 U. S. 441, 48 L. ed. 1060, 24 Sup. Ct. Rep. 695; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 Sup. Ct. Rep. 533; Henderson Bridge Co. v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553; Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, 12 Sup. Ct. Rep. 114; 23 Ops. Atty. Gen. 421.

Immunity from taxation by a state is granted to a Federal agent only upon the theory that such taxation may interfere with the usefulness or efficiency of the agent in serving the Federal government.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575, 14 Sup. Ct. Rep. 1060; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

[320] Mr. Justice McReynolds delivered the opinion of the court:

We are asked to reverse a judgment of the supreme court of Pennsylvania which denied plaintiff in error's claim that, in becoming surety upon bonds required by the United States, it acted as a Federal instrumentality, and was not subject to taxation on the premiums received. 244 Pa. 67, 90 Atl. 437.

Incorporated under the laws of Maryland, the Fidelity & Deposit Company is empowered by its charter to act as surety. It was duty licensed to transact business in Pennsylvania. In pursuance of the act of Congress referred to below, the Attorney General granted it authority to enter into obligations required by laws of the United States.

Contracting within Pennsylvania, the company became surety, during 1909, on bonds in the following matters: "Internal Revenue, customs, United States government officials, United States government contracts and banks for United States deposits, bonds given in courts of the United States in litigation there pending." Gross premiums thereon amounting to $17,646.86 were collected. Within the same period it also became party to other bonds and received therefor $198,199.19. The state demanded 2 per centum of such total receipts, basing its claim on the proviso in § 1, act of Assembly, June 28, 1895, P. L. 408, which declares: "That hereafter the annual tax upon premiums of insurance companies of other states or foreign governments shall be at the rate of 2 per centum upon the gross premiums of every character and description received from business done within this commonwealth within the entire calendar year preceding." The amount demanded because of premiums on bonds not authorized or required by the United States was paid; but liability for $352.92, assessed in respect of those so authorized, [321] was denied, and to enforce it the present suit was instituted in the common pleas court, Dauphin county.

The act of Congress entitled, "An Act Relative to Recognizances, Stipulations, Bonds, and Undertakings, and to Allow Certain Corporations to be Accepted as Surety Thereon," approved August 13, 1894 (chap. 282, 28 Stat. at L. 279, Comp. Stat. 1913, § 3293), provided:

Sec. 1. "That whenever any recognizance, stipulation, bond or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guarantying of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under

the laws of the United States, or of any state having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: Provided, That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company."

Sec. 2, that "no such company shall do business under the provisions of this act beyond the limits of the state or territory under whose laws it was incorporated and in which its principal office is located . . . until it shall, by a written power of attorney, appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, . . . as its agent, upon whom may be served [322] all lawful process against such company, . . ." Sec. 3, that every company, before transacting business under the act, shall deposit with the Attorney General of the United State a copy of its charter and a statement showing assets and liabilities, and "if the said Attorney General shall be satisfied that such company has authority under its charter to do the business provided for in this act, and that it has a paid-up capital of not less than $250,000 in cash or its equivalent, and is able to keep and perform its contracts, he shall grant authority in writing to such company to do business under this act." Sec. 4, that quarterly statements shall be filed with the Attorney General, who shall have power to revoke the authority of any company "whenever in his judgment such company is not solvent or is conducting its business in violation of this act." Sec. 5, that "any surety company doing business under the provisions of this act may be sued in respect thereof in any court of the United States" which has jurisdiction, in the district in which the instrument was made or guaranteed or the principal office of the company is located. Sec. 6, that "all right to do business under this act" shall be forfeited upon failure to pay a final judgment against it. Sec. 7, that a company having executed any instrument under the act shall be estopped to deny its corporate power to execute same. Sec. 8, that penalties therein prescribed for failure to comply with the provisions of the act shall be recovered by suit.

The court of common pleas held the tax *"is a charge* for the privilege of transacting business in the state, measured by the amount of the business done;" there is "nothing in the act of Congress to support the proposition that the defendant was authorized by it to transact its business in the state of Pennsylvania;" and in executing the specified bonds the surety company "was in no sense an instrumentality of government." Judgment was accordingly [323] rendered for the state; and, on appeal, this was affirmed upon findings and opinion below.

In behalf of plaintiff in error, counsel maintained that the taxing power of the state has been so exercised as to collide with operations of the Federal government; that under the act of Congress the surety company became a Federal instrumentality with power to execute bonds within the state, and consequently could not be subjected to a privilege tax therefor.

That the challenged tax "is an exaction for the privilege of doing business" seems plain (Equitable Life Assur. Soc. v. Pennsylvania, 238 U. S. 143, 59 L. ed. 1239, 35 Sup. Ct. Rep. 829); and undoubtedly a state may not directly and materially hinder exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a Federal instrumentality pay a tax for the privilege of performing its functions. Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706, 31 Sup. Ct. Rep. 354; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies, and confer freedom from state control. Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. ed. 242, 25 Sup. Ct. Rep. 50. Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations, contracting under it with the Federal government, shall not be exempt from state regulation and taxation, they must submit thereto. First Nat. Bank v. Kentucky, 9 Wall. 353, 362, 19 L. ed. 701, 703; Van Allen v. Assessors (Churchill v. Utica), 3 Wall. 573, 585, 18 L. ed. 229, 235; Cooley, Taxn. 3d ed. pp. 130, 131.

As revealed by its title, the purpose of the act of 1894 is "to allow certain corporations to be accepted as surety, etc." It does not undertake to endow any corporation with power, but only to permit those complying with specified conditions to exercise their lawful powers, derived from other sources, by contracting with the government [324] under official approval. "Power to guarantee," required by § 1, is not the same

thing as "authority under its charter" referred to in § 3; and we think the clear intent was that existence of the former should be determined by the laws in force at place of contract. Neither circumstances nor language of the act indicate design or necessity to limit application by the several states of a well-established system of licensing and taxing bonding companies not incorporated under their own statutes. Plaintiff in error's right to carry on business in Pennsylvania depended upon compliance with its laws.

We find no error in the judgment of the court below and it is affirmed.

SEABOARD AIR LINE RAILWAY, Appellant,
v.
RAILROAD COMMISSION OF GEORGIA et al.

(See S. C. Reporter's ed. 324–328.)

Constitutional law — due process of law — compulsory trackage connection.

It is within the power of a state, acting through an administrative body, to require crossing or intersecting railways entering the same town or city to make and maintain track connections for the interchange of traffic at that point, where the established facts show public necessity therefor, just regard being given to the advantages which will possibly result on one side, and necessary expenses to be incurred on the other.

[For other cases, see Constitutional Law, IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 170.]

Argued January 13 and 14, 1916. Decided February 21, 1916.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Northern District of Georgia, dismissing the bill in a suit to enjoin the enforcement of an order of the State Railroad Commission, requiring trackage connection between railways. Affirmed.

See same case below, 129 C. C. A. 613, 213 Fed. 27.

The facts are stated in the opinion.

Messrs. **Edgar Watkins**, and **W. G. Loving** argued the cause, and, with Mr. W. Carroll Latimer, filed a brief for appellant:

The order complained of is arbitrary, unreasonable, and without substantial evidence to support it.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 571, 48 L. ed. 565, 569, 24 Sup. Ct. Rep. 339; Wadley Southern R. Co. v. State, 137 Ga. 507, 73 S. E. 741; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 531, 56 L. ed. 863, 870, 32 Sup. Ct. Rep. 535.

It is the judgment of the Commission that the statute says must be satisfied. Such statute contemplates that the Commission should base its determination upon the evidence before it, and unless an order is founded upon substantial evidence, it should be set aside.

Railroad Commission v. Louisville & N. R. Co. 140 Ga. 817, L.R.A.1915E, 902, 80 S. E. 327, Ann. Cas. 1915A, 1018; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 59 L. ed. 379, P.U.R.1915A, 121, 35 Sup. Ct. Rep. 146; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P.U.R. 1915A, 106, 35 Sup. Ct. Rep. 214.

The courts cannot initiate any plan for a connection; that question has been left for determination by the Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

Congress having acted on the subject-matter, the Railroad Commission of Georgia had no jurisdiction to order the physical connection.

Blakely Southern R. Co. v. Atlantic Coast Line R. Co. 26 Inters. Com. Rep. 350; St. Louis, S. & P. R. Co. v. Peoria & P. U. R. Co. 26 Inters. Com. Rep. 226; Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; Southern R. Co. v. Reid, 222 U. S. 424, 440, 56 L. ed. 257, 261, 32 Sup. Ct. Rep. 140; United States v. Union Stock Yard & Transit Co. 226 U. S. 286, 303, 57 L. ed. 226, 232, 33 Sup. Ct. Rep. 83; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 269, 270, 57 L. ed. 506, 507, 33 Sup. Ct. Rep. 262; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 207, 54 L. ed. 727, 731, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Los Angeles Switch-

NOTE.—On requiring connection or joint use of properties of public service corporations as a taking for which compensation must be made—see note to Pacific Teleg. & Teleph. Co. v. Eshleman, 50 L.R.A.(N.S.) 652.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; Wilson v. North Carolina, 42 L. ed. U. S. 865.

ing Case (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.) 234 U. S. 294, 58 L. ed. 1319, 34 Sup. Ct. Rep. 814; Louisville & N. R. Co. v. Higdon, 234 U. S. 592, 58 L. ed. 1484, 34 Sup. Ct. Rep. 948; Illinois C. R. Co. v. De Fuentes, 236 U. S. 157, 59 L. ed. 517, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275.

Mr. James K. Hines argued the cause and filed a brief for appellees:

Error must affirmatively appear before there can be a reversal, and the burden is on the plaintiff to show it.

Mercantile Trust Co. v. Hensey, 205 U. S. 298, 306, 51 L. ed. 811, 814, 27 Sup. Ct. Rep. 535, 10 Ann. Cas. 572; Carroll v. Peake, 1 Pet. 18, 23, 7 L. ed. 34, 36; Bagnell v. Broderick, 13 Pet. 436, 10 L. ed. 235; Southern R. Co. v. Atlanta Stove Works, 128 Ga. 222, 57 S. E. 429.

The findings of the Railroad Commission of Georgia, having been concurred in by the district court and the circuit court of appeals, will not be interfered with, unless the record establishes that clear and unmistakable error has been committed.

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 445, 51 L. ed. 1128, 1130, 27 Sup. Ct. Rep. 700; Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U. S. 142, 154, 51 L. ed. 995, 1001, 27 Sup. Ct. Rep. 648.

Courts are reluctant to interfere with the laws of a state, or with the tribunals constituted to enforce them; and doubts will be resolved in favor of the state and its tribunals.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 467, 58 L. ed. 316, 34 Sup. Ct. Rep. 152.

There can be no doubt of the power of the state, acting through an administrative body, to require railroad companies to make track connections.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 468, 58 L. ed. 310, 317, 34 Sup. Ct. Rep. 152.

In determining the reasonableness of such an order, the court must consider all the facts, the places and persons interested, volume of business to be affected, the saving of time and expense to the shipper, as against the cost and expense to the carrier.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 528, 56 L. ed. 863, 869, 32 Sup. Ct. Rep. 535.

If this order was based upon a finding *which is* indisputably contrary to the evidence, or if the facts found do not, as a matter of law, support this order, then the same would be void.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185.

In matters of local concern, and not of national importance, the state may act for their control and management until Congress interferes and supersedes state action. Such exercise of authority is regarded as merely affecting interstate commerce incidentally or remotely, and not constituting a regulation of it in the meaning of the Constitution.

State Freight Tax Case, 15 Wall. 279, 21 L. ed. 162; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 485, 31 L. ed. 700, 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

A state statute is not to be deemed a regulation of commerce among the states, simply because it may incidentally or indirectly affect such commerce.

Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 881, 18 Sup. Ct. Rep. 488; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934.

This order, requiring the Seaboard Air Line Railway and the Lawrenceville Branch Railroad Company to connect their tracks within the city limits of Lawrenceville, for the interchange of traffic between said lines, is within the regulating power of the state and Commission; and is not unconstitutional as interfering with interstate commerce, or depriving the carriers of their property without due process of law.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 458, 58 L. ed. 313, 34 Sup. Ct. Rep. 152.

This order of the Railroad Commission is a regulation of the business of appellant, and not an appropriation of its terminal facilities for the use and benefit of the Lawrenceville Branch Railroad.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 519, 528, 56 L. ed. 867, 869, 32 Sup. Ct. Rep. 535; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 468, 58 L. ed. 310, 317, 34 Sup. Ct. Rep. 152.

Railroad companies are organized for the public interest, and to subserve primarily the public good and convenience.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 470, 58 L. ed. 310, 318, 34 Sup. Ct. Rep. 152.

It can require a carrier to run its trains so as to connect with another carrier, although this is done at a loss.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398.

So, the state can compel physical connections between railroads, when the public interest demands it, although the construction of such connections requires the expenditure of money by such companies, and entails on them loss of business and revenue.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 289, 45 L. ed. 195, 21 Sup. Ct. Rep. 115; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 519, 528, 56 L. ed. 867, 869, 32 Sup. Ct. Rep. 535.

A railway company accepts its franchise from the state, subject to the condition that it will conform at its own expense to any reasonable regulation.

Cincinnati, I. & W. R. Co. v. Connorsville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206.

A state is competent to create a commission and give it the power of regulating railroads and investigating conditions upon which regulations may be directed; and the judiciary will only interfere with such a commission when it appears that it has clearly transcended its powers.

Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

Mr. Justice McReynolds delivered the opinion of the court:

After hearing the interested parties, the Railroad Commission of Georgia concluded that making and maintaining physical connection at Lawrenceville, Georgia (a manufacturing town with two thousand inhabitants), between Lawrenceville Branch Railroad and Seaboard Air Line Railway, would be practicable and to the public interest; and accordingly passed an order that within four months the roads should provide and maintain one, together with sufficient interchange tracks to care for traffic moving between them. No definite point for the connection was prescribed; opinion was expressed that expenses should be borne equally by the two companies; and they were directed to report their action within thirty days.

[327] Appellant brought this proceeding in the United States district court, northern district of Georgia, alleging the order was null and void, and asking that its enforcement be enjoined. That court heard additional evidence and upon the whole record concluded the challenged order was not unreasonable, and the Commission was fully justified in making it. 206 Fed. 181. Injunction was accordingly denied and suit dismissed, and this action was affirmed by the circuit court of appeals. 129 C. C. A. 613, 213 Fed. 27.

Section 2664, Georgia Code 1910, gives the Railroad Commission "power and authority, when in its judgment practicable and to the interest of the public, to order and compel the making and operation of physical connection between lines of railroad crossing or intersecting each other, on entering the same incorporated town or city in this state." Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P. U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

It is within the power of a state, acting through an administrative body, to require railroad companies to make track connections, where the established facts show public necessity therefor, just regard being given to advantages which will probably result on one side and necessary expenses to be incurred on the other. The facts being established, the question then presented is whether, as matter of law, there is sufficient evidence to support a finding of public necessity,—the mere declaration of a Commission is not conclusive. Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 295, 296, 45 L. ed. 194, 198, 199, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Great Northern R. Co. v. Minnesota, 238 U. S. 340, 345, 59 L. ed. 1337, 1339, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753.

The state Commission and both courts were of opinion that the facts sufficed to show public necessity for the connection in question, and that it could be constructed and maintained without unreasonable expenditure. The only substantial question before us is whether such finding [328] is plainly erroneous because the evidence is insufficient to support it; and, having examined the record, we are unable to say the facts disclosed do not give the essential support. The judgment of the court below is accordingly affirmed.

JAKE BUTLER, Plff. in Err.,
v.
J. W. PERRY, as Sheriff of Columbia County, Florida.

(See S. C. Reporter's ed. 328–333.)

Constitutional law — involuntary servitude — conscripted labor on highway.

1. Involuntary servitude is not imposed, contrary to U. S. Const., 13th Amend., by the provisions of Fla. Laws 1913, chap. 6537, §§ 10, 12, making it a misdemeanor punishable by fine or imprisonment for any able-bodied male person between the ages of twenty-one and forty-five years to fail in any year to perform six days' labor on the highways of his county, when summoned, or to provide an able-bodied substitute, or, in lieu thereof, pay $3 to the road overseer.

[For other cases, see Constitutional Law, 1581–1587, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — liberty — conscripted labor on highways.

2. Liberty or property is not taken without due process of law, contrary to U. S. Const., 14th Amend., by the provisions of Fla. Laws 1913, chap. 6537, §§ 10, 12, making it a misdemeanor punishable by fine or imprisonment for any able-bodied male person between the ages of twenty-one and forty-five years to fail in any year to perform six days' labor on the highways of his county, when summoned, or to provide an able-bodied substitute, or, in lieu thereof, pay $3 to the road overseer.

[For other cases, see Constitutional Law, IV. b, 3; IV. b, 4, in Digest Sup. Ct. 1908.]

[No. 182.]

Submitted January 14, 1916. Decided February 21, 1916.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a judgment of the Circuit Court of Columbia County, in that state, refusing relief by habeas corpus to a person convicted of failing to do the required work on the public highways. Affirmed.

See same case below, 67 Fla. 405, 66 So. 150.

The facts are stated in the opinion.

Mr. Charles Cook Howell submitted the cause for plaintiff in error:

The Florida statute imposes involuntary servitude upon the plaintiff in error, not as a punishment for crime, in violation of the 13th Amendment to the Federal Constitution.

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; Civil Rights Cases, 109 U. S. 36, 27 L. ed. 847, 3 Sup. Ct. Rep. 18; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Slaughter-House Cases, 16 Wall. 69, 21 L. ed. 406; State ex rel. Erickson v. West, 42 Minn. 147, 43 N. W. 845; Re Thompson, 117 Mo. 83, 20 L.R.A. 462, 38 Am. St. Rep. 639, 22 S. W. 836; Ex parte Wilson, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283.

The police power of the state must always yield to the Federal Constitution and do rights granted or secured by the supreme law of the land.

1 Bailey, Habeas Corpus, § 38; Barrett v. New York, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. Rep. 203; Henderson v. New York, 92 U. S. 259, 23 L. ed. 543; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 58 L. ed. 857, 34 Sup. Ct. Rep. 564; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Re Tie Loy, 26 Fed. 611; Toney v. State, 141 Ala. 120, 67 L.R.A. 286, 109 Am. St. Rep. 23, 37 So. 332, 3 Ann. Cas. 319; Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347.

A statute declaring the exercise of a constitutionally guaranteed right to be a crime is unconstitutional.

Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, 161 Ala. 75, 49 So. 886; State v. Armstead, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915B, 495; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781.

Due process of law is denied by this statute.

Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Davis v. Florida Power Co. 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965, 5 N. C. C. A. 926; Taylor v. Porter, 4 Hill, 140, 40 Am. Dec. 274; Story, Const. 4th ed. §§ 1943 et seq.

Labor is property, and as such is entitled to the protection of the 14th Amendment.

Re Marshall, 102 Fed. 324; O'Hara v. Stack, 90 Pa. 491; Gillespie v. People, 188 Ill. 176, 52 L.R.A. 283, 80 Am. St. Rep. 176, 58 N. E. 1009; Slaughter-House Cases, 16 Wall. 69, 21 L. ed. 406; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637.

Statutes forcing an attorney to represent the state, or persons designated by it, with-

NOTE.—On conscription of labor for working highway as a tax—see note to State v. Wheeler, 5 L.R.A.(N.S.) 1139.

out remuneration, constitute deprivation of property without due process of law.

Blythe v. State, 4 Ind. 525; Clay County v. McGregor, 171 Ind. 634, 87 N. E. 1, 17 Ann. Cas. 333; Dane County v. Smith, 13 Wis. 585, 80 Am. Dec. 754; Howard County v. Pollard, 153 Ind. 371, 55 N. E. 87; Webb v. Baird, 6 Ind. 13.

Private property can be constitutionally taken for road duty only under the right of eminent domain, or upon the payment of just compensation.

People ex rel. Manhattan Sav. Inst. v. Otis, 90 N. Y. 48; Posey Twp. v. Senour, 42 Ind. App. 580, 86 N. E. 440; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Toone v. State, 178 Ala. 70, 42 L.R.A.(N.S.) 1045, 59 So. 665.

Mr. Thomas F. West, Attorney General of Florida, submitted the cause for defendant in error:

The statute complained of does not impose involuntary servitude upon the plaintiff in error not as a punishment for crime.

Re Dassler, 35 Kan. 678, 12 Pac. 130; State ex rel. Curtis v. Topeka, 36 Kan. 76, 59 Am. Rep. 529, 12 Pac. 310, 7 Am. Crim. Rep. 479.

The statute complained of does not deprive the plaintiff in error of his liberty or property without due process of law.

Galloway v. Tavares, 37 Fla. 58, 19 So. 170; Mashburn v. State, 65 Fla. 470, 62 So. 586; State v. Wheeler, 141 N. C. 773, 5 L.R.A.(N.S.) 1139, 115 Am. St. Rep. 700, 53 S. E. 358; Short v. State, 80 Md. 392, 29 L.R.A. 404, 31 Atl. 322; Toone v. State, 178 Ala. 70, 42 L.R.A.(N.S.) 1045, 59 So. 665; State v. McCrillis, 28 R. I. 165, 9 L.R.A.(N.S.) 635, 66 Atl. 301, 13 Ann. Cas. 701; State v. McMahon, 76 Conn. 97, 55 Atl. 591; Smith v. Elberton, 5 Ga. App. 286, 63 S. E. 48; Leedy v. Bourbon, 12 Ind. App. 486, 40 N. E. 640; Dennis v. Simon, 61 Ohio St. 233, 36 N. E. 832; State v. Rayburn, 2 Okla. Crim. Rep. 413, 22 L.R.A. (N.S.) 1067, 101 Pac. 1029, Ann. Cas. 1912A, 733.

The police power of the state is one of the most essential powers of the government and one of the least limitable; and the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

Hadacheck v. Sebastian, 239 U. S. 394, ante, 348, 36 Sup. Ct. Rep. 143.

Mr. Justice McReynolds delivered the opinion of the court:

Chapter 6537, Laws of Florida (Acts of 1913, pp. 469, 474, 475), provides:

"Sec. 10. Every able-bodied male person over the age of twenty-one years, and under the age of forty-five years, residing in said county for thirty days or more continuously next prior to the date of making of the list by the board of county commissioners, or the date of the summons or notice to work, shall be subject, liable and required to work on the roads and bridges of the several counties for six days of not less than ten hours each in each year when summoned so to do, as herein provided; that such persons so subject to road duty may perform such services by an able-bodied substitute over the age of eighteen years, or in lieu thereof may pay to the road overseer on or before the day he is called upon to render such service the sum of $3, and such overseer shall turn into the county treasury of his county any and all moneys so paid to him, the same to be placed to the [330] credit of the road and bridge fund and subject to the order of the board of county commissioners for road and bridge purposes; . . .

"Sec. 12. Any person or persons not exempt as aforesaid who shall fail to work on public roads of the several counties when required to do so, or to provide a substitute as herein provided, and shall neglect or refuse to make payment for the same, as hereinbefore provided, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $50 or imprisoned in the county jail for not longer than thirty days."

Plaintiff in error was convicted in the county judge's court, Columbia county, upon a charge of failing to work on a road, and sentenced to jail for thirty days. The circuit court granted a writ of habeas corpus; he was heard, remanded to the custody of the sheriff, and then released under bond. The supreme court of the state affirmed the action of the circuit court (67 Fla. 405, 66 So. 150), and the cause is here upon writ of error.

It is insisted that §§ 10 and 12, supra, are invalid because they undertake to impose involuntary servitude not as a punishment for crime, contrary to the 13th Amendment to the Federal Constitution; and also because their enforcement would deprive plaintiff of his liberty and property without due process of law, in violation of the 14th Amendment.

In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus de-

clared in Blackstone's Commentaries, bk. 1, page 357:

"Every parish is bound of common right to keep the [331] highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas*, to which every man's estate was subject; *viæ, expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted." The *trinoda necessitas* was an obligation falling on all freemen, or at least on all free householders. Vinogradoff, English Society in the Eleventh Century, p. 82.

From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor. Elliott, Roads & Streets, §§ 479, 480; Dill. Mun. Corp. 5th ed. § 1407, p. 2459, note; Cooley, Const. Lim. 7th ed. p. 736; Re Dassler, 35 Kan. 678, 12 Pac. 130; State v. Wheeler, 141 N. C. 773, 115 Am. St. Rep. 700, 53 S. E. 358, 5 L.R.A.(N.S.) 1139, note; Dennis v. Simon, 51 Ohio St. 233, 36 N. E. 832; State v. Rayburn, 2 Okla. Crim. Rep. 413, 22 L.R.A.(N.S.) 1067, 101 Pac. 1029, Ann. Cas. 1912A, 733; Sawyer v. Alton, 4 Ill. 127; State v. Halifax, 15 N. C. (4 Dev. L.) 345. In 1889 the statutes of twenty-seven states provided for such labor on public roads. Young's Recent Road Legislation.

The ordinance of 1787 for the government of the Northwest Territory declares: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted." [1 Stat. at L. 53, note.]

[332] In 1792 the territorial legislative body passed an act providing: "That every male inhabitant of sixteen years of age and upwards on being duly warned to work on the highways by the supervisor in the township to which such inhabitant may belong shall repair to the place and at the time by the said supervisor appointed with such utensils and tools as may be ordered him wherewith he is to labour and there abide and obey the direction of such supervisor during the day in opening and repairing the highway." (Sec. 5, chapter IV., Laws passed from July to December, 1792, Laws of the Territory Northwest of the Ohio, 1788–1798.) An act of the general assembly of the territory passed in 1799, declared: "That all male persons of the age of twenty-one years, and not exceeding fifty, who have resided thirty days in any township of any county within this territory, who are not a township charge, shall over and above the rate of assessment hereinafter mentioned, be liable, yearly and every year, to do and perform two days' work on the public roads, under the direction of the supervisor within whose limits they shall be respectively residents." (Sec. 10, chapter 28 of Northwest Territory Acts 1799.)

By their several Constitutions the states within the limits of the Northwest Territory prohibited involuntary servitude substantially in the language of the 1787 ordinance, and with the possible exception of Wisconsin, all of them early enacted and long enforced laws requiring labor upon public roads.

Utilizing the language of the ordinance of 1787, the 13th Amendment declares that neither slavery nor involuntary servitude shall exist. This Amendment was adopted with reference to conditions existing since the foundation of our government, and the term "involuntary servitude" was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results. [333] It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. Slaughter-House Cases, 16 Wall. 36, 69, 71, 72, 21 L. ed. 394, 406, 407; Plessy v. Ferguson, 163 U. S. 537, 542, 41 L. ed. 256, 257, 16 Sup. Ct. Rep. 1138; Robertson v. Baldwin, 165 U. S. 275, 282, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326; Clyatt v. United States, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145.

There is no merit in the claim that a man's labor is property, the taking of which without compensation by the state for building and maintenance of public roads violates the due process clause of the 14th Amendment. That Amendment was intended to preserve and protect fundamental rights long recognized under the common-law system. Slaughter-House Cases, su-

pra; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Giozza v Tiernan, 148 U. S. 657, 662, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; Mugler v. Kansas, 123 U. S. 623, 663, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Kelly v. Pittsburgh, 104 U. S. 78, 80, 26 L. ed. 658, 659; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616. Conceding for some purposes labor must be considered as property, it is evident from what already has been said that to require work on the public roads has never been regarded as a deprivation of either liberty or property.

The circumstances of the present case indicate no failure to observe due process of law in the exercise of the state's undoubted power. Ample notice appears to have been given and disregarded. There was an orderly trial and conviction before a duly constituted tribunal for a plainly defined statutory offense, followed by a sentence not alleged to be unreasonable.

We find no error in the judgment of the court below, and it is affirmed.

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[334] PHILADELPHIA & READING RAILWAY COMPANY, Appt.,
v.
UNITED STATES OF AMERICA (Interstate Commerce Commission, and Allentown Portland Cement Company, Intervening Respondents), Appellees.

(See S. C. Reporter's ed. 334-341.)

Carriers — discrimination in rates.

Jersey City is not subjected to any undue or unreasonable prejudice or disadvantage in respect to freight rates on cement from the Lehigh cement district because a carrier, while maintaining or participating in joint rates for cement to eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville, Pennsylvania, than the contemporaneous rates which it maintains or participates in from other cement mills in the Lehigh district, refuses contemporaneously to participate in the same relative adjustment on the cement traffic from Evansville to Jersey City for local consumption, where the Jersey City rate is intrinsically reasonable and nondiscriminatory in relation to rates accorded other consuming points.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 440.]

Argued and submitted October 18 and 19, 1915. Decided February 28, 1916.

APPEAL from the District Court of the United States for the Eastern District of Pennsylvania to review a decree which dismissed the bill by which a carrier sought to secure the annulment of an order of the Interstate Commerce Commission commanding it and other carriers to desist from subjecting Jersey City to undue prejudice and disadvantage in respect of rates on cement. Reversed and remanded for further proceedings.

See same case below, 219 Fed. 988.

The facts are stated in the opinion.

Mr. Henry S. Drinker, Jr., argued the cause, and, with Messrs. William L. Kinter, Charles Heebner, and Abraham M. Beitler, filed a brief for appellant:

When a carrier, in fixing its rates, has given proper consideration to circumstances within its control, it is not obliged to alter its otherwise reasonable rates by reason of circumstances beyond its power to regulate.

East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18, 45 L. ed. 719, 725, 21 Sup. Ct. Rep. 516.

An order of the Commission is unlawful which is predicated on a charge of discrimination by locality against a railroad which does not serve both the locality alleged to be preferred and that alleged to be prejudiced by the regulation complained of.

St. Louis, I. M. & S. R. Co. v. United States, 217 Fed. 80.

The exaction of inland rates on shipments for transshipment by water lower than the local rates for domestic consumption has so frequently been sustained by this court as to require but little comment.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

Assistant Attorney General Underwood submitted the cause for the United States. Mr. Blackburn Esterline was on the brief:

The practice complained of subjected Jersey City to undue and unreasonable prejudice and disadvantage.

Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 356, 58 L. ed. 1341, 1350, 34 Sup. Ct. Rep. 833; Southern R. Co. v. United States, 204 Fed. 465; Interstate Commerce Commission v. Louisville & N. R. Co. 118 Fed. 613; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 220, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

What is undue or unreasonable preference or advantage is a question not of law, but of fact.

Pennsylvania Co. v. United States, 236 U. S. 351, 361, 59 L. ed. 616, 623, P.U.R. 1915B, 261, 35 Sup. Ct. Rep. 370; Texas & P. R. Co. v. Interstate Commerce Commis-

sion, 162 U. S. 197, 219, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45.

The determination of this question of fact is for the Commission, and its findings are conclusive.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U. S. 235, 55 L. ed. 448, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 57 L. ed. 431, 33 Sup. Ct. Rep. 185; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 23–29, 45 L. ed. 719, 727–729, 21 Sup. Ct. Rep. 516; United States v. Louisville & N. R. Co. 235 U. S. 314, 320, 59 L. ed. 245, 250, 35 Sup. Ct. Rep. 113.

This case having been submitted on bill and answer, the preferences and discrimination alleged in the answer of the Commission must be taken as true.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 475, 54 L. ed. 280, 289, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 54 L. ed. 946, 30 Sup. Ct. Rep. 651.

Appellant having voluntarily, in its traffic agreements with the other carriers, established the same relative rates from all points in the Lehigh district to consuming points other than Jersey City, cannot, if conditions are the same, arbitrarily decline to make the same arrangement with respect to Jersey City.

Darling v. Baltimore & O. R. Co. 15 Inters. Com. Rep. 87; Spokane v. Northern P. R. Co. 21 Inters. Com. Rep. 424.

There is nothing in the record to show the absence of substantial evidence supporting the findings of fact, so they are conclusively correct in case of judicial review.

United States v. Louisville & N. R. Co. 235 U. S. 314, 320, 59 L. ed. 245, 250, 35 Sup. Ct. Rep. 113.

Mr. Charles W. Needham argued the cause, and, with Mr. Joseph W. Folk, filed a brief for the Interstate Commerce Commission:

So long as the parties affected appear and are fully heard, the power of the Commission extends to the granting of such relief as the facts disclosed may warrant, even though such facts may be presented by evidence technically outside the issues.

New York C. & H. R. R. Co. v. Interstate Commerce Commission, 168 Fed. 138.

The powers of the Commission are quasi judicial as well as administrative, and in making its orders it must have in view the general provisions of the act to regulate commerce and the prevention of any evil which that act declares unlawful. The outlook of the Commission must be as comprehensive as the interest of the whole country.

Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 103, 54 L. ed. 946, 955, 30 Sup. Ct. Rep. 651.

In the removal of discrimination the Commission must consider not only the welfare of the locality where the traffic originates; the welfare of the locality of destination is also, under the terms and spirit of the act, to be considered.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 220, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. St. Rep. 666.

In view of the facts found by the Commission as to preferences and discriminations, which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce, prohibiting preferences and discriminations.

Interstate Commerce Commission v. Illinois C. R. Co. 215 U. S. 452, 475, 477, 54 L. ed. 280, 289, 290, 30 Sup. Ct. Rep. 155.

The determination of what is undue or unreasonable prejudice or disadvantage requires the exercise of judgment and discretion on the part of the administrative, rate-regulating body.

Pennsylvania R. Co. v. International Coal Min. Co. 230 U. S. 184, 196, 57 L. ed. 1446, 1451, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.

It is the duty of the Commission, under the statute, and not of the courts, to pass upon administrative questions involving the reasonableness or unreasonableness of rates, regulations, or practices.

Mitchell Coal & Coke Co. v. Pennsylvania R. Co. 230 U. S. 247, 255, 257, 57 L. ed. 1472, 1475, 1476, 33 Sup. Ct. Rep. 916. See also Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342, 349, 359, 58 L. ed. 1341, 1346, 1351, 34 Sup. Ct. Rep. 833.

The concurrence of a carrier in a lawfully published rate subjects that carrier to the terms of the act as clearly as if it had itself actually filed the tariff in question.

United States v. New York C. & H. R. R. Co. 212 U. S. 509, 515, 53 L.ed. 629, 631, 29 Sup. Ct. Rep. 313.

Mr. William A. Glasgow, Jr., argued the cause, and, with Messrs. George W. Aubrey and Chester N. Farr, Jr., filed a brief for the Allentown Portland Cement Company.

Mr. Justice McReynolds delivered the opinion of the court:

This appeal brings up a final decree of the United States district court, eastern district of Pennsylvania, which dismissed the railway's original bill presented to secure annulment of an order by the Interstate Commerce Commission commanding it and other carriers to desist from subjecting Jersey City to undue prejudice and disadvantage in respect of rates on Portland cement from the "Lehigh district" in Pennsylvania. 219 Fed. 988.

Appellant maintains that when considered in connection with its report, the Commission's order is plainly erroneous as matter of law because wholly unsupported by the ascertained facts. Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Florida East Coast R. Co. v. United States, 234 U. S. 167, 185, 58 L. ed. 1267, 1271, 34 Sup. Ct. Rep. 867.

In November, 1912, the Allentown Portland Cement Company filed a petition before the Interstate Commerce Commission against the Philadelphia & Reading Railway Company, Central Railroad Company of New Jersey, Delaware, Lackawanna, & Western Railroad Company, Erie Railroad Company, and Pennsylvania Railroad Company, wherein it alleged the Philadelphia & Reading operates the only line reaching its plant at Evansville, Pennsylvania, and in connection with other defendants transports cement therefrom to many points, including Jersey City; [337] that the published rate of $1.35 per ton charged and collected for transportation to the latter place is unlawful and forbidden by §§ 1 and 3 of the act to regulate commerce. It prayed for "an order declaring the rates aforesaid to be unjust and unreasonable and that the same discriminate against complainant and the locality wherein is located its plant or factory aforesaid, and that the Commission will also enter an order fixing the reasonable and just rates for the transportation of Portland Cement from its factory or plant at Evansville, over the lines of the defendant." After hearing, a report and order were made by the Commission; upon rehearing the original findings were approved in an additional report, and a supplemental order, not substantially different from the first one, was passed. The material portions of these reports follow:

"The case involves the question of the reasonableness and justness of defendants' rate for the transportation of cement in car loads from Evansville, Pennsylvania, to Jersey City, New Jersey. Evansville is reached only by the Philadelphia & Reading Railway. That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate *via* these various routes is $1.35. Certain of the carriers which receive this Evansville cement from the Philadelphia & Reading at Allentown also serve other mills in the same general vicinity at Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district." (31 Interst. Com. Rep. 277.)

"Evansville is situated in the Lehigh district and is one of numerous cement producing points in that district located within a radius of perhaps 20 miles of each other. None of the other mills, however, are reached by the Philadelphia & [338] Reading, they being served by the Central Railroad of New Jersey or Lehigh Valley direct, or by short lines of railway which connect with those carriers at distances of from 1 to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading, the rate to Jersey City from these competing mills on other lines is 80 cents. . . . On shipments to Jersey City for trans-shipment by water to points in the southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills; and this equality of Evansville with the other mills is maintained on traffic to Philadelphia, Baltimore, New York city, and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

"The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth street totaling less than the $1.40 rate to New York proper plus the trucking charge to the same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third street, which is the greatest Cement consuming district. North of Ninetieth street complainant can compete with the other mills because of their

greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant cannot sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate."

"It cannot be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the [339] establishment of the 80-cent rate from these other mills, as it cannot participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers in and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York, and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist." (27 Inters. Com. Rep. 448.)

Purporting to base its action on the foregoing findings, the Commission directed:

"That the above-named defendants, according as their various lines or routes may run, be, and they are hereby, notified and required, on or before October 1, 1914, to cease and desist from said undue and unreasonable prejudices and disadvantages."

"That said defendants, according as their various lines or routes may run, be, and they are hereby notified and required to establish on or before October 1, 1914, upon statutory notice to the Interstate Commerce Commission and to the general public by filing and posting in the manner [340] prescribed in § 6 of the act to regulate commerce, and for a period of two years after said October 1, 1914, to maintain and apply to said transportation rates which will prevent and avoid the aforesaid undue and unreasonable prejudices and disadvantages."

Undue discrimination against itself or the locality of its plant, as alleged by the cement company, was not found; the community declared to be prejudiced by established conditions had offered no complaint and was not party to the proceedings. Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; and there was no positive finding touching the reasonableness—intrinsic or relative—of the 80-cent schedule from "Lehigh district" adopted by the remaining carriers.

In their brief here, counsel for the Commission say:

"The Commission did not pass upon the reasonableness of either rate [to Jersey City—80 cents or $1.35]. It struck at the discrimination and the cause of it. It said, in effect, to these five carriers, that as they treated the Lehigh cement district as one point of origin and made a *relative adjustment of rates* on cement to all the principle consuming points competing with Jersey City, they must make the same adjustment of the rates to Jersey City on this commodity; that they might make the rate any sum which they might choose to initiate, but that it must be the same as the rate from every mill in the district to Jersey City. . . . "

"If, as to all other consuming localities, they [the carriers] are giving the relative adjustment of rates on cement from cement mills in the Lehigh district, and refusing this adjustment to one consuming locality, they are prejudicing that locality. . . . "

"The establishment of joint rates is provided for in § 6 of the act to regulate commerce. Such rates [341] are made by agreement between the participating carriers and cannot be filed or published without such agreement. . . ."

"The appellant has no individual rate which covers the cement traffic from Evansville to Jersey City; the traffic moves on a joint rate. The cement traffic from other mills to Jersey City and to other principal consuming points also moves on joint rates. The Philadelphia & Reading is a party to many of these rates. It is also a party to the joint rate from Evansville to Jersey City. As a participating carrier in these rates it is responsible for the violation of the act described in the order."

We must assume the Jersey City rate of $1.35 is intrinsically reasonable and nondiscriminatory in relation to those accorded other consuming points; and, plainly, if this were put in by all carriers, the Commission's order would be complied with and the

supposed discrimination disappear. It must be taken as true that no rate above what all might lawfully establish is being demanded by any carrier; and, with one exception, they are paid 40 per cent less than that amount. If a universal rate of $1.35 could not justly be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to "any undue or unreasonable prejudice or disadvantage."

As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined. The decree below is accordingly reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed.

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[342] JOHN W. RAST, Tax Collector for Duval County, State of Florida, et al., Appts.,

v.

VAN DEMAN & LEWIS COMPANY, The Harkisheimer Company, J. S. Pinkussohn Cigar Company.

(See S. C. Reporter's ed. 342-368.)

Federal courts — enjoining state officers — civil or criminal proceedings.

1. The threatened enforcement by state officers through civil or criminal proceedings, of a state statute which is attacked as repugnant to the Federal Constitution, may be enjoined by a Federal court, where the statute, if exerted against complainants and their property, will produce irreparable injury.

[For other cases, see Courts, VI. d, 2; Injunction, I. 1, 1, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — license tax.

2. There is such a difference between the selling of goods accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, and the selling of goods without such inducements to purchasers, that the imposition upon the former business of an additional license tax for each place in each and every county in which said business is conducted, as is done by Florida Laws 1913, chap. 6421, § 35, does not offend against the equal protection of the laws clause of the Federal Constitution.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Commerce — state licenses — retail sales — redeemable coupons or certificates.

3. The delivery by a Florida merchant of coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, in connection with sales of merchandise at retail, is not interstate commerce so as to be protected against the imposition of a state license tax, although the coupons may have been inserted in the retail packages by the manufacturer or shipper outside the state, and are redeemable outside the state, either by such manufacturer or shipper, or by some other agency outside the state.

[For other cases, see Commerce, IV. b, 1, in Digest Sup. Ct. 1908.]

NOTE.—On injunction to restrain prosecution of criminal or quasi criminal nature —see notes to Hall v. Dunn, 25 L.R.A.(N.S.) 193; Denton v. McDonald, 34 L.R.A.(N.S.) 453; and Alexander v. Elkins, L.R.A.1916C, 263.

As to when action against officer is deemed to be action against the state—see note to Louisville & N. R. Co. v. Burr, 44 L.R.A.(N.S.) 189.

On forbidding use of trading stamps—see notes to Ex parte Drexel, 2 L.R.A.(N.S.) 588; Denver v. Frueauff, 7 L.R.A.(N.S.) 1131; District of Columbia v. Kraft, 30 L.R.A.(N.S.) 957; and State ex rel. Hartigan v. Sperry & H. Co. 49 L.R.A.(N.S.) 1123.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

As to state licenses or taxes, generally, as affecting interstate commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311, and Pittsburgh & S. Coal Co. v. Bates, 39 L. ed. 538.

On excessive penalty as denial of due process of law—see note to State v. Crawford, 46 L.R.A.(N.S.) 1039.

Internal revenue — tobacco —redeemable coupons — state regulation of retail sales.

4. The permission, if any, granted by the amendment of the act of July 1, 1902 (32 Stat. at L. 715, chap. 1371, Comp. Stat 1913, § 6204), § 2, to U. S. Rev. Stat. § 3394, to inclose in packages of tobacco redeemable coupons, profit-sharing certificates, etc., does not extend to retail sales of such packages within a state so as to invalidate state restrictions upon such sales.

[For other cases, see Internal Revenue, III. i, in Digest Sup. Ct. 1908.]

Constitutional law —impairing contract obligations — regulating retail sales with redeemable coupons.

5. Contract obligations are not unconstitutionally impaired by the imposition, under Florida Laws 1913, chap. 6421, § 35, of an additional license fee upon merchants offering with merchandise bargained or sold coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, since the statute must be deemed to be prospective in its operation, and not to affect sales completed before its enactment.

[For other cases, see Constitutional Law, 1450–1474, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — freedom of contract — license tax on sales accompanied by redeemable coupons.

6. Liberty to contract is not unconstitutionally infringed, contrary to the due process of law clause of U. S. Const., 14th Amend., by Florida Laws 1913, chap. 6421, § 35, making merchants offering with merchandise bargained or sold any coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, liable to pay an additional license tax, which may be prohibitive, and, if the same are to be redeemed by someone else than the merchant offering them, liable to pay a similar license fee for the one who is to redeem.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — excessive penalties.

7. The penalties of $1,000 fine, or six months' imprisonment, prescribed by Florida Laws 1913, chap. 6421, § 35, for violations of its provisions against the sale without payment of the specified license fee, of merchandise accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness, or other liability redeemable in premiums, are not so severe as to intimidate against a contest of the validity of such statute, and thus deny the equal protection of the laws.

[For other cases, see Constitutional Law, IV. a, 7, in Digest Sup. Ct. 1908.]

[No. 41.]

Argued October 29 and November 1 and 2, 1915. Decided March 6, 1916.

APPEAL from the District Court of the United States for the Southern District of Florida to review a decree granting an interlocutory injunction to restrain the threatened enforcement of a statute imposing a license fee on merchants using redeemable coupons, profit-sharing certificates, etc. Reversed and remanded, with directions to dismiss the bill.

See same case below, 214 Fed. 827.

Statement by Mr. Justice McKenna:

A statute of Florida passed in 1913, imposing licenses and other taxes, provides that merchants, druggists, and storekeepers shall pay a license tax upon the cash value of the "stock of merchandise" of $3 for the first $1,000 or fraction thereof, and $1.50 for each additional $1,000 or fraction thereof. The tax upon wholesale dealers is $1.50 upon each $1,000. The statute has this proviso:

"Provided, further, That each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a state license tax of five hundred ($500) dollars and a county license tax of two hundred and fifty ($250) dollars in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate state and county license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license prescribed in this section shall be in addition to other licenses prescribed by this act. Any [345] person violating any of the provisions of this section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand ($1,000) dollars or by imprisonment in the county jail not exceeding six months.

"Mercantile agencies: Shall pay a license tax of one hundred ($100) dollars in each county in which an office is established.

"Merchants using trading stamps, shall pay a license tax of two hundred and fifty ($250) dollars for each place of business where they use such stamps.

"Merchant tailors shall pay a license tax

of ten ($10) dollars for each place of business."

This suit was instituted by appellees (Florida merchants) against appellant Rast as tax collector of Duval county, Florida, and the tax collectors of each county in the state, the different state's attorneys, county solicitors, and prosecuting attorneys of the circuits and counties of Florida. The purpose of the suit was to restrain those officers from proceeding under the statute or enforcing it. A preliminary and perpetual injunction was prayed, and that the act be declared unconstitutional, illegal, and void.

The bill is very elaborate and we select from its repetitions and condense the following: It alleges the various businesses in which the complainants are engaged. The Van Deman & Lewis Company is a Florida corporation and a wholesale grocer, doing business as such and selling groceries in certain counties in the state; Harkisheimer Company is also a Florida corporation and is a retail grocer; J. S. Pinkussohn Cigar Company is a corporation organized under the laws of South Carolina and is a wholesale and retail merchant, buying and selling cigars and other tobacco products in the cities of Jacksonville and Pensacola, Florida. With these complainants were joined others, corporations and individuals, doing business in Florida.

[346] It is alleged that complainants and each of them, in the conduct of their business, offer for sale and deal in various and numerous articles of merchandise manufactured and produced in other states than Florida by persons and corporations in those states and shipped into Florida to be sold therein, and who, for the purpose of advertising their businesses and increasing their sales, inclose in the packages in which the merchandise is put up for market and sale coupons, slips, certificates, and other profit-sharing discount or premium tokens. The articles and the persons and companies producing them are enumerated.

The manner or method of disposing of and redeeming and taking up such coupons, etc., is alleged to be that the same are inclosed in packages or the wrappers thereof, or are a part of the wrappers, the packages are put into boxes, cases, or other receptacles or inclosures and shipped by the manufacturer or producer from his place of business outside of Florida to the merchants in Florida, generally to a wholesale merchant or jobber, and are received by such in Florida and sold to the retail merchants in that state. The retail merchant sells them to his customers. When the latter have accumulated a sufficient number of the coupons, etc., to entitle them to receive a premium or article or payment therefor according to some list, catalogue, or rule promulgated by the manufacturer, producer, or original shipper, they send such coupons, etc., to such manufacturer, producer, or original shipper, or, in some instances, to a company or agency in some state other than Florida, where they are redeemed or paid, or the articles which the purchasers have selected are sent to them in consideration of such coupons, etc., or for the same and a postage stamp or stamps, or a small sum of money in addition thereto. And this in accordance with the contract, agreement, or sale made to the purchasers by the manufacturer, shipper, or producer outside of the [347] state. And it is alleged that the transactions so detailed, the manufacture without the state and shipment to wholesale merchants within the state, the sale by the latter to retail merchants, and by the latter again to customers, constitute interstate commerce.

That the form of the coupons, etc., varies, and when its identity is secured as prescribed it is evidence that each purchaser of a package has bought a definite part of some article, to be selected by him or her from a certain list, the list showing a number of valuable articles which can be paid for by a certain number of the tokens and a two-cent stamp.

In another case there is an accumulation of the tokens which are to be sent to the redemption or coupon agency or corporation and exchanged for a valuable article of merchandise to be selected by the purchaser from a list or catalogue furnished him.

Another form of coupons, etc., is where each of them is good for a certain value; for instance, one-half cent in presents or premiums, the coupons being sent from the state of Florida to another state. There are also other forms in which the coupons or tokens are to be redeemed, paid for, or used in the purchase of other articles of merchandise or in the accumulation of premiums or the like. All of the articles are known and largely used as legitimate articles of commerce, and the transactions detailed are interstate commerce.

That divers forms of coupons, etc., in connection with the sale of merchandise, are used by the merchants of the state substantially in similar form mentioned above, and the payment or redemption is made by the Florida merchant in Florida, sometimes by the delivery of some valuable article of merchandise; sometimes by the payment of cash or the allowance of credit on account of purchases in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the

[348] customer. The tokens are sometimes in the form of a cash register slip or memorandum.

That the methods detailed are a form of advertising and the use of such coupons, etc., induces purchasers to trade more largely with and to make more of their purchases from complainants on account of the additional inducement of such coupons, etc.; that they increase the businesses of complainants and their profits, and enable them to carry and sell stocks of goods covering the various articles of merchandise, and are of great importance and value to complainants in their several businesses; and if they are prevented from using them, their businesses will be decreased to the amount of many thousands of dollars.

That at the time of the passage of the statute complainants had on hand large amounts and quantities of goods, and if they are prevented from selling them in the manner detailed they will be subjected to great loss and damage, will be embarrassed and injured in their businesses, and the value of their property destroyed or greatly lessened.

That the transactions and methods give an additional value to purchasers and they are substantially benefited thereby. That there is no element of gambling or chance in the transactions, and nothing in them or their methods prejudicial to the public health, safety, morals, or welfare.

That if there is a cessation of the transactions, purchasers and customers who have received tokens, but have not accumulated a sufficient number of them, will be unable to have the same redeemed or paid, or secure articles therewith. That about 500 merchants are similarly affected with complainants.

That certificates or tokens commonly called trading stamps, and so designated in the statute, are substantially like some of the tokens hereinbefore mentioned and [349] described, and when delivered by retail merchants with the various articles sold to purchasers, such purchasers are entitled to purchase or receive various valuable articles of merchandise, according to a list or catalogue, upon the presentation of the stamps to some person or company that has issued the trading stamps, and that redeems them according to the provisions of such list or catalogue.

That under the statute every person, firm, or corporation offering with merchandise any coupon, profit-sharing certificate, or other evidence of indebtedness or liability redeemable in premiums, is not only liable to pay the license tax for himself or itself, but to pay such tax for every other person, firm, or corporation who may redeem any such coupon, etc.

That such taxes are unreasonable, enormous, and prohibitive on account of the number of articles sold, and by reason of the provision requiring complainants and each and every other person in like situation to pay the license tax to the state, and it is alleged with much circumstance that, from their number and the number of the articles that each sells, each and every person would be required to pay for license tax to the state and for one county or one place of business alone $15,000 per year, or one half that amount for six months or less time.

That as a result of the statute, if the tax be paid for only 100 persons, or persons, firms, or corporations, it would amount to $75,000 per annum; if for 1,000 persons, or persons, firms, or corporations in Florida for one place of business, it would amount to $750,000, and so on as to any number to be paid by and for each and every manufacturer, producer, or shipper.

That such coupons, etc., inclosed in packages of tobacco and so delivered, are authorized and rendered lawful by § 3394 of the Revised Statutes of the United [350] States, as amended by § 10 of the act of July 24, 1897 [30 Stat. at L. 206, chap. 11], and by § 2 of the act of July 1, 1902 [32 Stat. at L. 715, chap. 1371, Comp. Stat. 1913, § 6204], of the statutes of the United States.

That the provision of § 35 (the provision quoted above) of the Florida statute and all provisions and enactments for its enforcement are in violation of the Constitution of the United States in that they violate (1) the commerce clause, (2) the due process clause of the 14th Amendment, and (3) the equal protection clause of that Amendment. There are many specifications of the particulars and it is alleged: (1) The statute discriminates between merchants in similar lines of business. (2) Between merchants who advertise in a certain manner and those who advertise in another manner. (3) The taxes are not upon the business or occupation of complainants, but upon the mere incidents of the business, and are an unreasonable and illegal interference with the method and manner of conducting the business. (4) The taxes are unreasonable, arbitrary, oppressive, discriminatory, and prohibitory for the reasons already detailed, and are far in excess of the amounts of taxes or licenses fixed or imposed when other methods of advertising or inducing custom are used, and will prevent complainants from carrying on their legitimate business. (5) They are not productive of revenue, are in excess of the

profits of the businesses, and are in fact prohibitory. (6) That the methods employed by complainants in no wise affect the public health, morals, or welfare, and the imposition of the taxes is in no way a legitimate or lawful exercise of the police power of the state. (7) That the fines are so onerous, drastic, excessive, and enormous as to deter complainants in going on and doing business as they have heretofore done, and testing the validity of the statute in a court of law.

That by the statute and in § 59 thereof a violation of its provisions is made a misdemeanor, and it is provided [351] in § 35 that, for failure to pay any of the license taxes, any person, whether acting for himself or as agent of another, may be imprisoned in the county jail, not exceeding six months.

It is further alleged that the statute impairs the obligations of the contracts entered into between complainants and their customers, in violation of clause 1, § 10, article I., of the Constitution of the United States.

That the officers of the state threaten to enforce the statute, and that the state's attorneys, county solicitors, and prosecuting attorneys of the several circuits and counties of the state are respectively empowered and authorized to prosecute in the several courts of the state, and such officers are threatening to prosecute divers of the complainants, and it is alleged that a multitude of prosecutions will be instituted, with seizures, sales, and injury to property, if a temporary restraining order be not granted. There is a prayer for such order and for a perpetual injunction.

A restraining order was issued. The defendants appeared specially and filed motions to dismiss the suit, and as grounds thereof denied the allegations and implications of the bill as to the various grounds of infringement of the Constitution of the United States charged against the statute, and set up that complainants had a complete and adequate remedy at law. That the bill sought a restraint of the enforcement of a criminal statute of the state, and to enjoin an alleged threatened seizure of property in the enforcement of the alleged illegal tax, and the enforcement of the collection of a tax imposed by a statute of the state of a general and public nature.

A motion was made for an interlocutory injunction, hearing upon which was referred to three judges. Upon the hearing the injunction was ordered (214 Fed. 827), to review which this appeal has been prosecuted.

60 L. ed.

Mr. Thomas F. West, Attorney General of Florida, argued the cause and filed a brief for appellants:

No ground for equitable interposition is shown to exist as against the tax collectors.

Florida Packing & Ice Co. v. Carney, 49 Fla. 293, 111 Am. St. Rep. 95, 38 So. 602, 51 Fla. 190, 41 So. 190; H. W. Metcalf Co. v. Martin, 54 Fla. 531, 127 Am. St. Rep. 149, 45 So. 463; Cruickshank v. Bidwell, 176 U. S. 73, 80, 44 L. ed. 377, 380, 20 Sup. Ct. Rep. 280; Cooley, Taxn. 3d ed. pp. 536, 1411, 1412; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

A statute may perform the double function of regulating the business under the police power, and of producing revenue, if authorized by the law of the state, and this is such a statute.

Harrison v. Kersey, 67 Fla. 24, 64 So. 353; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Gundling v Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

A court of equity has no jurisdiction to restrain the prosecuting officers named, because any action taken by them, looking to the enforcement of the provisions of this statute, is a criminal proceeding, and to enjoin them is to enjoin the state from proceeding in its own courts.

Ex parte Nightingale, 12 Fla. 274; Re Sawyer, 124 U. S. 200, 211, 31 L. ed. 402, 406, 8 Sup. Ct. Rep. 482; Fitts v. McGhee, 172 U. S. 516, 531, 532, 43 L. ed. 535, 542, 543, 19 Sup. Ct. Rep. 269.

A part of the business conducted by the appellees being wholly intrastate, the enforcement of the statute cannot violate the commerce clause of the Federal Constitution.

Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Browning v. Waycross, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

The statute is not in contravention of the

provisions of the 14th Amendment to the Federal Constitution.

State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Lansburgh v. District of Columbia, 11 App. D. C. 512; Humes v. Ft. Smith, 93 Fed. 857; Wilder v. Quebec, Rap. Jud. Quebec, 25 C. S. 128; Otis v. Parker, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 204, 205, 57 L. ed. 184, 188, 189, 33 Sup. Ct. Rep. 44.

There is a just basis for the classification made by this statute.

Lindsley v. Natural Carbonic Gas. Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Lansburgh v. District of Columbia, 11 App. D. C. 512; Com. v. Reinecke Coal Min. Co. 117 Ky. 885, 79 S. W. 287; Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Freund Pol. Power, § 3; McLean v. Arkansas, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Ferguson v. McDonald, 66 Fla. 496, 63 So. 915; Afro-American Industrial & Ben. Asso. v. State, 61 Fla. 85, 54 So. 383; Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 So. 398; Peninsular Casualty Co. v. State, 68 Fla. 411, 67 So. 165; Pullman Co. v. Knott, 235 U. S. 23, 59 L. ed. 105, 35 Sup. Ct. Rep. 2; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 106, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 69, 70, 57 L. ed. 730, 733, 734, 33 Sup. Ct. Rep. 441; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364.

Mr. **Charles M. Cooper** argued the cause and filed a brief for appellees:

The court below had jurisdiction of the subject-matter of the bill of complaint, of the parties, and to grant the relief prayed.

Little v. Tanner, 208 Fed. 605; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 167, 54 L. ed. 430, 431, 30 Sup. Ct. Rep. 286; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 152, 164, 54 L. ed. 423, 425, 430, 30 Sup. Ct. Rep. 280; Dobbins v. Los Angeles, 195 U. S. 223, 242, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Mills v. Chicago, 127 Fed. 732; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 37, 38, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Glucose Ref. Co. v. Chicago, 138 Fed. 209; Ozark-Bell Teleph. Co. v. Springfield, 140 Fed. 666; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Bacon v. Rutland R. Co. 232 U. S. 134, 138, 58 L. ed. 538, 539, 34 Sup. Ct. Rep. 283; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; Fargo v. Hart, 193 U. S. 490, 503, 48 L. ed. 761, 767, 24 Sup. Ct. Rep. 498; Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan) 113 U. S. 516, 526, 527, 28 L. ed. 1098, 1102, 5 Sup. Ct. Rep. 601; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 37, 38, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Croom v. Pennington, 59 Fla. 473, 52 So. 957; Louisville & N. R. Co. v. Railroad Comrs. (Louisville & N. R. Co. v. Burr) 63 Fla. 491, 502, 44 L.R.A.(N.S.) 189, 58 So. 543; Michigan C. R. Co. v. Powers, 201 U. S. 245, 290, 291, 50 L. ed. 744, 760, 761, 26 Sup. Ct. Rep. 459; San Francisco Gas & E. Co. v. San Francisco, 189 Fed. 943; Des Moines City R. Co. v. Des Moines, 151 Fed. 854; Wilmington City R. Co. v. Taylor, 198 Fed. 159; Kankakee v. American Water Supply Co. 118 C. C. A. 195, 199 Fed. 758; Linton v. Denham, 6 Fla. 533; Carter v. Bennett, 6 Fla. 214; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Holt v. Hillman-Sutherland Co. 56 Fla. 801, 47 So. 934; Carter v. Fortney, 172 Fed. 722.

There is no just or reasonable classification upon which these license taxes are based.

Little v. Tanner, 208 Fed. 605; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–159, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 103, 104, 112, 113, 46 L. ed. 92, 106, 107, 109, 110, 22 Sup. Ct. Rep. 30; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Southern R. Co. v. Greene, 216 U. S. 400, 412, 417, 418, 54 L. ed. 536, 539, 541, 542, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Seaboard Air Line R. Co. v. Simon, 56 Fla. 545, 20 L.R.A.(N.S.) 126,

47 So. 1001, 16 Ann. Cas. 1234; Jacksonville v. Ledwith, 26 Fla. 165, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885.

The allegations of the bill of complaint as to the character of the business and use of such coupons, profit-sharing certificates, etc., and that it contains no element of gambling, and that there is nothing in connection therewith or in the use of the same that is prejudicial to public health, safety, morals, or welfare, and that, in fact, there is thereby given to purchasers either a discount or an additional value in premiums or articles, and that the purchasers of such articles of merchandise are substantially benefited thereby, are allegations of fact admitted by the motion to dismiss.

American School v. McAnnulty, 187 U. S. 94, 103, 47 L. ed. 90, 94, 23 Sup. Ct. Rep. 33.

The allegations that these enormous license taxes which are stated in detail in the bill of complaint, with detailed statements of facts showing that they are necessarily prohibitory, and followed up by the positive allegations in the bill, not as matters of opinion and conclusion, but as ultimate facts, that said license taxes, if enforced, will, in fact, preclude and prevent complainants and all persons in like situation, using such coupons, profit-sharing certificates, etc., from doing such business, and that, in fact, they are prohibitory and will produce no revenue, and in fact are not imposed for the purpose of revenue or taxation, are all allegations of fact which are admitted by the motion to dismiss.

St. Louis v. Knapp, S. & Co. 104 U. S. 658, 661, 26 L. ed. 883, 884.

The allegation of the intent or purpose with or for which a thing was done is an allegation of fact, not an opinion or conclusion. Thus, a mere general allegation that a certain act was fraudulent may be merely a matter of opinion or conclusion; but an allegation that something was done with the intent to defraud, especially where connected with other allegations as to the facts, is not a statement of a conclusion or opinion, but is the statement of a fact which is admitted by demurrer or motion.

Platt v. Mead, 9 Fed. 91.

Such pretended classification and such attempted license taxes on account of using coupons, certificates, or the like, as made in this case, are unconstitutional and void.

Ex parte Hutchinson, 137 Fed. 950; Humes v. Little Rock, 138 Fed. 929; Sperry & H. Co. v. Tacoma, 190 Fed. 682; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 77 N. E. 457, 5 Ann. Cas. 684; Opinion of Justices, 207 Mass. 606, 94 N. E. 846; Ex parte Drexel, 147 Cal. 763, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Montgomery v. Kelly, 142 Ala. 552, 110 Am. St. Rep. 43, 38 So. 67; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A. (N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; Young v. Com. 101 Va. 853, 45 S. E. 327; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4.

The imposition of the license taxes is in no way a legitimate exercise of any police power of the state.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; Dobbins v. Los Angeles, 195 U. S. 224, 239, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150–159, 41 L. ed. 666–669, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 103, 104, 112, 113, 46 L. ed. 92, 106, 107, 109, 110, 22 Sup. Ct. Rep. 30; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Southern R. Co. v. Greene, 216 U. S. 400, 412, 417, 418, 54 L. ed. 536, 539, 541, 542, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

The Florida statute violates the commerce clause of the Constitution of the United States.

Lottery Case (Champion v. Ames) 188 U. S. 321, 351, 354, 47 L. ed. 492, 499, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Dozier v. Alabama, 218 U. S. 124, 127, 128, 54 L. ed. 965, 966, 967, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Crenshaw v. Arkansas, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; Caldwell v. North Carolina, 187 U. S. 622, 631, 632, 633, 47 L. ed. 336, 341, 23 Sup. Ct. Rep. 229; Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Brown v. Maryland, 12 Wheat. 444, 6 L. ed. 687.

The equal protection of the laws, which, by the 14th Amendment, no state can deny

to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

One man cannot be required to pay taxes for another, nor can his property be levied on or sold to enforce collection of taxes for another.

Brown v. Snell, 6 Fla. 741.

Fines so great and imprisonment so severe are fixed for nonpayment of such license taxes as to intimidate complainants from continuing to do business and testing the validity of such statute in a court of law, and therefore the provisions of the statute are unconstitutional.

Ex parte Young, 209 U. S. 123, 148, 52 L. ed. 714, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Consolidated Gas Co. v. New York, 157 Fed. 851.

The provisions of the statute amount to confiscation of the goods complainants have on hand with inserts of coupons, certificates, or the like.

People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497.

Such license taxes, upon the face thereof, are so exorbitant, onerous, and unreasonable, as to be manifestly prohibitory and void.

Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Humes v. Little Rock, 138 Fed. 929; Ex parte Hutchinson, 137 Fed. 949, 950.

The provisions of the statute are contrary to the provisions of the Constitution of the United States against impairing the obligation of contracts.

Humes v. Little Rock, 138 Fed. 929; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Collins v. New Hampshire, 171 U. S. 30, 33, 43 L. ed. 60, 61, 18 Sup. Ct. Rep. 768.

In its virtual prohibition of tobacco-insert coupons, certificates, or the like, the Florida statute is contrary to the statutes of the United States which authorize such insertions.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Bettman v. Warwick, 47 C. C. A. 185, 108 Fed. 50; M'Culloch v. Maryland, 4 Wheat. 436, 4 L. ed. 608.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

It was determined that the bill set forth grounds of equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that the statute, if exerted against complainants and their property, would produce irreparable injury, citing Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498. We concur in this view.

Passing on the constitutional questions involved, the [356] court was of opinion that the statute violated the 14th Amendment, and considered it unnecessary to decide whether there was an interference with interstate commerce.

It is not entirely clear upon what clause of the 14th Amendment the court rested its judgment. The equality clause was selected for special comment. After stating the limitation upon legislation and the power of classification, the court proceeds to say: "Is there a just basis for the classification attempted in this section [§ 35] of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And if goods are offered for sale with which coupons are given, redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods.

"We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a 'greater burden' than that imposed on others in the same calling and condition." [214 Fed. 833.]

But the court went farther and declared that "the use of coupons, etc., was an entirely legitimate method of advertising," and that such had been the ruling in state cases which were cited. And excluding the application of cases adduced by defendants to sustain the statute as an exercise of the police power of the state, the court said: "As before pointed out, this coupon business is legitimate, in no way affecting the health or morals of the community."

Though it is not clear, as we have said, certainly not explicit in the opinion of the court, whether it decided the due process clause as well as the equal protection clause of the 14th Amendment was violated by the

statute, [357] we may assume that the violation of both was decided. It may be that the court thought that even though the use of coupons was a legitimate method of advertising, and not affecting the health or morals of the community, it was nevertheless within the power of the state to license if the statute were free from discrimination, or it may be that the court considered that the two grounds interlocked and were dependent upon the same reasoning. However, the two grounds may be, indeed must be, taken into consideration, as they are submitted for decision.

The ground of discrimination, simply and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 413, 414, 58 L. ed. 1011, 1022, 1023, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Price v. Illinois, 238 U. S. 446, 452, 59 L. ed. 1400, 1405, 35 Sup. Ct. Rep. 892.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. Eubank v. Richmond, 226 U. S. 137, 142, 57 L. ed. 156, 158, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192; Sligh v. Kirkwood, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501. And, we repeat, "it may make discriminations if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary." Quong [358] Wing v. Kirkendall, 223 U. S. 59, 62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192, and the cases cited above.

Of course, an element to be considered is the authority of the legislature over the subject-matter, and this will best be examined in considering the contentions of complainants under the due process clause. Preceding that, however, are the contentions based on the commerce clause and the sanction which the Constitution gives to the integrity of contracts.

First, as pertinent to our discussion are the specific schemes at which, it is said, the statute is directed, and we adopt complainants' description of them. The first is "where the Florida merchant issues his own coupon, certificate, or cash register receipt, and himself makes payment or redemption of the same, sometimes by the delivery of some valuable article of merchandise, sometimes by the payment of cash or allowance of credit on account of purchases, being in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer." In a word, it is a case where the Florida merchant issues his own coupons and redeems them.

The second is "where the manufacturer or shipper outside of the state of Florida, in some other state of the Union, inserts such coupons or certificates in packages of his goods which he ships to Florida, and the ultimate purchaser or consumer takes such coupons or certificates from such packages and returns them to such manufacturer or shipper in such state outside of Florida, who gives a premium for them and sends such premium or proceeds of redemption to such ultimate purchaser or consumer in Florida who has forwarded to him such coupons or certificates." The merchandise so shipped into Florida is kept in stock by the merchants of the state, and the coupons, etc., are delivered upon the sale of the merchandise to their customers, who have them redeemed in the [359] manner described. That is, the coupons are redeemed by the person who originally issues them; the coupons, however, to repeat, being delivered by the Florida merchant as a part of the transaction between him and the purchaser from him at retail.

The third is "where the manufacturer or shipper in a state other than Florida inserts in the packages of his goods which he ships to Florida such coupons or certificates which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some company or agency in some state of the United States outside of the state of Florida other than the manufacturer or shipper of the goods, to be redeemed or paid, and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupons or certificates." This differs from the other two cases in that a premium company or agency other than the manufacturer or shipper himself is used

for the redemption or payment of the coupons or certificates. But here again the Florida merchant is a factor because it is in completion of the sale by him at retail that the coupons are delivered to the purchasers.

We are careful, by much repetition, to show the difference between the cases, to distinguish between the premium systems, and to show, as urged by counsel, that this case is not concerned with a license tax upon a trading stamp business pure and simple, a license upon companies engaged in such business being provided by another section of the statute.[1]

It is well here to observe, to avoid misunderstanding, that the redemption in the first scheme is "*sometimes by the payment of cash or allowance of credit on account of* [360] *purchases or for or on account of a certain amount having been purchased of the merchant by the customer.*" We are not concerned with a statute directed solely at such method of redemption or a business so confined. The Florida statute imposes its license tax on coupons, etc., "redeemable in premiums." And therefore, whether any other method of redemption—be it by giving a discount or an allowance of credit simply—would be amenable to objection, we express no opinion. In all of the schemes other methods of redemption are used and are attempted to be justified.

With this comment we may say that all of the schemes have a common character,—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase,—something of value given other than it; and even as to the second and third schemes, the transactions are only executed through the purchase at retail. In other words, they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the state, and not as transactions in interstate commerce, and this is conceded as to the first scheme; it is true as to the second and third schemes. All of the schemes have their influence and effect within the state. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the state.

The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce; they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their disposition in the packages of importation. Of course, there is shipment to Florida merchants, but [361] for the disposition of the merchandise in retail trade. The schemes contemplate such disposition and are executed by it. Detach the importations from the retail sale, consider only the transportation to the state of merchandise in its original package, being sold therein in such package, and there may, indeed, be interstate commerce; but so detached and so considered the importations are left without purpose, the schemes without execution. Indeed, complainants contend for the right not only of importations in the original package containing the coupons, but the disposition of the goods and coupons through the retail merchant. This, we repeat, has no protection in the commerce clause.

Nor is the regulation of the statute prohibited by § 3394 of the Revised Statutes of the United States as amended in 1897 [30 Stat. at L. 206, chap. 11] and 1902 [32 Stat. at L. 715, chap. 1371, Comp. Stat. 1913, § 6204]. Section 3394 provides for a tax on cigars and cigarettes. By the amendment of 1897 it was forbidden to pack in, attach to, or connect with any package of tobacco or cigarettes anything but the wrappers, and it was further provided that there should not be affixed to, or branded, stamped, marked, written, or printed upon the packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward. This provision upset the practice of manufacturers, and was attacked on the ground that it was beyond the power of Congress under the Constitution to enact, the prohibited practice being a method of advertising. The provision was sustained. Felsenheld v. United States, 186 U. S. 126, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740, affirming 103 Fed. 453. In 1902 the paragraph containing the provision was amended so as to forbid the inclosure or attachment to the packages of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in, or dependent upon the event of a lottery, [362] nor any indecent or immoral picture, representation, print or words."

Let it be granted that this provision permitted the inclosure in the package of tobacco of tokens of the character with which this case is concerned. It goes no farther nor does it purport to go farther. It does not attempt to protect and enforce the permission to the retail sales of packages in

[1] "Sec. 55. Trading stamp firms: Persons or firms or corporations known as trading stamp companies shall pay a state license tax of one thousand ($1,000) dollars in each county where they transact any business."

the state. It might not legally have such effect if attempted; and such attempt will not lightly be inferred. Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784. The statute of Florida does not seek to control the interstate transportation of the packages; it controls only their sale in the state through the retail merchant, or, it may be, directly to the individual consumer for the purpose described, and in both cases for the ultimate redemption of the tokens delivered with the sale.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39, is not applicable. There Congress, for the effective execution of the food and drugs act, defined what the "package" of commerce should be, and necessarily any law which conflicted with it was void. In the case at bar there is no such definition. There is only permission to insert in the package whatever the manufacturer of tobacco may choose, with a single exception. There is no compulsion of use, and omission to avail of the permission has no effect upon the purpose of Congress in the enactment of the revenue laws which provide for the packing of tobacco products.

The contract clause of the Constitution is also unavailable to complainants. The statute must be held to have prospective operation. Sales completed before its enactment are unaffected by it. We say "sales completed," and by this we mean those in which the right of redemption according to some of the schemes has accrued as distinguished from what is alleged in the bill as "the [363] understanding and expectation" arising from one or more sales that complainants would continue to sell to such purchasers other articles so that they might be able to accumulate tokens and use them. It cannot be said that there is an obligation to continue sales or an obligation to continue purchases. Besides, as the business is subject to regulation, the contracts made in its conduct are subject to such regulation. Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265, and New York C. & H. R. R. Co. v. Gray, 239 U. S. 583, ante, 451, 36 Sup. Ct. Rep. 176.

Having disposed of the other contentions of complainants, we are brought to a consideration of the question whether the statute of Florida offends the due process clause of the 14th Amendment of the Constitution. In other words, does the statute interfere with the business liberty of complainants? Is it an illegal meddling with a lawful calling and a deprivation of freedom of contract? This is the contention, and it is attempted to be supported by the assertion that the schemes detailed in the bill are but a method of advertising, and, as such, mere allurements to customers, not detrimental in any way to the public health and morals, nor obstructive of the public welfare; but are a means of enterprise, mere incidents of the businesses of complainants, and as beneficial to their customers as to them. And besides, that they are but a method of giving discount, practically in some instances a rebate upon the price, and in others an equivalent gift of some article that may attract the choice of the purchaser, the choice being free and the article of definite utility and value.

These contentions have the support of a number of cases. They are opposed by others, not nearly so numerous as the supporting cases, but marking a change of opinion. Both sets of cases indicate by the statutes passed upon a persistent legislative effort against the schemes under review or some form of them, beginning in 1880 and [364] repeated from time to time until the statute in controversy was passed in 1913.[2] In such differences between judicial and legislative opinion where should the choice be? That necessarily depends upon what reasoning judicial opinion was based. We appreciate the seriousness of the situation. Regarding the number of the cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion.

The foundation of all of them is that the schemes detailed are based on an inviolable right, that they are but the exercise of a personal liberty secured by the Constitution of the United States and distinguished from other lawful exercise of business contracts and activity by a method of advertising and lawful inducements to an increased custom, and that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone, and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts, but legislatures, may be the best judges, and, it may be, the conclusive judges.

This may be illustrated. A lottery of it-

[2] It is said that twenty-three states have attempted either to prohibit or to license the selling or use of trading stamps and coupons. And there has been like legislation for the District of Columbia and the territory of Hawaii.

self is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. All participants in it have an equal chance; there is no admonishing caveat of one against the other. And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from [365] circumstances, become the source of evil or may have evil tendency. Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697.

But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success.

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a "lottery," may not be called "gaming;" it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry,—a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612. And it is not required that we should be sure as to the precise reasons for such judgment, or that we should certainly know them [366] or be convinced of the wisdom of the legislation. Southwestern Oil Co. v. Texas, 217 U. S. 114, 126, 127, 54 L. ed. 688, 694, 695, 30 Sup. Ct. Rep. 496. See also Munn v. Illinois, 94 U. S. 113, 132, 24 L. ed. 77, 86.

But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*" Otis v. Parker, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 328, 23 Sup. Ct. Rep. 168.

That case illustrated the reach of the power of government to protect or promote the general welfare. It sustained a provision of the Constitution of the state of California which made void all contracts for the sale of the stock of corporations on margin or to be delivered at a future day. The practice had been common, its evil was disputed. It was attempted to be justified by argument very much like those advanced in the case at bar, but this court decided that the legislative judgment was controlling.

Even more pertinent in illustration of the power of the states as unaffected by the 14th Amendment is Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66. A statute of the state was sustained which provided that anyone engaged in the manufacture, production, or distribution [367] of any commodity in general use, who should intentionally, for the purpose of destroying the competition of any regular, established dealer, discriminate between different places by selling such commodity at a lower rate in one place than such person charged in another, after equalizing the distance from the point of production, should be guilty of a crime. Freedom of conduct was restricted by the statute, which had its incentive in trade advantages. It was the judgment of the legislature that such practice was an impediment to the public welfare. The legislative judgment was sustained against the attack,

among others, that the law was an infringement of freedom of conduct and contract.

In Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856, the company issued scrip payable in merchandise only from its store as an advance of monthly wages in payment of labor performed. A statute of the state (West Virginia) prohibited the issue of any order for the payment of labor unless it was redeemable in money. The statute was assailed on the ground that it interfered with the freedom of contract. It will be observed that there was a consideration for the order payable in merchandise; it was a payment in advance, and hence it was asserted that the statute was an injury to the employees and employers. There were elements in the transactions of apparent advantage to both, and it would seem to have been within the liberty of both to contract upon an estimate of the value of that advantage. It was deemed an evil by the legislature and this court sustained its judgment.

In Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761, a law of the state of New York required railroad companies to pay their employees semimonthly, and prohibited them from making contracts which should vary the time of payment. The law was sustained mainly upon the ground that it was an amendment of the charter of the corporation, but the extent of the police power was adverted to and the competency [368] of the legislature exercising that power to enact the legislation. The incentive of the legislation was the benefit which accrued to the employees by the period of payment. The public welfare was deemed to be promoted by it.

Other cases might be cited, and, it may be, of more pertinent application, which, from their number and instances, would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts, and, in the exercise of the power, to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary.

Complainants allege that the license tax which the statute imposes is of prohibitory character, and assert that they are exercising inviolable rights and privileges which the excess of the tax prevents in violation of the 14th Amendment; they contend that hence the statute is invalid.

It is not certain from the allegations of the bill that the tax is of the asserted character, but granting it to be so, we have shown that the business schemes described in the bill are not protected from regulation or prohibition by the Constitution of the United States. Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; see also Dobbins v. Los Angeles, 195 U. S. 238, 49 L. ed. 176, 25 Sup. Ct. Rep. 18; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 699, 38 L. ed. 874, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596.

The contention that the statute intimidates against a contest of its legality by the severity of its penalties, and is therefore unconstitutional on that ground, within the ruling in Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, is not justified.

Order reversed and case remanded with directions to dismiss the bill.

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[369] W. V. TANNER, as Attorney General of the State of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, State of Washington, and E. W. Evenson, County Treasurer of Spokane County, State of Washington, Appts.,

v.

JOHN T. LITTLE, August Stahlberg, Lawrence Ryan, and William T. Oathout, Doing Business as Ryan and Oathout, et al.

(See S. C. Reporter's ed. 369-386.)

Federal courts — enjoining state officers — civil or criminal proceedings.

1. The threatened enforcement by state officers through civil or criminal proceedings of a state statute which is attacked as repugnant to the Federal Constitution may be enjoined by a Federal court, where the statute, if exerted against complainants and their property, will produce irreparable injury.

[For other cases, see Courts, VI. d, 2; Injunction, I. i, 1, in Digest Sup. Ct. 1908.]

NOTE.—On injunction to restrain prosecution of criminal or quasi criminal nature—see notes to Hall v. Dunn, 25 L.R.A. (N.S.) 193; Denton v. McDonald, 34 L.R.A. (N.S.) 453; and Alexander v. Elkins, L.R.A. 1916C, 263.

On forbidding use of trading stamps—see notes to Ex parte Drexel, 2 L.R.A.(N.S.) 588; Denver v. Frueauff, 7 L.R.A.(N.S.)

States — immunity from suit — suit against state officers.

2. The state's immunity from suit does not extend to a suit against state officers to enjoin the threatened enforcement of a state statute which is attacked as repugnant to the Federal Constitution.

[For other cases, see States, IX. c, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — license tax.

3. The imposition, under Washington Laws 1913, chap. 134, of an annual license tax of $6,000 upon merchants using stamps, tickets, or coupons redeemable in cash or merchandise, is not repugnant to the equal protection of the laws clause of U. S. Const., 14th Amend., as an attempted arbitrary classification, whether such stamps are prepared or redeemed by the merchant issuing them or by a third party with whom the merchant has a contract for their use.

[For other cases, see Constitutional Law, IV. a, 4, in Digest Sup. Ct. 1908.]

Constitutional law — police power — license tax — retail sales — trading stamps or coupons.

4. The police power of the state justifies the enactment of Washington Laws 1913, chap. 134, imposing an annual license tax of $6,000 upon merchants using stamps, tickets, or coupons redeemable in cash or merchandise.

[For other cases, see Constitutional Law, IV. c, 3, d, in Digest Sup. Ct. 1908.]

Internal revenue — tobacco — redeemable coupons — state regulation.

5. A state license tax on merchants using stamps, tickets, or coupons redeemable in cash or merchandise is not invalid as applied to sales of packages of tobacco containing such coupons because of the permission, if any, granted by the amendment of July 1, 1902 (32 Stat. at L. 715, chap. 1371, Comp. Stat. 1913, § 6204), § 2, to U. S. Rev. Stat. § 3394, to inclose in packages of tobacco redeemable coupons, profit-sharing certificates, etc.

[For other cases, see Internal Revenue, III. 1, in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations — sales with trading stamps or coupons.

6. The imposition of a prohibitive license tax on merchants using stamps, tickets, or coupons, redeemable in cash or merchandise, as is done by Washington Laws 1913, chap. 134, does not unconstitutionally impair the contract obligations of such merchants with their customers or with third parties with whom they have contracted for the use of such stamps or coupons.

[For other cases, see Constitutional Law, 1450–1474, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — liberty of contract — prohibiting trading stamps or redeemable coupons.

7. There is no denial of due process of law in the imposition under Washington Laws 1913, chap. 134, of a prohibitive license tax upon merchants using stamps, tickets, or coupons redeemable in cash or merchandise as inducements to purchasers.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Criminal law — indefiniteness of statute — prohibiting trading stamps or redeemable coupons.

8. The lack of any definite or fixed retail market price for the premium articles does not render invalid for indefiniteness and uncertainty the provisions of Washington Laws 1913, chap. 134, making the use of trading stamps or other devices which entitle the holders to obtain goods for less than the retail market price a crime unless a prohibitive license fee is paid.

[For other cases, see Criminal Law, I. a, in Digest Sup. Ct. 1908.]

[No. 224.]

Argued October 29 and November 1 and 2, 1915. Decided March 6, 1916.

APPEAL from the District Court of the United States for the Eastern District of Washington to review a decree granting an interlocutory injunction to restrain the threatened enforcement of a statute imposing a prohibitive license fee on the use of trading stamps or redeemable coupons. Reversed and remanded, with directions to dismiss the bill.

See same case below, 208 Fed. 605.

Statement by Mr. Justice McKenna:

This case was submitted with No. 41, and attacks the validity of a statute of the state of Washington of the same general import and purpose as the Florida statute

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1131; District of Columbia v. Kraft, 30 L.R.A.(N.S.) 957; and State ex rel. Hartigan v. Sperry & H. Co. 49 L.R.A.(N.S.) 1123.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, *generally—see notes* to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection generally —see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Generally, as to what laws are void as impairing obligation of contracts—see notes to Franklin County Grammar School v. Bailey, 10 L.R.A. 405; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Henderson v. State Soldiers & S. Monument Comrs. 13 L.R.A. 169; and Fletcher v. Peck, 3 L. ed. U. S. 162.

passed on in No. 41. [240 U. S. 342, ante, 679, 36 Sup. Ct. Rep. 370.]

The statute requires that every person, etc., who shall use or furnish to any other person, etc., to use in, with, or for the sale of any goods, etc., any stamps, etc., which shall entitle the purchaser receiving the same with such sale of goods, etc., to procure from any person, etc., any goods, etc., free of charge, or for less than the retail market price thereof, upon the production of any number of such stamps, etc., shall, before so furnishing, selling, or using [370] the same, obtain a license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, etc., from which such furnishing or selling, or in which such using, shall take place.

The statute fixes the license at $6,000, and there is a prohibition of the use of the stamps, etc., in any town, city, or county other than that in which they are furnished or sold. Violation of the act is made a "gross misdemeanor."

The complainants are nineteen in number, counting partnerships as single individuals, and engaged in the business of hardware, cleaning and dyeing, grocery, soap, canned goods, meats, drugs, dry goods, boots and shoes, fuel, photography, laundry, and wine. Complainants sue for all similarly situated.

Their allegations, condensed and narratively stated, are as follows: They carry on their respective businesses at Spokane, state of Washington, and advertise in various ways, which are enumerated, including the premium advertising system, so-called, and have at various times, for the purpose of increasing their general trade and volume of business, especially their cash trade, adopted and used a premium advertising system conducted as follows: with the sale of their goods and merchandise they each give to their cash customers stamps, tickets, or coupons at the rate of one stamp for each cash purchase of a convenient unit amount, as one stamp for each 5, 10, or 25-cent cash purchase, as the case may be, which stamps or coupons entitled their customers to the choice of a certain cash discount or, free of charge, to certain articles of merchandise of their own selection, when presented in certain prescribed numbers for redemption to complainants who redeem their own stamps or certificates, or to a third party with whom other of the complainants have contracts, many of which are still in force, for the use of their premium [371] advertising system, including the use of their trading stamps or coupons used in connection therewith, and the redemption thereof in merchandise.

Many of the complainants accept the coupons, at the cash value thereon printed, in payment or part payment of the cash retail price of the premium articles.

The stamps and coupons are redeemable in accordance with the terms of printed catalogues or premium lists. Booklets are distributed free among complainants' customers and describe the articles which may be secured by the stamps or coupons, and state the number thereof required to obtain the same. The delivery of the required number of stamps or coupons set forth in the list is in full payment for the article specified, and no money or other consideration is charged therefor.

There is no element of chance involved in the system. The value of each article is fixed as to cash and merchandise redemption and the right of every holder is secure. The articles are of sound value and durable manufacture and are open to inspection during business hours. The premiums are not regularly dealt in by many of the complainants, but are used exclusively in connection with premium advertising.

A number of complainants have contracts based on the system, running from one to five years for the use of their premium advertising system, including their trading stamps in connection therewith, which contracts are now in force and were in force at the passage of the act, and a large number of stamps are now in the hands of complainants, and if they are prevented from disposing of them complainants will suffer great and irreparable loss.

A great many manufacturers of various lines of merchandise, for the purpose of advertising their businesses and increasing the volume of their sales, inclose in the packages of their merchandise coupons and other premium tokens which entitle the purchaser of such merchandise to [372] other articles of merchandise free of charge. The number of the manufacturers is given, their names and the articles which they manufacture.

Complainants have upon their shelves large quantities of merchandise in which premium tokens are packed, which, upon their sale, entitle purchasers to other articles in the manner described, and in such packages are tobacco and tobacco products, and the use of the coupons and tickets as described is authorized and rendered lawful by § 3394 of the Revised Statutes of the United States and the amendments of that section in 1897 [30 Stat. at L. 206, chap. 11, § 10] and 1902 [32 Stat. at L. 715, chap. 1371, § 2, Comp. Stat. 1913, § 6204].

The adoption of the premium advertising system enables complainants to give a discount upon purchases of small as well as

large amounts, one coupon or stamp being given with each 5, 10, or 25-cent cash purchase, or multiple thereof, as the case may be. And a larger discount in merchandise can be given than otherwise there could be because, as a result of large purchases of the merchandise given in exchange for the tokens, the articles are secured at much less than the regular retail price. By reason of the system complainants have been enabled at a moderate cost to greatly increase their businesses and profits, and are benefited because their articles in the homes of their customers are a continual advertisement. And the businesses are lawful ones, and not prejudicial to the public health, safety, morals, or welfare.

The statute of Washington violates the provisions of the 14th Amendment to the Constitution of the United States in that it deprives complainants of their property without due process of law and of the equal protection of the laws (a) because it is not equal and uniform in operation, each of the complainants paying their taxes as do other merchants engaged in similar lines of business, and who use other and various methods of advertising, and [373] who are not required to pay a license tax of $6,000. The statute is therefore arbitrary and discriminatory. (b) The tax is not upon the businesses of complainants, but upon their incidents, and is an unwarrantable interference with the method and manner of conducting the same, is arbitrary, oppressive, discriminatory, is in excess of profits and prohibitive, and, while in the guise of revenue, will produce none. (c) It deprives complainants of their liberty and property without due process of law inasmuch as they cannot bestow a gift or give an order upon another merchant for a gift to a customer, which is the exercise of a natural right, without paying on onerous and excessive tax. (d) The penalties and fines are so drastic and excessive that they deter complainants from violating the act and testing its validity in a court of law. (e) The statute is in contravention of § 10, article 1, of the Constitution of the United States, in that it impairs the obligations of contracts with and the right of complainants to contract with their customers to give trading stamps and coupons with the purchase of merchandise redeemable in merchandise heretofore given by them. It also impairs the obligations of contracts entered into by complainants with third parties for the use of the advertising system, including the use of the stamps and coupons and the redemption thereof in merchandise. (f) The statute is partial, unreasonable, oppressive, unequal, in restraint of trade, and prohibitive of lawful business. (g) The statute conflicts with § 3394 of the Revised Statutes of the United States and the amendments thereof (Comp. Stat. 1913, § 6204). (h) It is criminal, making a crime of acts the test of which is incapable of ascertainment; that is, it makes a crime of furnishing stamps or similar devices which are redeemable "for less than the retail market price thereof," the premium article having no definite or fixed retail market price. The statute is therefore void for indefiniteness and uncertainty; and such provision is besides prohibitive of the business, [374] as the articles are not dealt in by complainants except in connection with the premium system. And further, that the statute is void because it attempts to fix the price at which complainants shall sell their merchandise.

The prosecuting attorney of the county threatens to enforce the provisions of the statute, to bring numerous criminal prosecutions as well as civil suits to enforce the payment of the license, and if complainants are forced to discontinue their business as described they will suffer great and irreparable damage because they have expended large sums of money in advertising the premium system, which expenditures would be a total loss, they having large stocks of merchandise on hand in which are packed the premium tokens, and which cannot be removed without practically destroying the packages and the value of the merchandise contained therein, and that therefore, if not permitted to dispose of them, complainants will lose a large amount of money.

Complainants have outstanding in the hands of customers a large amount of tokens, the result of transactions before the passage of the statute, and it will be necessary, in order to keep faith with their customers, for complainants to redeem such tokens in merchandise in the future from time to time as the necessary and requisite number of the same are presented for redemption. If they fail to do so they will lose many customers and a large amount of trade and suffer thereby great loss and injury.

Having no remedy at law, complainants pray an injunction, first temporary and then perpetual.

A temporary restraining order was issued, which the attorney general and the prosecuting attorney of Spokane county separately made motions to quash, each appearing only for that purpose. The motions asserted exemption from suit of those officers in a Federal court because the suit was against them as officers of the state to prevent the enforcement of the criminal laws of the state, and was [375] therefore a suit against the state, in violation of the

11th Amendment to the Constitution of the United States.

Subsequently motions to dismiss were filed by them and also by the defendant Evenson, county treasurer of Spokane county. The grounds of the motions alleged were misjoinder of parties complainants and of defendants, improper union of causes of suit, insufficiency of the facts alleged to justify the relief prayed, the adequacy of a remedy at law, and the absence of jurisdiction over the persons of the defendants or of the subject-matter of the action.

The motion for an interlocutory injunction came before three judges. Rudkin, district judge, delivered the opinion and judgment ordering an injunction was prayed. 208 Fed. 605. This appeal was then taken.

Mr. Dallas V. Halverstadt argued the cause, and, with Mr. W. V. Tanner, Attorney General of Washington, *in propria persona*, filed a brief for appellants:

The act is not arbitrary classification.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Barrett v. Indiana, 229 U. S. 26, 57 L. ed. 1050, 33 Sup. Ct. Rep. 692; Brodnax v. Missouri, 219 U. S. 285, 55 L. ed. 219, 31 Sup. Ct. Rep. 238; Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 48 L. ed. 604, 24 Sup. Ct. Rep. 319; Clark v. Kansas City, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; Clark v. Titusville, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. Rep. 31; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Erb v. Morasch, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A. (N.S.) 1097, 34 Sup. Ct. Rep. 761; Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565; Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Freund, Pol. Power; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Mutual Loan Co. v. Martell, 222 U. S. 235, 56 L. ed. 179, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Ohio River & W. R. Co. v. Dittey, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Rippey v. Texas, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; Southwestern Oil Co. v. Texas, 217 U. S

114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; Sperry & H. Co. v. Blue, 120 C. C. A. 354, 202 Fed. 82; Sperry & H. Co. v. Melton, 69 W. Va. 124, 34 L.R.A.(N.S.) 433, 71 S. E. 19; Sperry & H. Co. v. Owensboro, 151 Ky. 389, 151 S. W. 932, Ann. Cas. 1915A, 373; Sperry & H. Co. v. Tacoma, 68 Wash. 254, L.R.A.1915B, 241, 122 Pac. 1060; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, L.R.A.1915A, 1196, 34 Sup. Ct. Rep. 60; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Wheeler v. Sohmer, 233 U. S. 434, 58 L. ed. 1030, 34 Sup. Ct. Rep. 607; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 18 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412.

If the state possesses power to tax for revenue, the extent of exercise of power is immaterial.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 58 L. ed. 127, L.R.A. —, —, 34 Sup. Ct. Rep. 15; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Frederick v. Seattle, 13 Wash. 428, 43 Pac. 364; Re Garfinkle, 37 Wash. 650, 80 Pac. 188; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; McKnight v. Hodge, 55 Wash. 289, 40 L.R.A.(N.S.) 1207, 104 Pac. 504; Nathan v. Louisiana, 8 How. 73, 12 L. ed. 992; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Sperry & H. Co. v. Blue, 120 C. C. A. 354, 202 Fed. 82; Sperry & H. Co. v. Melton, 69 W. Va. 124, 34 L.R.A.(N.S.) 433, 71 S. E. 19; Sperry & H. Co. v. Tacoma, 68 Wash. 254, L.R.A.1915B, 241, 122 Pac. 1060; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; Stull v. De Mattos, 23 Wash. 71, 51 L.R.A. 892, 62 Pac. 451; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Veazie Bank v. Tenno, 8 Wall. 533, 19 L. ed. 482; Ward v. Maryland, 12 Wall. 428, 20 L. ed. 452; Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128.

The state may prohibit the use of trading stamps by virtue of the police power.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Antoni v. Greenhow, 107 U. S. 769, 27 L. ed. 468; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Barrett v. Indiana, 229 U. S. 29, 57 L. ed. 1052, 33 Sup. Ct. Rep. 692; Bartemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; Booth v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; 13 Columbia L. Rev. 296; Com. v. Strauss, 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; Erie R. Co. v. Williams, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Freund, Pol. Power; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup.

Ct. Rep. 859; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Karasek v. Peier, 22 Wash. 419, 50 L.R.A. 345, 61 Pac. 33; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A.(N.S.) 671, 31 Sup. Ct. Rep. 265; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; McCracken v. Hayward, 2 How. 608, 11 L. ed. 397; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; McKnight v. Hodge, 55 Wash. 289, 40 L.R.A.(N.S.) 1207, 104 Pac. 504; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Petit v. Minnesota, 177 U. S. 168, 44 L. ed. 719, 20 Sup. Ct. Rep. 666; Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030; Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Schmidinger v. Chicago, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; Seattle v. Hurst, 50 Wash. 424, 18 L.R.A.(N.S.) 169, 97 Pac. 454; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A. 60 L. ed. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; State v. Buchanan, 29 Wash. 602, 59 L.R.A. 342, 92 Am. St. Rep. 930, 70 Pac. 52; State v. Nichols, 28 Wash. 628, 69 Pac. 372; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; State v. Neitzel, 69 Wash. 567, 43 L.R.A.(N.S.) 203, 125 Pac. 939, Ann. Cas. 1914A, 899; Sturges & B. Mfg. Co. v. Beauchamp, 231 U. S. 320, 58 L. ed. 245, L.R.A.1915A, 1196, 34 Sup. Ct. Rep. 60; Watson v. Maryland, 218 U. S. 174, 54 L. ed. 988, 30 Sup. Ct. Rep. 644; Welch v. Swasey, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; State v. Underwood, — La. —, 71 So. 513.

In the vast majority of the cases in which it has been held that the trading stamp and coupon business could not be prohibited, the courts have limited the police power to the protection of the public health, morals and safety, a view considerably more limited than that which has been held by this court even from the time of the case of Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; Com. v. Moorhead, 7 Pa. Co. Ct. 513; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; District of Columbia v. Kraft, 35 App. D. C. 253, 30 L.R.A.(N.S.) 957; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Gamble v. Montgomery, 147 Ala. 682, 39 So. 353; Re Gregory, 219 U. S. 210, 55 L. ed. 184, 31 Sup. Ct. Rep. 143; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Humes v. Ft. Smith, 93 Fed. 857; Humes v. Little Rock, 138 Fed. 929; Ex parte Hutchinson, 137 Fed. 949; Ex parte Hutchinson, 137 Fed. 950; Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136; Kane v. Segerstrom Piano Mfg. Co. 118 Minn. 483, 41 L.R.A.(N.S.) 1041, 137 N. W. 170; Lansburgh v. District of Columbia, 11 App. D. C. 512; Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879; Little v. Tanner, 208 Fed. 605; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Oilure Mfg. Co. v. Pidduck-Ross Co. 38 Wash. 137,

80 Pac. 276; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Opinion of Justices, 208 Mass. 607, 94 N. E. 848; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Sperry & H. Co. v. Blue, 120 C. C. A. 354, 202 Fed. 82; Sperry & H. Co. v. Brady, 134 Fed. 691; Sperry & H. Co. v. Melton, 69 W. Va. 124, 34 L.R.A.(N.S.) 433, 71 S. E. 19; Sperry & H. Co. v. Owensboro, 151 Ky. 389, 151 S. W. 932, Ann. Cas. 1915A, 373; Sperry & H. Co. v. Tacoma, 190 Fed. 682, 68 Wash. 254, L.R.A.1915B, 241, 122 Pac. 1060, 199 Fed. 853; Sperry & H. Co. v. Temple, 137 Fed. 992; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A.(N.S.) 1123, 144 N. W. 795; State ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; State v. Caspare, 115 Md. 7, 80 Atl. 606; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; State v. Hawkins, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209, 80 Wash. 699, 141 Pac. 883; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; State v. Walker, 105 La. 494, 29 So. 973; Territory v. M. A. Gunst & Co. 18 Haw. 196; Van Deman & L. Co. v. Rast, 214 Fed. 828; Ex parte West, 147 Cal. 774, 82 Pac. 434; State v. Underwood, — La. —, 71 So. 513; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Winston v. Hudson, 135 N. C. 286, 47 S. E. 1023; Young v. Com. 101 Va. 853, 45 S. E. 327.

The appellees are merchants using trading stamps in their business. They, therefore, have no legal interest in the question of the right of anyone to sell stamps to merchants.

Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044; Turpin v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.) 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

Mr. Blackburn Esterline also argued the cause for appellants.

Mr. W. T. Dovell argued the cause, and, with Mr. Frank T. Wolcott, filed a brief for appellees:

As authority for the maintenance of this action to restrain state officers from the threatened enforcement of an unconstitutional enactment, our reliance is upon the doctrine of Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and Western U. Teleg. Co. v. Andrews, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286.

The act is prohibitive.

Murphy v. California, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209.

To prohibit the conduct of the business is contrary to the law of the land.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

Does the prohibition fall within the police power because it tends to limit extravagance?

Allnutt v. Inglis, 12 East, 527, 11 Revised Rep. 482; Cooley's Bl. Com. bk. 1, p. 125; Cooley, Const. Lim. 7th ed. p. 549; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; 2 Farrand, Records of the Federal Convention, p. 344; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Humes v. Little Rock, 138 Fed. 929; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E. 236; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Pullman Co. v. Knott, 235 U. S. 23, 59 L. ed. 105, 35 Sup. Ct. Rep. 2; Ex parte Quarg, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; Seattle v. Dencker, 58 Wash. 501, 28 L.R.A.(N.S.) 446, 137 Am. St. Rep. 1076, 108 Pac. 1086; State v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L.R.A. 359, 25 Am. St. Rep. 891, 10 S. E. 288; Stickney, State Con-

trol of Trade & Commerce, chap. 1, p. 100; Tiedeman, Limitations of Pol. Power, p. 154.

Is the act brought within the police power because it may foster intermediate concerns?

Denver v. Frueauff, 39 Colo. 20, 7 L.R.A. (N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; Wiseman v. Tanner, 221 Fed. 694.

The act denies equal protection of the law because the attempted classification for the purpose of a license tax is purely arbitrary.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Ex parte Hutchinson, 137 Fed. 949; Ex parte Hutchinson, 137 Fed. 950; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Sperry & H. Co. v. Temple, 137 Fed. 992; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350.

The adjudicated cases have held the classification arbitrary.

Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Van Deman & L. Co. v. Rast, 214 Fed. 827.

If the business or practice is lawful, it may not be prohibited indirectly by a license tax.

Connolly v. Union Sewer Pipe Co. 184 U. S. 560, 46 L. ed. 690, 22 Sup. Ct. Rep. 431; Cooley, Taxn. 3d ed. pp. 260, 1140, 1143; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; 26 Harvard L. Rev. 682; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; 3 McQuillin, Mun. Corp. § 1002; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482; Weston v. Charleston, 2 Pet. 449, 7 L. ed. 481; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep 257.

Repeated attempts to enact such legislation offer no argument for its constitutionality.

Chaddock v. Day, 75 Mich. 527, 4 L.R.A. 809, 13 Am. St. Rep. 468, 42 N. W. 977; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60.

The "retail market price" provision in the act renders it unconstitutional.

Bishop, Statutory Crimes, 2d ed. § 41; Brown v. State, 137 Wis. 543, 119 N. W. 338; Buckles v. State, 5 Okla. Crim. Rep. 109, 113 Pac. 244; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Collins v. Kentucky, 234 U. S. 634, 58 L. ed. 1510, 34 Sup. Ct. Rep. 924; Cook v. State, 26 Ind. App. 278, 59 N. E. 489; International Harvester Co. v. Kentucky, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853; Kilbourne v. State, 84 Ohio St. 247, 35 L.R.A.(N.S.) 766, 95 N. E. 824; 2 Lewis's Sutherland Stat. Constr. 2d ed. § 520; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; Savage v. Wallace, 165 Ala. 572, 51 So. 605; Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917.

The act is invalid because its observance requires the removal of inserts.

Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Bettman v. Warwick, 47 C. C. A. 185, 108 Fed. 46; Com. v. R. I. Sherman Mfg. Co. 189 Mass. 76, 75 N. E. 71, 4 Ann. Cas. 268; Felsenheld v. United States, 186 U. S. 126, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep.

488; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075.

The excessive penalty renders the act unconstitutional.

Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Consolidated Gas Co. v. New York, 157 Fed. 849; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Portland R. Light & P. Co. v. Portland, 201 Fed. 119; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Southwestern Oil Co. v. Texas, 217 U. S. 114, 54 L. ed. 688, 30 Sup. Ct. Rep. 496; State v. Crawford, 74 Wash. 248, 46 L.R.A.(N.S.) 1039, 133 Pac. 590; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

[380] Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The court ruled against the motions to dismiss, and, concurring with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants, we pass to the consideration of the validity of the statute of the state. Of that it was said: "The court is fully satisfied from a bare inspection of the act without more, and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. It is plainly manifest that no merchant could afford to pay the sum of $6,000 annually for the mere privilege of giving away trading stamps or allowing discounts on his cash sales. But if this were the only objection to the act, it may be that the courts would be powerless to enjoin its execution. The power of taxation rests upon necessity and is inherent in every independent state. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy. Postal Teleg. Cable Co. v. Charleston, 153 U. S. 699, 38 L. ed. 874, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; Kehrer v. Stewart, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403." [208 Fed. 609.]

The charge of discrimination against the statute was decided to be a factor as to its validity. The use of trading stamps and other similar devices was regarded as a legitimate system of advertising, and that to distinguish it from other systems of advertising was a violation of the equality clause of the Federal Constitution. And it was said: "As well might the legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling who do not so advertise."

[381] In this conclusion we think, for the reasons expressed in Rast v. Van Deman & L. Co. just decided [240 U. S. 342, ante, 679, 36 Sup. Ct. Rep. 370], that the court erred. We have been at pains to summarize the bill in this case to show its similitude to that.

The coupons in this case, in compliance with the law of the state of Washington (Laws of 1907, p. 742), must be redeemed in cash if demanded by the purchaser; otherwise in articles of merchandise selected by him. The redemption of the coupons in some instances is directly by the merchant issuing them; in others, it is alleged, by "a third party, with whom said complainants have a contract for the use of their trading stamps or coupons used in connection therewith and the redemption thereof in merchandise." These differences, however, do not affect the principle announced in No. 41. Whether the coupons are prepared by the issuing merchant or prepared by another, whether they be redeemed by him or by another, is but a phase of the system, not affecting its essential character. And we may say here, as we said in No. 41, that we are

not concerned with consideration of a business in which coupons, etc., are issued or used and not redeemed in merchandise; that is, where they are used as a rebate upon the price of the article or a discount upon purchases, nor with the legality of a statute which should regulate or prevent such use of the coupons disassociated from other uses of them. Complainants contend for a broad use, and assert that there cannot legally be any limitation of their methods of redemption, which they comprehensively denominate the "premium system."

The opinion in No. 41 is, therefore, decisive of the contentions in this case. We said there that there were manifest differences between the "premium system" of advertising and the other methods enumerated, and that those differences justified a difference in measures. And this is justified not only by the wide [382] discretion which may be exercised in legislation, but by a rigid principle of classification. Classification is not different in law than in other departments of knowledge. "It is the grouping of things in speculation or practice because they 'agree with one another in certain particulars and differ from other things in those particulars.'" Billings v. Illinois, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. Upon what differences or resemblances it may be exercised depends necessarily upon the object in view, may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered. It may not make the distinction adverted to, but it may make others the appropriateness of which, considered logically, may be challenged; for instance: between sales of stock upon margin or for immediate or future delivery (Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168); between acts directed against a regularly established dealer and one not so established (Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66); in an inspection law, between coal mines where more than five men are employed and coal mines where that or a lesser number are employed (Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616); and a like distinction in a workmen's compensation law (Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570); between a combination of purchasers and a combination of laborers (International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859); between residents and nonresidents (Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673); in a law requiring railroads to heat passenger coaches, between roads of 50 miles and [383] roads of that length or less (New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; see also Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360); between theaters according to the price of admission (Metropolis Theatre Co. v. Chicago, 228 U. S. 61, 57 L. ed. 730, 33 Sup. Ct. Rep. 441); between landowners as to liability for permitting certain noxious grasses to go to seed on the lands (Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638); between businesses in the solicitation of patronage on railroad trains and at depots (Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865); and a distinction based on the evidence of the qualifications of physicians (Watson v. Maryland, 218 U. S. 179, 54 L. ed. 990, 30 Sup. Ct. Rep. 644).

Those were instances (and others might be cited) of the regulation of conduct and the restriction of its freedom, it being the conception of the legislature that the regulation and restriction were in the interest of the public welfare. Those classifications were sustained as legal, being within the power of the legislature over the subject-matter, and having proper bases of community.

But the classification which was sustained in Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616, was condemned in Truax v. Raich, 239 U. S. 33, ante, 131, 36 Sup. Ct. Rep. 7. The statute in the latter case required employers of more than five workers at any one time to employ not less than 80 per cent qualified electors or native-born citizens of the United States or of some subdivision of such. The statute was held void because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate, or scientific, will not be sustained; if such authority exist, a classification may be deficient in those at-

tributes, may be harsh and oppressive, and yet be within the power of the legislature. This has been declared many times. Let us apply the test to the case at bar. Let it be granted that the "premium system" is a method of advertising; can there not be differences in advertising [384] which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? Fifth Ave. Coach Co. v. New York, 221 U. S. 467, 55 L. ed. 815, 31 Sup. Ct. Rep. 709; Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451. However, a decisive answer to the questions need not be given, for we have said, in Rast v. Van Deman & L. Co. that the "premium system" is not one of advertising merely. It has other, and, it may be, deleterious, consequences. It does not terminate with the bringing together of seller and buyer, the profit of one and the desire of the other satisfied, the article bought and its price being equivalents. It is not so limited in purpose or effect. It has ulterior purpose, and how it has developed complainants vividly represent by their averments. It appears that companies are formed, called trading stamp companies,[1] which extend and facilitate the schemes, making a seller of merchandise their agent for the distribution of stamps to be redeemed by them or other merchants, the profit of all being secured through the retail purchaser who has been brought under the attraction of the system. There must, therefore, be something more in it than the giving of discounts, something more than the mere laudation of wares. If companies—evolved from the system, as counsel say in justification of them—are able to reap a profit from it, it may well be thought there is something in it which is masked from the common eye, and that the purchaser at retail is made to believe that he can get more out of the fund than he has put into it, something of value which is not offset in the prices or quality of the articles which he buys. It is certain that the prices he pays make the [385] efficiency of the system and the fund, if we may individualize it, out of which the cost of the instruments and agents of the system must be defrayed and the profit to all concerned paid. The system, therefore, has features different from the ordinary transactions of trade which have their impulse, as we have said, in immediate and definite desires having definite and measurable results. There may be in them at times reckless buying, but it is not provoked or systematized by the seller.

Complainants charge that the tax of the statute is not upon the business, but upon its incidents. The separation is artificial. It is the incidents which give character to the business, affecting it with evil, it was thought, provoking therefore against it the power of the state, and taking away from it the immunity it else might have.

It is unimportant what the incidents may be called, whether a method of advertising, discount giving, or profit sharing. Their significance is not in their designations, but in their influence upon the public welfare. And of this the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength. Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature. McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206. Such belief [386] has many examples in state legislation, and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation; certainly, from its generality, it cannot be declared to be made in mere wantonness. Central Lumber Co. v. South Dakota, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 204, 205, 57 L. ed. 184, 188, 189, 33 Sup. Ct. Rep. 44.

Discrimination aside, the power to enact the legislation we need not discuss, but may refer to the opinion in No. 41. Of course, it is in the exercise of the police power of the state. We will not here define it or its limitations. As was said by Mr. Justice Brown, in Camfield v. United States, 167 U. S. 518, 524, 42 L. ed. 260, 262, 17 Sup. Ct. Rep. 864, citing Rideout v. Knox, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19

[1] Lansburgh v. District of Columbia, 11 App. D. C. 512; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A. (N.S.) 966, 126 N. W. 120; State v. Underwood, decided October 18, 1915, by the supreme court of Louisiana; Hewin v. Atlanta, 121 Ga. 723, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296.

N. E. 390: "The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests."

In the view that the license is prohibitive we may concur, and concede that such is the effect given it by the supreme court of the state in State v. Pitney, 80 Wash. 699, 141 Pac. 883, one of the cases submitted with this one. And we think it was competent for the state to give it that effect. The cases cited by Judge Rudkin and those cited in the opinion in No. 41 so establish.

For answer to the other contentions which we consider material to notice we refer to No. 41.

Decree reversed and case remanded with directions to dismiss the bill.

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[387] F. S. PITNEY, Plff. in Err.,
v.
STATE OF WASHINGTON.

(See S. C. Reporter's ed. 387-391.)

This case is governed by the decisions in Rast v. Van Deman & Lewis Company and Tanner v. Little, ante, 679, 691.

[No. 242.]

Argued November 1 and 2, 1915. Decided March 6, 1916.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which, on a second appeal, affirmed a conviction in the Superior Court of King County, in that state, for using redeemable coupons without having paid the license tax. Affirmed.

See same case below, 80 Wash. 699, 141 Pac. 883.

The facts are stated in the opinion.

Mr. Louis Marshall argued the cause, and, with Mr. Sol. M. Stroock, filed a brief for plaintiff in error:

The Washington statute under which the plaintiff in error has been convicted violates the 14th Amendment, in that it deprives him of his liberty and property without due process of law.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385.

The extensive use of this system of advertising is so much a matter of common knowledge that many courts, having under consideration statutes similar to that here involved, have referred to that fact.

People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A.(N.S.) 1123, 144 N. W. 795; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327.

The lawfulness of the trading stamp and premium advertising business has often been sustained.

State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Humes v. Little Rock, 138 Fed. 929; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; People ex rel. Appel v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; State v. Ramseyer, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; Ex parte Drexel, 147 Cal. 772, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Ex parte West, 147 Cal. 774, 82 Pac. 434; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; State ex rel. Simpson v. Sperry & H. Co. 110 Minn. 378, 30 L.R.A. (N.S.) 966, 126 N. W. 120; State v. Caspare, 115 Md. 7, 80 Atl. 606; Opinion of Justices, 208 Mass. 607, 94 N. E. 848; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Territory v. M. A. Gunst & Co. 18 Haw. 196; Sperry & H. Co. v. Weber, 161 Fed. 219; Sperry & H. Co. v. Fisher (Md.) Baltimore Daily Record, Oct. 7, 1905; Sperry & H. Co. v. Temple, 137 Fed. 992; Ex parte Hutchinson, 137 Fed. 950; Sperry & H. Co. v. Brady, 134 Fed. 691; Sperry & H. Co. v. Mechanics' Clothing Co. 135 Fed. 833; Sperry & H. Co. v. Tacoma, 190 Fed. 682; Van Deman & L. Co. v. Rast, 214 Fed. 827; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Ex parte McKenna, 126 Cal. 429, 58 Pac. 916; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Long v. State, 74 Md. 565, 12 L.R.A. 425, 22 Atl. 4; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A. (N.S.) 1123, 144 N. W. 795; Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879.

Similar in principle are:

Schnaier v. Navarre Hotel & Importation

Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065; Hauser v. North British & M. Ins. Co. 206 N. Y. 455, 42 L.R.A.(N.S.) 1139, 100 N. E. 52, Ann. Cas. 1914B, 263; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420.

Although the police power is extensive, and there is a present tendency to enlarge its boundaries, it is nevertheless subordinate to the constitutional guaranties of life, liberty, and property.

Lochner v. New York, 198 U. S. 56, 49 L. ed. 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Wright v. Hart, 182 N. Y. 333, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263; Allgeyer v. Louisiana, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Re Kelso, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 Ann. Cas. 1124; Bryan v. Chester, 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894; State ex rel. McGrael v. Phelps, 144 Wis. 1, 35 L.R.A.(N.S.) 353, 128 N. W. 1041; Bonnett v. Vallier, 136 Wis. 193, 17 L.R.A.(N.S.) 486, 128 Am. St. Rep. 1061, 116 N. W. 885; Tolliver v. Blizzard, 143 Ky. 773, 34 L.R.A.(N.S.) 890, 137 S. W. 509; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234.

This legislation deprives merchants who use in their business stamps, coupons, tickets, certificates, or similar devices, in connection with their sales, of the equal protection of the law.

Ex parte Hutchinson, 137 Fed. 950; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 Ann. Cas. 684; Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; Humes v. Little Rock, 138 Fed. 929; Winston v. Beeson, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; Trading Stamp Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136; Sperry & H. Co. v. Tacoma, 190 Fed. 682; Little v. Tanner, 208 Fed. 605; Van Deman & L. Co. v. Rast, 214 Fed. 827; People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 Ann. Cas. 101; People ex rel. Moskowitz v. Jenkins, 202 N. Y. 53, 35 L.R.A.(N.S.) 1079, 94 N. E. 1065; Smith v. Texas, 233 U. S. 630, 58 L. ed. 1129, L.R.A.1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Connolly v. Union Sewer Pipe Co. 184 U. S. 549, 46 L. ed. 685, 22 Sup. Ct. Rep. 431.

Mr. Dallas V. Halverstadt argued the cause, and, with Mr. Alfred H. Lundin and Mr. W. V. Tanner, Attorney General of Washington, filed a brief for defendant in error:

This act is not invalid because it does not cover the entire range of possible evils. If it hits the evil where it has been found by experience most prevalent, that is sufficient.

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; Heath & M. Mfg. Co. v. Worst, 207 U. S. 353, 356, 52 L. ed. 243, 244, 28 Sup. Ct. Rep. 114; Miller v. Wilson, 236 U. S. 373, 383, 59 L. ed. 628, 631, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342.

The possibility of abuse of power does not affect existing power.

Powell v. Pennsylvania, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257.

The New York court of appeals is not in accord with this court as to the extent and efficacy of the police power.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; McCray v. United States, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1

Ann. Cas. 561; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; Halter v. Nebraska, 205 U. S. 34, 51 L. ed. 696, 27 Sup. Ct. Rep. 419, 10 Ann. Cas. 525; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; People v. Williams, 189 N. Y. 131, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; People ex rel. Duryea v. Wilber, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626.

Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638.

Mr. Blackburn Esterline also argued the cause for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

A companion case with Nos. 41 and 224 [240 U. S. 342, 369, ante, 679, 691, 36 Sup. Ct. Rep. 370, 379]. It was argued and submitted with those cases and involves the same general questions and the validity of the statute passed upon in No. 224.

A criminal information was filed in the superior court of the state of Washington for the county of King, charging that the United Cigar Stores Company, Inc., a New Jersey corporation, doing business in the state of Washington, owned and conducted a certain store and place of business in the city of Seattle, and had not then or theretofore obtained a separate license from the auditor of the county entitling it at its store and place of business to use or furnish to other persons, etc., to use, in, with, or for the sale of any goods, etc., any stamps, etc., or other similar devices, entitling the purchaser receiving the same to procure from any person, etc., any goods, etc., free of charge or for less than the retail price thereof upon the production of any number of said stamps, etc.

That Pitney (plaintiff in error), at said place of business, [389] well knowing the above facts, did then and there unlawfully, as the manager, servant, and agent of the United Cigar Stores Company, Inc., use and furnish in, with, and in connection with the sale of certain goods, etc., to one John Garvin a certain stamp, etc., of the following tenor:

No. 139,198. Dr.
United Cigar Stores Company (Incorporated).
Certificate.

Cash value at any Profit-Sharing Station in the state of Washington, 1 cent, but average merchandise value, according to profit-sharing list, 2 cents.

This certificate represents a 25-cent purchase, and is redeemable according to the conditions of our profit-sharing list. Ask for a copy of list. Redeemable only by the person to whom originally issued.

United Cigar Stores Company (Incorporated).
Largest Cigar Retailers in the world.

And it was alleged that Garvin received the same.

A demurrer was filed to the information, the grounds of which were, as alleged, that the defendant had not violated any law, that the information failed to state facts sufficient to constitute a crime or misdemeanor, and that it did not charge any offense against the laws of Washington. The demurrer was sustained and the case dismissed. This action was reversed by the supreme court of the state and the cause remanded with directions to overrule the demurrer. 79 Wash. 608, 140 Pac. 918.

Upon the return of the case to the superior court the demurrer was overruled and defendant pleaded guilty. He then moved in arrest of judgment, invoking against the law and sentence under it articles 5 and 8 of the Constitution of the United States and § 1 of the 14th Amendment of that Constitution.

It was stipulated that Pitney, as charged, furnished Garvin a certain stamp, etc., which entitled Garvin to procure from the United Cigar Stores Co., Inc., upon the [390] production of a certain specified number of such stamps, etc., or other similar device, certain goods, etc., free of charge; that the stamp, etc., so delivered to Garvin, was redeemable by the company alone, and entitled him to receive from the company, and from no other, such goods, etc.; that the stamp, etc., was by its terms redeemable in goods, etc., or 1 cent in cash,

at the option of the holder, as provided by the laws of the state of Washington.[1]

Judgment of a fine of $10 and costs was pronounced against him, which was affirmed by the supreme court for the reasons announced in its former opinion. The case was then brought here by writ of error allowed by the chief justice of the state.

The court overruled Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879, in which case it had decided that the law, passed in 1905, prohibiting the use of trading stamps, was unconstitutional, giving as reason that the police power of the state, as expounded and illustrated by the decisions of this court, was legally exercised in the passage of the statute.

The reasons and conclusion of the court are combated [391] by plaintiff in error by the same considerations and arguments that were advanced in Nos. 41 and 224. What we said in answer to them there we need not repeat here, and upon the authority of those cases the judgment of the Supreme Court must be, and it is, affirmed.

GEORGE S. BADDERS, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 391–395.)

Postoffice — power of Congress — offenses — furthering scheme to defraud.

1. The placing of letters in the mail for the purpose of executing a scheme to defraud could be made a criminal offense by Congress, as was done by the provision of the Criminal Code, § 215, although the fraudulent scheme itself may be outside the jurisdiction of Congress.

[For other cases, see Postoffice, VI., in Digest Sup. Ct. 1908.]

Criminal law — cruel and unusual punishment — separate offenses.

2. Making the deposit of each letter placed in the mails for the purpose of executing a scheme to defraud a separate offense punishable by fine and imprisonment, as is done by the United States Criminal Code, § 215, does not render the statute unconstitutional as imposing cruel and unusual punishment and excessive fines.

[For other cases, see Criminal Law, V. b, in Digest Sup. Ct. 1908.]

Grand jury — absence of judge from district — validity of indictment.

3. The absence of the judge from the Federal district during a part of the deliberations of the grand jury does not invalidate the indictment.

[Matters as to grand jury, see Grand Jury, in Digest Sup. Ct. 1908.]

[No. 521.]

Argued February 23 and 24, 1916. Decided March 6, 1916.

IN ERROR to the District Court of the United States for the District of Kansas to review a conviction for placing letters in the mail for the purpose of executing a scheme to defraud. Affirmed.

The facts are stated in the opinion.

Mr. James H. Harkless argued the cause, and, with Messrs. D. R. Hite and Clifford Histed, filed a brief for plaintiff in error:

Section 215 of the Criminal Code as applied to the facts set up in the indictment in this case is not within the grant to Congress of power to establish postoffices and post roads, and to make all laws which shall be necessary and proper for carrying into execution such power.

Lottery Case (Champion v. Ames) 188 U. S. 321, 374, 375, 47 L. ed. 492, 508, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 321; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394.

Interpreted so as to make each letter placed in the mails for the purpose of executing a scheme or artifice, as alleged in the indictment herein, a separate offense, the section is repugnant to the constitutional provision that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

O'Neil v. Vermont, 144 U. S. 337, 341, 36 L. ed. 457, 458, 12 Sup. Ct. Rep. 693.

Where the accused is held under a Fed-

[1] The law of Washington, passed in 1907 (Laws 1907, p. 742), provided:

(§ 1) That no stamps, etc., or other similar device which should entitle the holder thereof to receive from the vendor or indirectly through any other person, money or goods, etc., should be sold or issued unless each of the stamps, etc., should have legibly printed or written upon the face thereof the redeemable value thereof in cents.

(§ 2) That such stamps, etc., should be redeemable in goods, etc., "or in cash, good and lawful money of the United States, at the option of the holder thereof," and any number of such stamps, etc., should be redeemed at the value thereof in cents printed on the face thereof, and it should not be necessary for the holder thereof to have any stipulated number of the same.

(§ 3) That in case of refusal to redeem the stamps, etc., the vendor or such other person should be liable to the holder thereof for the face value thereof.

(§ 4) Violation of the act is made a misdemeanor.

Note.—On cruel and unusual punishment—see notes to State ex rel. Garvey v. Whitaker, 35 L.R.A. 561, and Franklin v. Brown, L.R.A.1915C, 557.

eral indictment which does not substantially state an offense against the laws of the United States, he is deprived of his constitutional right to be informed of the charge against him.

Stewart v. United States, 55 C. C. A. 641, 119 Fed. 89; United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

The statement of facts in that part of the indictment attempting to charge a scheme or artifice is insufficient.

Miller v. United States, 66 C. C. A. 399, 133 Fed. 337; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; United States v. Cruikshank, supra; United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; Naftzger v. United States, 200 Fed. 502; Miller v. United States, 66 C. C. A. 399, 133 Fed. 341; Martin v. United States, 93 C. C. A. 484, 168 Fed. 205; United States v. Watkins, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649; United States v. Post, 113 Fed. 854; People v. Flack, 125 N. Y. 325, 11 L.R.A. 807, 26 N. E. 267; People v. Baker, 96 N. Y. 344; Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912; Whart. Crim. Ev. 10th ed. pp. 901, 906, 1685, 1698, 1771.

The indictment is fatally defective in that it does not state facts showing that the defendant devised any scheme or artifice.

Etheredge v. United States, 108 C. C. A. 356, 186 Fed. 434; United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; Stewart v. United States, supra.

The indictment is fatally defective because it does not charge an intent on the part of the defendant to use the postoffice establishment as a means to effect the alleged scheme or artifice.

Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542.

Plaintiff in error is held to answer for an infamous crime without an indictment of a grand jury, found and presented as required by law.

People v. Rotolo, 61 Misc. 579, 115 N. Y. Supp. 854; Renigar v. United States, 26 L.R.A.(N.S.) 683, 97 C. C. A. 172, 172 Fed. 654, 19 Ann. Cas. 1117; State v. Cox, 28 N. C. (6 Ired. L.) 445.

The defendant was not arraigned as required by law.

Crain v. United States, 162 U. S. 625, 40 L. ed. 1097, 16 Sup. Ct. Rep. 952; State v. Chenier, 32 La. Ann. 103; 1 Bishop, Crim. Proc. § 733.

Assistant Attorney General Wallace argued the cause and filed a brief for defendant in error:

The indictment is sufficient in law.

United States v. Young, 232 U. S. 155, 161, 58 L. ed. 548, 551, 34 Sup. Ct. Rep. 303; United States v. Stever, 222 U. S. 167, 56 L. ed. 145, 32 Sup. Ct. Rep. 51; Brooks v. United States, 76 C. C. A. 581, 146 Fed. 227; United States v. Young, 215 Fed. 267; United States v. Wootten, 29 Fed. 702; United States v. Watson, 35 Fed. 358; Bettman v. United States, 140 C. C. A. 265, 224 Fed. 826, denied in 239 U. S. 642, ante, 482, 36 Sup. Ct. Rep. 163.

The indictment is not duplicitous.

United States v. Ridgway, 199 Fed. 289; Gardes v. United States, 30 C. C. A. 596, 58 U. S. App. 219, 87 Fed. 175; Emanuel v. United States, 116 C. C. A. 137, 196 Fed. 320.

Where an indictment has been regularly returned in open court, the presumption, in the absence of a contrary showing, is that the grand jury, the several court officials, and the court all properly discharged their respective duties.

Carlisle v. United States, 114 C. C. A. 531, 194 Fed. 827.

While it appears that the grand jury was not polled when the indictment was returned, this defect cannot be said to have worked any substantial injury to the defendant, and is cured by the provisions of U. S. Rev. Stat. § 1025, Comp. Stat. 1913, § 1691.

Breese v. United States, 226 U. S. 1, 11, 57 L. ed. 91, 102, 33 Sup. Ct. Rep. 1.

The judge's absence during the deliberations of the grand jury is not prejudicial.

Jones v. United States, 89 C. C. A. 303, 162 Fed. 421, denied in 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685; Com. v. Bannon, 97 Mass. 220; Nealon v. People, 39 Ill. App. 483; People ex rel. Pickard v. Chautauqua, 11 N. Y. Civ. Proc. Rep. 184.

Criminal prosecutions in the Federal courts are governed by Federal, and not by state, statutes.

United States v. Reid, 12 How. 361, 366, 13 L. ed. 1023, 1025; Bucher v. Chesire R. Co. 125 U. S. 555, 582, 31 L. ed. 795, 798, 8 Sup. Ct. Rep. 974; Jones v. United States, 89 C. C. A. 303, 162 Fed. 417, and cases cited.

The record shows that defendant was properly arraigned.

Garland v. Washington, 232 U. S. 642, 647, 58 L. ed. 772, 775, 34 Sup. Ct. Rep. 456; State v. O'Kelley, 258 Mo. 345, 52 L.R.A.(N.S.) 1063, 167 S. W. 980.

Denial of an application for a bill of particulars, a motion to postpone, or a motion for a continuance, is not subject to review

unless there has been a flagrant abuse of discretion. No such abuse is shown.

Dunlop v. United States, 165 U. S. 486, 491, 41 L. ed. 799, 800, 17 Sup. Ct. Rep. 375; Hardy v. United States, 186 U. S. 224, 46 L. ed. 1137, 22 Sup. Ct. Rep. 889; Isaacs v. United States, 159 U. S. 487, 489, 40 L. ed. 229, 230, 16 Sup. Ct. Rep. 51.

The alleged constitutional questions have no merit.

Barrett v. United States, 169 U. S. 218, 42 L. ed. 723, 18 Sup. Ct. Rep. 327; United States v. Young, 232 U. S. 155, 58 L. ed. 548, 34 Sup. Ct. Rep. 303; Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508; Re De Bara, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. Rep. 110; Streep v. United States, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244; Stokes v. United States, 157 U. S. 187, 39 L. ed. 667, 15 Sup. Ct. Rep. 617; Re Henry, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Horner v. United States, 143 U. S. 207, 213, 36 L. ed. 126, 129, 12 Sup. Ct. Rep. 407; Re Rapier, 143 U. S. 110, 133, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; Ebeling v. Morgan, 237 U. S. 625, 631, 59 L. ed. 1151, 1153, 35 Sup. Ct. Rep. 710; Carter v. McClaughry, 183 U. S. 365, 394, 46 L. ed. 236, 250, 22 Sup. Ct. Rep. 181.

Solicitor General Davis also filed a brief for defendant in error:

The power vested in Congress to establish postoffices and post roads authorizes all measures necessary to secure the safe and speedy transmission of the mails and a prompt delivery of their contents, as well as the power to prescribe what should be carried and what should be excluded.

Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877; Re Rapier, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; Public Clearing House v. Coyne, 194 U. S. 497, 506, 48 L. ed. 1092, 1097, 24 Sup. Ct. Rep. 789; Burton v. United States, 202 U. S. 344, 371, 50 L. ed. 1057, 1067, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362. See also United States v. Loring, 91 Fed. 881, 882; Lottery Case (Champion v. Ames) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

The punishment denounced by § 215 is neither cruel nor unusual.

Re Henry, 123 U. S. 372, 374, 31 L. ed. 174, 175, 8 Sup. Ct. Rep. 142; Re De Bara, 179 U. S. 316, 322, 45 L. ed. 207, 210, 21 Sup. Ct. Rep. 110; Durland v. United States, 161 U. S. 306, 315, 40 L. ed. 709, 712, 16 Sup. Ct. Rep. 508; Howard v. Fleming, 191 U. S. 126, 137, 48 L. ed. 121, 125, 24 Sup. Ct. Rep. 49; Hanley v. United States, 62 C. C. A. 561, 127 Fed. 930; Francis v. United States, 81 C. C. A. 407, 152 Fed. 155; Hall v. United States, 81 C. C. A. 562, 152 Fed. 420; United States v. McVickar, 164 Fed. 894; Rinker v. United States, 81 C. C. A. 379, 151 Fed. 755; Jackson v. United States, 42 C. C. A. 452, 102 Fed. 487.

Section 215 does not deprive the accused of his liberty without due process of law.

Missouri Drug Co. v. Wyman, 129 Fed. 623; Re Rapier, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374.

Mr. Justice Holmes delivered the opinion of the court:

The case is brought to this court from the district court under § 238 of the Judicial Code, act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. 1913, § 1215, on the ground that it involves the construction and application of the Constitution of the United States. The plaintiff in error was indicted for placing letters in the mail for the purpose of executing a scheme to defraud devised by him, in violation of § 215 of the Criminal Code, act of March 4, 1909, chap. 321, 35 Stat. at L. 1088, Comp. Stat. 1913, § 10,385. There were twelve counts, on seven of which, each relating to a different letter, he was found guilty. He was sentenced to five year's imprisonment on each count, the periods being concurrent, not cumulative, and also to a fine of $1,000 on each or $7,000 in all. The grounds for coming to this court are, first, that § 215 of the Criminal Code is beyond the power of Congress, as applied to what may be a mere incident of a fraudulent scheme that itself is outside the jurisdiction of Congress to deal with; and second, that if it makes the deposit of each letter a separate offense, subject to such punishment as it received in this case, it imposes cruel and unusual punishment and excessive fines.

These contentions need no extended answer. The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. Ex parte Jackson, 96 U. S. 727, 24 L. ed. 877. Whatever the limits to the power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not. Re Rapier, 143 [394] U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; Public Clearing House v. Coyne, 194 U. S. 497, 507, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; United States v. Stever, 222 U. S. 167, 173, 56 L. ed. 145, 147, 32 Sup. Ct. Rep. 51. See Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim.

Rep. 561; United States v. Holte, 236 U. S. 140, 144, 59 L. ed. 504, 505, L.R.A.1915D, 281, 35 Sup. Ct. Rep. 271. Intent may make an otherwise innocent act criminal, if it is a step in a plot. Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3; Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276. The acts alleged have been found to have been done for the purpose of executing the scheme, and there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them. The whole matter is disposed of by United States v. Young, 232 U. S. 155, 161, 58 L. ed. 548, 551, 34 Sup. Ct. Rep. 303. As to the other point, there is no doubt that the law may make each putting of a letter into the postoffice a separate offense. Ebeling v. Morgan, 237 U. S. 625, 59 L. ed. 1151, 35 Sup. Ct. Rep. 710; Re Henry, 123 U. S. 372, 374, 31 L. ed. 174, 175, 8 Sup. Ct. Rep. 142. And there is no ground for declaring the punishment unconstitutional. Howard v. Fleming, 191 U. S. 126, 135, 48 L. ed. 121, 124, 24 Sup. Ct. Rep. 49; Ebeling v. Morgan, supra.

The other matters discussed are before us only as incident to the constitutional questions upon which the case was brought here. As those questions merely attempt to reopen well established and familiar law, it is not necessary to go beyond them. Brolan v. United States, 236 U. S. 216, 222, 59 L. ed. 544, 549, 35 Sup. Ct. Rep. 285. There is the more reason for declining further consideration in the extravagant and unnecessary multiplication of exceptions and assignments of error that often has been condemned by this court. Central Vermont R. Co. v. White, 238 U. S. 507, 509, 59 L. ed. 1433, 1435, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265. If there were anything in the objections to the indictment, they are not of a kind to involve constitutional rights (Lamar v. United States, 240 U. S. 60, ante, 526, 36 Sup. Ct. Rep. 255), although the argument attempts to give a constitutional turn to them and to other technical complaints, such as that the judge was absent during a part of the deliberations of the grand jury. We find no error in this or the other particulars mentioned in argument. [395] Jones v. United States, 89 C. C. A. 303, 162 Fed. 417, 421, s. c. 212 U. S. 576, 53 L. ed. 657, 29 Sup. Ct. Rep. 685; Com. v. Bannon, 97 Mass. 214, 220. See Breese v. United States, 226 U. S. 1, 11, 57 L. ed. 97, 102, 33 Sup. Ct. Rep. 1. As to the arraignment, see Garland v. Washington, 232 U. S. 642, 646, 647, 58 L. ed. 772, 775, 776, 34 Sup. Ct. Rep. 456. We deem it unnecessary to go into further detail.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY, Yazoo & Mississippi Valley Railroad Company, and J. B. Boothe et al., Their Sureties, Plffs. in Err.,

v.

V. P. MESSINA.

(See S. C. Reporter's ed. 395–398.)

Carriers — free transportation — riding with employee's consent.

Riding upon the tender of an interstate train by permission of the engineer without payment of fare is made unlawful by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 1, as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), under which any common carrier violating the provisions of that statute against free transportation is guilty of a misdemeanor and subject to a penalty, and any person, other than those excepted, who uses such interstate free transportation, is made subject to a like penalty.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 535.]

Argued February 23, 1916. Decided March 6, 1916.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment which affirmed a judgment of the Circuit Court of Holmes County, in that state, in favor of plaintiff in a personal-injury action. Reversed.

See same case below, — Miss. —, 67 So. 963.

The facts are stated in the opinion.

Mr. R. V. Fletcher argued the cause, and, with Messrs. Blewett Lee and Edward Mayes, filed a brief for plaintiffs in error:

Messina was, at the time of the injury, violating a Federal law.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Spencer v. Chicago, M. & St. P. R. Co. 161 Wis. 474, 154 N W. 979; Chicago, I. & L. R. Co. v. United States, 219 U. S. 486, 55 L. ed. 305, 31 Sup. Ct. Rep. 272; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265.

NOTE.—On liability of railway company for injury to person wrongfully on train by collusion with a train employee—see note to St. Louis, I. M. & S. R. Co. v. Jones, 37 L.R.A.(N.S.) 418.

There are very many respectable authorities in the United States and England holding, just as the Mississippi court has held in the McLaurin Case, that no one can recover from a tort feasor, however great the negligence, provided the plaintiff, in proving his case, must establish his own unlawful act.

Western U. Teleg. Co. v. McLaurin, — Miss. —, L.R.A.1915C, 487, 66 So. 739; 1 Cooley, Torts, p. 172; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119; Gulf, C. & S. F. R. Co. v. Johnson, 71 Tex. 619, 1 L.R.A. 730, 9 S. W. 602; Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Bosworth v. Swansey, 10 Met. 363, 43 Am. Dec. 441; James v. Wellston Twp. 13 L.R.A. (N.S.) 1271, note.

Mr. Harry Peyton argued the cause, and Mr. William H. Watkins filed a brief for defendant in error:

Even though the ruling by the Mississippi supreme court as to the applicability of the Hepburn act to the facts of this case should be conceded to be erroneous, still this Federal question is without merit, and the case should be affirmed.

Southern P. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277.

The right of action of the defendant in error, asserted in the court below, was not derived from any contract, and was not deduced from any supposed violation of the Hepburn act. It arose from the obligation created by law, as construed by the state court, not to wilfully and wantonly injure him after consenting, and therefore having knowledge that he was aboard the engine.

Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575.

The violation of the Hepburn act, assuming, for the sake of argument, that the defendant in error here was guilty of such violation, was in no sense the cause of his injury, nor did he have to rely upon such illegal act in order to make out his case. It was only the occasion for his injury by the railroad company's wilful, wanton, and grossly negligent act, as held by the Mississippi supreme court. It was merely a condition, and was not a contributing cause.

Delaware, L. & W. R. Co. v. Trautwein, supra; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, Gil. 110, 18 Am. Rep. 360.

A carrier, in transporting a person in violation of constitutional or statutory provisions, cannot rely upon the violation of such provisions to evade the consequences resulting from personal injury through the negligence of the carrier.

Watson, Damages for Personal Injuries, § 230; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; John v. Northern P. R. Co. 42 Mont. 18, 32 L.R.A.(N.S.) 85, 111 Pac. 632; Gabbert v. Hackett, 135 Wis. 86, 14 L.R.A.(N.S.) 1070, 115 N. W. 345; Bradburn v. Whatcom County R. & Light Co. 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020; Delaware, L. & W. R. Co. v. Trautwein, and Carroll v. Staten Island R. Co. supra. See also Conithan v. Royal Ins. Co. 91 Miss. 386, 18 L.R.A.(N.S.) 214, 124 Am. St. Rep. 701, 45 So. 361, 15 Ann. Cas. 539; Philadelphia & R. R. Co. v. Derby, 14 How. 470, 14 L. ed. 502, 10 Am. Neg. Cas. 602.

The rule that where parties are *in pari delicto* the court will lend its aid to neither is subject to the exception that the rule will not be applied where paramount public interest requires the intervention of the court.

Rideout v. Mars, 99 Miss. 199, 35 L.R.A. (N.S.) 485, 54 So. 801, Ann. Cas. 1913D, 770; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries suffered by the defendant in error while upon a train running from Mississippi to Tennessee. He had paid no fare, but was upon the tender, as he said, by permission of the engineer. The engineer had notice that the water was high between Beatty and Sawyer and over the track at Sawyer. After passing Beatty the train was going at a rate variously put as 35 to 50 or 60 miles an hour when it ran into the water and was thrown from the track. The plaintiff was caught between the tender and a car and sadly hurt.

The plaintiff got a judgment for $10,000, which was sustained by the supreme court. At the trial the jury were instructed that the defendant railroad was presumed to be negligent, and that if the evidence left it doubtful, it was their duty to find full damages for the plaintiff. The judge refused to instruct them that the engineer had no authority to permit the plaintiff to ride on the train "at the place he was in," but the request for this instruction was based upon the company's rules, not upon the act to regulate commerce. The supreme court, however, discussed the act of Congress and held that it did not apply to the case.

By § 1 of the act, as amended by the act of June 29, 1906, chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1913, § 8563, and still

in force, any common carrier violating the provisions against free transportation is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted "who uses any such interstate . . . free transportation" is made subject to a like penalty. No doubt the enactment had somewhat more formal [397] uses especially in view, but we see no reason for limiting the prohibition to them. The word "such" like "said" seems to us to indicate no more than that free transportation had been mentioned before. We cannot think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain free carriage, he would escape the act. We are of opinion therefore that the act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. Western U. Teleg. Co. v. McLaurin, — Miss. —, L.R.A.1915C, 487, 66 So. 739. And although there are expressions in the opinion below that raise a doubt, the fact that the supreme court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed.

Judgment reversed.

Mr. Justice **Hughes**, dissenting:

The supreme court of the state held that the provision of the Federal act was not applicable to this case, and I think that the court was right. Congress did not concern itself with the possibility that prominent persons, or others, might steal a ride through the unauthorized action of some employee of the railroad company. Congress was concerned with the well-known abuse which consisted in the giving of passes, or free transportation, by railroad companies, and it directed its legislation to that abuse. The provision is: "No common carrier subject to the provisions of this act shall, . . . directly or indirectly, *issue* or *give* any interstate free ticket, free pass or free transportation for passengers," except as stated; and [398] that "any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction shall pay . . . a penalty . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty." [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563.] Here, it was found that the engineer had no authority to give any free transportation to the plaintiff, and I cannot but think that in this view the defendant in error was outside the act. The supreme court of the state said: "The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. . . . It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the act of Congress is not directed against acts of the character here involved. [— Miss. —, 67 So. 966.]

I know of no reason for disregarding the finding of the state court as to want of authority in the engineer, and it was on this hypothesis that the court held the Federal provision to be inapplicable. Aside from this ruling, it is not suggested that any Federal question is involved.

I am authorized to say that Mr. Justice McKenna concurs in this dissent.

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[399] POWHATAN E. CAUSEY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 399–403.)

Appeal — review of facts — concurrent findings.

1. Concurrent findings of fact by the master and the two lower courts that a patentee under the homestead laws had agreed that the title when acquired should inure to the benefit of another will not be disturbed by the Federal Supreme Court on appeal unless plainly erroneous.

[For other cases, see Appeal and Error, 4920–4930, in Digest Sup. Ct. 1908.]

Public lands — homestead — acquiring title for another — commutation.

2. An agreement by a homestead entryman that the title when acquired shall inure to the benefit of another disqualifies him from securing title under the commutation provision of the homestead laws by substituting the minimum price of the land for a part of the required five years of residence and cultivation.

[For other cases, see Public Lands, 855–861, in Digest Sup. Ct. 1908.]

Appeal — presumptions — sanction of Attorney General.

3. The sanction of the Attorney General to a suit purporting to be brought in the name and for the benefit of the United States by a bill bearing the signature of the assistant United States attorney for

the district sufficiently appears on appeal where the case was argued on behalf of the government by one of the Assistant Attorneys General, who filed a certified copy of a letter from the Attorney General, authorizing the institution of the suit conformably to a request of the Secretary of the Interior,—especially where it is fairly inferable that the letter was exhibited in the court below.

[For other cases, see Appeal and Error, VIII. d; United States, IV. a, in Digest Sup. Ct. 1908.]

Public lands — suit to annul patent — offer to return consideration.

4. An offer to return the land scrip certificates received by the United States when a commutation homestead entry was made is not a prerequisite to a suit by the government to annul the patent because of an agreement by the entryman that title, when acquired, shall inure to the benefit of another.

[For other cases, see Public Lands, I. i, 3, in Digest Sup. Ct. 1908.]

[No. 197.]

Argued January 26, 1916. Decided March 6, 1916.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Louisiana in a suit to annul a patent for public lands. Affirmed.

See same case below, 121 C. C. A. 663, 203 Fed. 1022.

The facts are stated in the opinion.

Mr. T. Marshall Miller argued the cause and filed a brief for appellant.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for appellee.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit by the United States to recover the title to 157.77 acres of land in Ascension parish, Louisiana, patented to Powhatan E. Causey and by him transferred to James L. Bradford. While the land was yet public, Causey secured a preliminary homestead entry thereof by taking an oath, as was required, that he had not directly or indirectly made, and would not make, any agreement whereby the title which he might acquire would inure in whole or in part to the benefit of another. After the expiration of fourteen months he secured a final entry under the commutation provision of the homestead law by presenting proof that he had not sold or contracted to sell any part of the land, and by paying therefor in so-called scrip at the rate of $1.25 per acre. Pursuant to the final entry the land was patented to him, and he transferred it to Bradford. As grounds for the suit the bill charges that the oath and proof whereby the entries were secured were false in that, when Causey applied for the preliminary entry, he had entered into an agreement with one Wright, a clerk and agent of Bradford, whereby the title when acquired was to be passed to the latter; that both entries were made in pursuance of this unlawful agreement and were therefore fraudulent; and that Bradford took the transfer from Causey under the agreement and with full knowledge of the fraud perpetrated upon the government. It also is alleged that, in virtue of an arrangement with Bradford, Causey is claiming an interest in half of the land. With Bradford's [401] consent a decree was entered against him. Causey answered, denying the unlawful agreement and fraud, and the suit was referred to a master, who found the facts to be as charged in the bill. The findings were sustained by the district court, which entered a decree against Causey, and the decree was affirmed by the circuit court of appeals. 121 C. C. A. 663, 203 Fed. 1022.

Complaint is made of the findings. They were concurred in by the master and both courts, and therefore should be permitted to stand unless shown to be plainly erroneous. Washington Securities Co. v. United States, 234 U. S. 76, 78, 58 L. ed. 1220, 1222, 34 Sup. Ct. Rep. 725; Gilson v. United States, 234 U. S. 380, 383, 58 L. ed. 1361, 1362, 34 Sup. Ct. Rep. 778. Testing them by the evidence, we discover no plain error, but, on the contrary, that they are amply sustained.

That the title was acquired by substituting the minimum price of the land for a part of the required five years of residence and cultivation, as permitted by the commutation provision of the homestead law, is not material, for the agreement to obtain the land for the benefit of another disqualified Causey from acquiring the title in either mode. Bailey v. Sanders, 228 U. S. 603, 608, 57 L. ed. 985, 988, 33 Sup. Ct. Rep. 602; Gilson v. United States, 234 U. S. 380, 384, 58 L. ed. 1361, 1363, 34 Sup. Ct. Rep. 778.

The bill, while purporting to be brought in the name and for the benefit of the United States, and bearing the signature of the assistant United States attorney for the district, does not state or show that it is brought with the sanction of the Attorney General, and because of this it is objected, as it was in both courts below, that the bill should not be entertained, but dismissed. In the absence of a controlling statute, and there is none, it is essential to such a suit that it be brought with the Attorney General's approval; and while the usual and

better practice is to state or show in the bill that it is brought with his approval, this is not indispensable. The case is argued here on behalf of the government by one of the Assistant Attorneys General, who files a certified copy of a letter [402] from the Attorney General, authorizing the institution of the suit conformably to a request of the Secretary of the Interior. This sufficiently meets the objection, especially as it is fairly inferable that the letter was exhibited in the courts below. United States v. Throckmorton, 98 U. S. 61, 70, 25 L. ed. 93, 96; McLaughlin v. United States (Western P. R. Co. v. United States) 107 U. S. 526, 528, 27 L. ed. 621, 2 Sup. Ct. Rep. 802; Mullan v. United States, 118 U. S. 271, 276, 30 L. ed. 170, 172, 6 Sup. Ct. Rep. 1041; United States v. San Jacinto Tin Co. 125 U. S. 273, 278-287, 31 L. ed. 747, 749-752, 8 Sup. Ct. Rep. 850.

The further objection is made that the bill cannot be maintained because it does not contain an offer to return the scrip received when the commuted entry was made. The objection assumes that the suit is upon the same plane as if brought by an individual vendor to annul a sale of land fraudulently induced. But, as this court has said, the government, in disposing of its public lands, does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development, and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 170, 171, 34 L. ed. 640, 644, 11 Sup. Ct. Rep. 57; Heckman v. United States, 224 U. S. 413, 447, 56 L. ed. 820, 833, 32 Sup. Ct. Rep. 424. And see Rev. Stat. § 2362; Comp. Stat. 1913, § 4771; Act June 16, 1880, chap. 244, § 2, 21 Stat. at L. 287, Comp. Stat. 1913, § 4596; [403] Hoffeld v. United States, 186 U. S. 273, 46 L. ed. 1160, 22 Sup. Ct. Rep. 927; United States v. Commonwealth Title Ins. & T. Co. 193 U. S. 651, 48 L. ed. 830, 24 Sup. Ct. Rep. 546; United States v. Colorado Anthracite Co. 225 U. S. 219, 56 L. ed. 1063, 32 Sup. Ct. Rep. 617.

Decree affirmed.

HANOVER STAR MILLING COMPANY, Petitioner,
v.
D. D. METCALF. (No. 23.)

ALLEN & WHEELER COMPANY, Appt. and Petitioner,
v.
HANOVER STAR MILLING COMPANY. (No. 30.)

(See S. C. Reporter's ed. 403-426.)

Trademark — abandonment — nonuser in particular market — estoppel.

1. The first appropriator of the words "Tea Rose" for flour, by confining his use of that trademark to territory north of the Ohio river, with the result that his "Tea Rose" flour is wholly unknown in the southeastern states under that name, loses any right to enjoin the use in Alabama of the same trademark by another flour manufacturer who, in entire good faith and without knowledge of the other trademark, has built up such an extensive trade in the southeastern states that in the flour trade in that territory the mark "Tea Rose" has come to mean its flour and nothing else.

[For other cases, see Trademark, V.; Estoppel, III. b, in Digest Sup. Ct. 1908.]

Unfair competition — imitation of package.

2. A manufacturer of flour who has built up such an extensive trade in the southeastern states for flour labeled "Tea Rose" that in the flour trade in that territory those words have come to mean its flour and nothing else is entitled, irrespective of any question of technical trademark right, to enjoin the sale in Alabama of "Tea Rose" flour made by a rival manufacturer and put up in packages so closely resembling those used by the former that they are calculated to, and do, deceive ordinary and casual purchasers into the belief that they are purchasing its flour.

[For other cases, see Unfair Competition, in Digest Sup. Ct. 1908.]

[Nos. 23 and 30.]

Argued May 7 and 10, 1915. Decided March 6, 1916.

NOTE.—On territorial extent of right in trademark or tradename used in limited locality where used by another in a different locality—see note to Eastern Outfitting Co. v. Manheim, 35 L.R.A.(N.S.) 251, and to case No. 30 in circuit court of appeals, as reported in L.R.A.1916D, 136.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed, with directions to dismiss the bill, a decree of the District Court for the Middle District of Alabama, granting a temporary injunction to restrain infringement of a trademark. Reversed and remanded for further proceedings. Also, an

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the District Court for the Eastern District of Illinois, granting a temporary injunction to restrain the infringement of a trademark. Dismissed for want of jurisdiction. Also,

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the same decree. Affirmed.

See same case below in No. 23, 122 C. C. A. 483, 204 Fed. 211; No. 30, L.R.A.1916D, 136, 125 C. C. A. 515, 208 Fed. 513.

The facts are stated in the opinion.

Messrs. **Henry Fitts** and **Edgar L. Clarkson** argued the cause, and, with Messrs. James E. Morrisette and John London, filed a brief for the Hanover Star Milling Company:

Trademark property is limited to the territory occupied by the trade which is incident to the mark, and the rights in the mark extend only to markets where the trader's goods have become known and identified by the use of the mark.

Hanover Star Mill. Co. v. Allen & W. Co. L.R.A.1916D, 136, 125 C. C. A. 515, 208 Fed. 513; C. A. Briggs Co. v. National Wafer Co. Ann. Cas. 1914C, 932, note; Cohen v. Nagle, 5 Ann. Cas. 561, note; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 Pac. 1014; Corwin v. Daly, 7 Bosw. 222; Lee v. Haley, L. R. 5 Ch. 155, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242; Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552; Tetlow v. Tappan, 85 Fed. 774; Levy v. Waitt, 25 L.R.A. 190, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. 1008; Heublein v. Adams, 125 Fed. 782; Dietz v. Horton Mfg. Co. 96 C. C. A. 41, 170 Fed. 865; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 468; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Goodyear's Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Howe Scale Co. v. Wycoff, Seamans & Benedict, 198 U. S. 118, 49 L. ed. 972, 25 Sup. Ct. Rep. 609; Rathbone v. Champion Steel Range Co. 37 L.R.A.(N.S.) 258, 110 C. C. A. 596, 189 Fed. 26; Thomas G. Carroll & Son Co. v. McIlvaine & Baldwin, 171 Fed. 125.

Messrs. **Edward Everett Longan** and **J. Fred Gilster** argued the cause and filed a brief for D. D. Metcalf:

The exclusive right to the use of the trademark, or device claimed as a trademark, is founded on priority of appropriation; that is to say, the claimant of the trademark must have been the first to use or employ the same on like articles of production.

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581.

The right to the use of a technical trademark extends throughout the jurisdiction of the sovereignty wherein the right is created; and it is immaterial to its exclusive use that the proprietor does not extend his business to a particular locality.

Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Columbia Mill Co. v. Alcorn, supra; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16.

One whose registered trademark is manifestly an imitation of an earlier but unregistered trademark cannot restrain a third party from using it.

Ubeda v. Zialcita, 226 U. S. 452, 57 L. ed. 296, 33 Sup. Ct. Rep. 165.

Messrs. **Edward Everett Longan** and **J. Fred Gilster** argued the cause, and, with Mr. L. O. Whitnel, filed a brief for the Allen & Wheeler Company:

The sole and only function of a technical trademark is to indicate the origin or ownership of the goods to which it is affixed.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Amoskeag Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993.

The real basis of the remedy for infringement of a technical trademark is the exclusive property right in the use of the mark itself.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270.

The inherent characteristic or attribute of a trademark is its exclusiveness; and it

must distinctly indicate origin or ownership.

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828.

The principles of this case have heretofore been decided by this honorable court, in the following cases:

Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Columbia Mill Co. v. Alcorn; Amoskeag Mfg. Co. v. Trainer; and McLean v. Fleming, supra; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 45 L. ed. 60, 21 Sup. Ct. Rep. 7; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16.

The right to the use of a technical trademark extends throughout the jurisdiction of the sovereignty wherein the right is created, and it is immaterial to its exclusive use that the proprietor does not extend his business to a particular locality.

Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170; Browne, Trade-Marks, §§ 47, 324; Paul, Trade-Marks, § 88; Hopkins, Trade-Marks, § 13; Kidd v. Johnson, 100 U. S. 617, 25 L. ed. 769; Metcalf v. Hanover Star Mill. Co. 122 C. C. A. 483, 204 Fed. 211; United Drug Co. v. Theodore Rectanus Co. 206 Fed. 570; Saxlehner v. Eisner & M. Co. 179 U. S. 19–39, 45 L. ed. 60–76, 21 Sup. Ct. Rep. 7; Saxlehner v. Siegel-Cooper Co. 179 U. S. 42, 45 L. ed. 77, 21 Sup. Ct. Rep. 16; Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143; McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828.

The right of action in technical trademarks is based upon the ground that an exclusive property right in the mark is claimed, and the mere use of a close imitation of it by another *ipso facto* creates a cause of action. Unfair competition cases do not necessarily involve the violation of any exclusive right in a trademark, but may arise from the use of marks which are free to everybody. It is true, the results of the infringement in both cases may be identical; that is, injury to the owner and also to the public. However, this similarity in results does not affect the kind and degree of ownership in either.

Cohen v. Nagle, 2 L.R.A.(N.S.) 964, and note, 190 Mass. 4, 76 N. E. 276, 5 Ann. Cas. 553.

Mr. Justice Pitney delivered the opinion of the court:

These cases were argued together, and may be disposed of in a single opinion.

In No. 23, the Hanover Star Milling Company, an Illinois corporation engaged in the manufacture of flour in that state, filed a bill in equity on March 4, 1912, in the United States district court for the middle district of Alabama, against Metcalf, a citizen of the state of Alabama and a merchant engaged in the business of selling flour at Greenville, Butler county, in that state, to restrain alleged trademark infringement and unfair competition. The bill averred that for twenty-seven years last past complainant had been engaged in the manufacture of a superior and popular grade of flour, sold by it at [406] all times under the name of "Tea Rose" flour, in a wrapping with distinctive markings, including the words "Tea Rose" and a design containing three roses imprinted upon labels attached to sacks and barrels; that this flour had been marketed thus by complainant in the state of Alabama for the preceding twelve years, during which time, by maintaining a high and uniform quality, by expensive advertising, and by diligent work of its representatives, it had built up a large and lucrative market, with annual sales of more than $175,000 of Tea Rose flour in that state, and had established a valuable reputation for the name "Tea Rose" and the distinctive wrappings in Alabama and other states, particularly Georgia and Florida; that until shortly before the commencement of the suit complainant's Tea Rose flour was the only flour made, sold, or offered for sale under that name in Butler county or elsewhere in the state of Alabama, and the name "Tea Rose" had represented and stood for complainant's flour; and that recently the Steeleville Milling Company, of Steeleville, Illinois, had, through Metcalf's agency, been marketing in Alabama, and particularly in Butler county, flour of its manufacture, in packages and wrappings substantially identical with complainant's and bearing a design containing three roses and the name "Tea Rose" upon the labels, in a manner calculated to deceive and in fact deceptive to purchasers, thereby threatening pecuniary loss to complainant exceeding $3,000 in amount, and destroying the prestige of complainant's "Tea Rose" flour, and damaging its trade therein.

Defendant's answer denied all attempts to deceive purchasers, and further denied complainant's right to the exclusive use of the words "Tea Rose" or the picture of a rose as a trademark; averred that long prior to complainant's first use of it, and as early as the year 1872, the name had been adopted, appropriated, and used as [407] a trademark for flour by the firm of Allen & Wheeler, of Troy, Ohio, and used by it and its successor, the Allen & Wheeler Company, continuously as such; and alleged that the Steeleville Milling Company had used its "Tea Rose" brand for more than sixteen years last past, and as early as the year

1899 had sold flour in Alabama under that label.

Upon consideration of the bill and answer and affidavits submitted by the respective parties, the district court granted a temporary injunction restraining Metcalf from selling flour labeled "Tea Rose," manufactured by the Steeleville Company or any person, firm, or corporation other than the Hanover Company, at Greenville, or at any other place in the middle district of Alabama. Upon appeal, the circuit court of appeals for the fifth circuit reversed this decree and remanded the cause, with directions to dismiss the bill. 122 C. C. A. 483, 204 Fed. 211. A writ of certiorari was then allowed by this court.

In No. 30, the Allen & Wheeler Company, a corporation of the state of Ohio, manufacturing flour at the city of Troy, in that state, filed a bill against the Hanover Star Milling Company on May 23, 1912, in the United States district court for the eastern district of Illinois, averring that in or before the year 1872 the firm of Allen & Wheeler, then engaged in the manufacture of flour at Troy, adopted as a trademark for designating one of its brands the words "Tea Rose," and from thence until the year 1904 continuously used that trademark by placing it upon sacks, barrels, and packages containing the brand and quality of flour designated by that term and sold throughout the United States; that in 1904 the Allen & Wheeler Company was incorporated and took over the mills, machinery, stock, trademark, and good will of the firm, since which time the corporation had continued to use the trademark upon flour of its manufacture, and had distributed and sold such flour in the markets [408] of the United States, whereby the words "Tea Rose" had become the common-law trademark of the Allen & Wheeler Company; that recently it had learned that the Hanover Star Milling Company had adopted the words "Tea Rose" as designating a brand of flour manufactured by it, and, notwithstanding notice of complainant's rights, was persisting in the sale of its flour under that name and threatening to continue so to do; and that defendant had sold large quantities of Tea Rose flour, particularly in the markets of the states of Alabama, Florida, and Mississippi, with large gross sales, and profits approximating $5,000 per year for the past five years, causing damage and loss to complainant in excess of $3,000. An injunction and an accounting of profits were prayed. Upon this bill, a demurrer filed by the Hanover Company, and affidavits presented by both parties, the district court granted a temporary injunction restraining the use of the words "Tea Rose" as a trademark for flour, without territorial restriction. The circuit court of appeals for the seventh circuit reversed this decree, and remanded the cause to the district court for further proceedings not inconsistent with its opinion. L.R.A.1916D, 136, 125 C. C. A. 515, 208 Fed. 513. An appeal was taken to this court, and a writ of certiorari was subsequently granted. The appeal must be dismissed for want of jurisdiction, and the case will be disposed of under the writ of certiorari.

No question is raised respecting the propriety of passing upon the questions at issue on a review of decisions rendered upon applications for temporary injunction. Both district courts granted such injunctions, and both circuit courts of appeals reversed upon grounds that went to the merits. These courts differed upon fundamental questions, and it was because of this that the writs of certiorari were allowed, the situation being such that it was deemed proper to allow them before final decrees [409] were made, notwithstanding the general rule to the contrary. American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 378, 384, 37 L. ed. 486, 489, 491, 13 Sup. Ct. Rep. 758; The Three Friends, 166 U. S. 1, 49, 41 L. ed. 897, 913, 17 Sup. Ct. Rep. 495; The Conqueror, 166 U. S. 110, 113, 41 L. ed. 937, 939, 17 Sup. Ct. Rep. 510; Denver v. New York Trust Co. 229 U. S. 123, 133, 57 L. ed. 1101, 1120, 33 Sup. Ct. Rep. 657.

In both cases it was shown without dispute that the firm of Allen & Wheeler adopted and used the words "Tea Rose" as a trademark for one kind or quality of flour manufactured by it as early as the year 1872, and continued that use until the year 1904, when the Allen & Wheeler Company was incorporated and took over the mills, machinery, stock, trademark, and good will of the firm and succeeded to its business. But there is nothing to show the extent of such use or the markets reached by it, except that in the year 1872 Allen & Wheeler sold three lots of 25 barrels each to a firm in Cincinnati, Ohio, and one lot of 100 barrels to a firm in Pittsburgh, Pennsylvania; that in the early 70's another firm in Pittsburgh was a customer for this brand; and that in the later 70's a firm in Boston, Massachusetts, was a customer for the same brand. As to the Allen & Wheeler Company, there are affivadits stating in general terms that since its incorporation in 1904, and "continuously down to the present time," the company has used the brand "Tea Rose" for flour; but there is a remarkable absence of particular statements as to time, place, or circumstances; in short, no showing whatever as to the extent of the use or the markets

reached. There is nothing to show that the Allen & Wheeler "Tea Rose" flour has been even advertised in Alabama or the adjoining states, and there is clear and undisputed proof that it has not been sold or offered for sale or known or heard of by the trade in Alabama, Mississippi, or Georgia. In No. 30, there is uncontradicted proof that the Allen & Wheeler Company is selling flour in Alabama and Georgia, but under the brands "Eldean Patent" and "Trojan Special."

[410] In both suits, the Hanover Star Milling Company introduced affidavits fairly showing that shortly after its incorporation in the year 1885 it adopted for one of its brands of flour the name "Tea Rose," and adopted for the package or container, whether sack or barrel, a label bearing the name "Tea Rose" and the design already referred to; and that this trademark was adopted and used in good faith without knowledge or notice that the name "Tea Rose" had been adopted or used by the Allen & Wheeler firm, or by anybody else. In 1904 the Hanover Company began and has since prosecuted a vigorous and expensive campaign of advertising its Tea Rose flour, covering the whole of the state of Alabama, and parts of Mississippi, Georgia, and Florida, employing many ingenious and interesting devices that are detailed in the proofs, with the result that at the commencement of the litigation its sales of Tea Rose flour in these markets amounted to more than $150,000 a year, the Hanover Star Milling Company has come to be known as the Tea Rose mill, the reputation of the mill is bound up with the reputation of Tea Rose flour, and "Tea Rose" in the flour trade in the territory referred to means flour of the Hanover Companys' manufacture. There is nothing to show any present or former competition in Tea Rose flour between the latter company and the Allen & Wheeler firm or corporation, or that either party has even advertised that brand of flour in territory covered by the activities of the other.

Metcalf's purchases of competing Tea Rose flour, which gave rise to the suit brought by the Hanover Company against him, were made from the Steeleville Milling Company, an Illinois corporation, which appears to have adopted the name and design of a tea rose for flour in the year 1895.

It should be added that, so far as appears, none of the parties here concerned has registered the trademark [411] under any act of Congress or under the law of any state. Nor does it appear that in any of the states in question there exists any peculiar local rule, arising from statute or decision. Hence, the cases must be decided according to common-law principles of general application.

Interesting and important questions are raised concerning the territorial extent of trademark rights. In behalf of the Hanover Company it is, in effect, insisted: (a) that the failure of the Allen & Wheeler Company and its predecessors to enter the southeastern territory with their Tea Rose flour, and the fact that such flour has been and is wholly unknown there under that name, disentitle it to interfere with the Hanover Company's trade established in good faith in that territory under the same mark; (b) that the same considerations entitle Hanover to affirmative trademark rights of its own, enforceable against the Steeleville Company and everybody else over whom it has priority in that territory; and (c) that Hanover is entitled to relief against Steeleville and against Metcalf as its agent, upon the ground of unfair competition in trade regardless of the trademark right. An affirmative answer to the first proposition will decide the Allen & Wheeler case (No. 30) in favor of Hanover, and an affirmative answer to the third proposition will decide the Metcalf case (No. 23) in favor of Hanover, irrespective of the disposition that might be made of the second proposition. In view of possible consequences to the rights of parties not before the court, it is desirable to limit the range of our decision as much as practicable, especially as the proofs now before us are incomplete and in some respects unsatisfactory.

It will be convenient to dispose first of No. 30. Here the bill is rested upon alleged trademark infringement, pure and simple, and no question of unfair competition is involved. The decision of the court of appeals for the seventh circuit in favor of the Hanover Company and [412] against the Allen & Wheeler Company was rested upon the ground that although the adoption of the Tea Rose mark by the latter antedated that of the Hanover Company, its only trade, so far as shown, was in territory north of the Ohio river, while the Hanover Company had adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that anybody else was using or had used those words in such a connection, and during many years it had built up and extended its trade in the southeastern territory, comprising Georgia, Florida, Alabama, and Mississippi, so that in the flour trade in that territory the mark "Tea Rose" had come to mean the Hanover Company's flour, and nothing else. The court held in effect that the right to protection in the exclusive use of a trademark extends only to those markets where the trader's goods have b-

come known and identified by his use of the mark; and because of the nonoccupancy by the Allen & Wheeler Company of the southeastern markets it had no ground for relief in equity. Let us test this by reference to general principles.

The redress that is accorded in trademark cases is based upon the party's right to be protected in the good will of a trade or business. The primary and proper function of a trademark is to identify the origin or ownership of the article to which it is affixed. Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy. Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trademarks adopted to maintain and extend it. The essence of the [413] wrong consists in the sale of the goods of one manufacturer or vendor for those of another. Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 322, 20 L. ed. 581, 583; McLean v. Fleming, 96 U. S. 245, 251, 24 L. ed. 828, 830; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 53, 25 L. ed. 993, 994; Menendez v. Holt, 128 U. S. 514, 520, 32 L. ed. 526, 527, 9 Sup. Ct. Rep. 143; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 546, 34 L. ed. 997, 1003, 11 Sup. Ct. Rep. 396.

This essential element is the same in trademark cases as in cases of unfair competition unaccompanied with trademark infringement. In fact, the common law of trademarks is but a part of the broader law of unfair competition. Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 674, 45 L. ed. 365, 379, 21 Sup. Ct. Rep. 270; G. & C. Merriam Co. v. Saalfield, 117 C. C. A. 245, 198 Fed. 369, 372; Cohen v. Nagle, 190 Mass. 4, 8, 15, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 Ann. Cas. 553, 555, 558.

Common-law trademarks, and the right to their exclusive use, are, of course, to be classed among property rights (Trade-Mark Cases, 100 U. S. 82, 92, 93, 25 L. ed. 550, 551); but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trademark is an instrumentality. As was said in the same case (p. 94), the right grows out of use, *not mere adoption*. In the English courts it often has been said that there is no property whatever in a trademark, as such. *Per* Ld. Langdale, M. R., in Perry v. Truefitt, 6 Beav. 73; *per* Vice Chancellor Sir Wm. Page Wood (afterwards Ld. Hatherly), in Collins Co. v. Brown, 3 Kay & J. 423, 426, 3 Jur. N. S. 930, 5 Week. Rep. 676; *per* Ld. Herschell in Reddaway v. Banham [1896] A. C. 199, 209, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193. But since in the same cases the courts recognize the right of the party to the exclusive use of marks adopted to indicate goods of his manufacture, upon the ground that "a man is not to sell his own goods under the pretense that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot therefore be [414] allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person" (6 Beav. 73); it is plain that in denying the right of property in a trademark it was intended only to deny such property right except as appurtenant to an established business or trade in connection with which the mark is used. This is evident from the expressions used in these and other English cases. Thus, in Ainsworth v. Walmsley, L. R. 1 Eq. 518, 524, Vice Chancellor Sir Wm. Page Wood said: "This court has taken upon itself to protect a man in the use of a certain trademark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark."

In short, the trademark is treated as merely a protection for the good will, and not the subject of property except in connection with an existing business. The same rule prevails generally in this country, and is recognized in the decisions of this court already cited. See also Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 18, 20; Levy v. Waitt, 25 L.R.A. 190, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. 1008, 1011; Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed.

468, 471, 475; Congress & E. Spring Co. v. High Rock Congress Spring Co. 57 Barb. 526, 551; Weston v. Ketcham, 51 How. Pr. 455, 456; Candee v. Deere, 54 Ill. 439, 457; Avery v. Meikle, 81 Ky. 73, 86.

[415] Expressions are found in many of the cases to the effect that the exclusive right to the use of a trademark is founded on priority of appropriation. Thus, in Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 323, 20 L. ed. 581, 583, reference is made to "the first appropriator;" in McLean v. Fleming, 96 U. S. 245, 251, 24 L. ed. 828, 830, to "the person who first adopted the stamp;" in Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 53, 25 L. ed. 993, 994, the expression is "any symbol or devise, not previously appropriated, which will distinguish," etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.

Of course, if the symbol or device is already in general use, employed in such a manner that its adoption as an index of source or origin would only produce confusion and mislead the public, it is not susceptible of adoption as a trademark. Such a case was Columbia Mill Co. v. Alcorn, 150 U. S. 460, 464, 37 L. ed. 1144, 1146, 14 Sup. Ct. Rep. 151, affirming 40 Fed. 676, where it appeared that before complainant's adoption of the disputed word as a brand for its flour the same word was used for the like purpose by numerous mills in different parts of the country.

That property in a trademark is not limited in its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs, is true in a limited sense. Into whatever markets the use of a trademark has extended, or its meaning has become [416] known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trademark, good in the markets where it has been employed, can monopolize markets that his trade has never reached, and where the mark signifies not his goods, but those of another. We agree with the court below (L.R.A.1916D, 136, 125 C. C. A. 515, 208 Fed. 519) that "since it is the trade, and not the mark, that is to be protected, a trademark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article."

To say that a trademark right is not limited in its enjoyment by territorial bounds is inconsistent with saying that it extends as far as the sovereignty in which it has been enjoyed. If the territorial bounds of sovereignty do not limit, how can they enlarge such a right? And if the mere adoption and use of a trademark in a limited market shall (without statute) create an exclusive ownership of the mark throughout the bounds of the sovereignty, the question at once arises, "What sovereignty?" So far as the proofs disclose, the Allen & Wheeler mark has not been used at all, is not known at all in a market sense, within the sovereignty of Alabama, or the adjacent states, where the controversy with the Hanover Star Milling Company arose. And so far as the controversy concerns intrastate distribution as distinguished from interstate trade, the subject is not within the sovereign powers of the United States. Trade-Mark Cases, 100 U. S. 82, 93, 25 L. ed. 550, 551.

We are referred to an expression contained in the opinion of this court in Kidd v. Johnson, 100 U. S. 617, 619, 25 L. ed. 769, 770: "The right to use the trademark is not limited to any place, city, or state, and, therefore, must be deemed [417] to extend everywhere." But a reference to the facts of the case, and the context, shows that the language was not used in the sense attributed to it in the argument. The question presented for decision related to the ownership of a trademark used by complainants (Johnson & Company), on packages and barrels containing whisky, manufactured and sold by them in Cincinnati, and this turned in part upon the force to be given to a written transfer executed by one Pike, and delivered to complainant's predecessors in business in connection with a sale of the distillery and its appurtenances, which were Pike's individual property. Kidd, the defendant, claimed the right to use the same mark as surviving partner of a firm of which Pike had been a member. The court, speaking by Mr. Justice Field, said (p. 619): "That transfer was plainly designed to confer whatever right Pike

possessed. It, in terms, extends the use of the trademark to Mills, Johnson, & Company and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trademark would be of no service in distinguishing the whisky of the manufacturer in Cincinnati; and thus the company would lose all the benefit arising from the reputation the whisky there manufactured had acquired in the market. The right to use the trademark is not limited to any place, city, or state, and, therefore, must be deemed to extend everywhere." This does not import that the trademark right assigned was greater in extent than the trade in which it was used. The record in the case showed that complainant's trade had been extended to New Orleans, and the controversy arose out of sales made there by defendants as licensees of Kidd. It was admitted in the answer that they had sold whisky in competition with that of complainants at New Orleans, and under the same trademark, and the case was by stipulation treated as a test case to settle whether Johnson & Company or Kidd had the [418] exclusive right, or whether they had a joint right, to the use of the mark.

We are also referred to Derringer v. Plate, 29 Cal. 292, 295, 87 Am. Dec. 170, in which it was said by the court: "The manufacturer at Philadelphia who has adopted and uses a trademark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture." In that case plaintiff averred that he was a resident of Philadelphia, and upwards of thirty years before the action invented a pistol and adopted as a trademark for it the words "Derringer, Philadel.," which was and ever since had been his trademark, and which he had caused to be stamped on the breech of all pistols manufactured and sold by him; and that the defendant since 1858 had been engaged in the manufacture of pistols at San Francisco similar to plaintiff's, on the breech of which he had stamped plaintiff's trademark, etc. The report of the case shows (p. 294) that the only question presented was whether the California statute of 1863 concerning trademarks had repealed or abrogated the remedies afforded by the common law in trademark cases. This was answered in the negative, and in the course of the reasoning the court said, p. 295: "The right is not limited in its enjoyment by territorial bounds, but, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same, the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs;" continuing with what we have first quoted. Although not expressly stated, it is implicit in the report that plaintiff's pistols were on the market in San Francisco, and his trademark known there and imitated by defendant for that very reason. It was such a mark as could not be accidentally hit upon.

It results from the general principles thus far discussed that trademark rights, like others that rest in user, may [419] be lost by abandonment, nonuser, laches, or acquiescence. Abandonment, in the strict sense, rests upon an intent to abandon; and we have no purpose to qualify the authority of Saxlehner v. Eisner & M. Co. 179 U. S. 19, 31, 45 L. ed. 60, 73, 21 Sup. Ct. Rep. 7, to that effect. As to laches and acquiescence, it has been repeatedly held, in cases where defendants acted fraudulently or with knowledge of plaintiffs' rights, that relief by injunction would be accorded although an accounting of profits should be denied. McLean v. Fleming, 96 U. S. 245, 257, 24 L. ed. 828, 833; Menendez v. Holt, 128 U. S. 514, 523, 32 L. ed. 526, 528, 9 Sup. Ct. Rep. 143; Saxlehner v. Eisner & M. Co. 179 U. S. 19, 39, 45 L. ed. 60, 76, 21 Sup. Ct. Rep. 7. So much must be regarded as settled. But cases differ according to their circumstances, and neither of those cited is in point with the present. Allowing to the Allen & Wheeler firm and corporation the utmost that the proofs disclose in their favor, they have confined their use of the "Tea Rose" trademark to a limited territory, leaving the southeastern states untouched. Even if they did not know—and it does not appear that they did know—that the Hanover Company was doing so, they must be held to have taken the risk that some innocent party might, during their forty years of inactivity, hit upon the same mark and expend money and effort in building up a trade in flour under it. If, during the long period that has elapsed since the last specified sale of Allen & Wheeler "Tea Rose"—this was "in the later 70's"—that flour has been sold in other parts of the United States, excluding the southeastern states, no clearer evidence of abandonment by nonuser of trademark rights in the latter field could reasonably be asked for. And when it appears, as it does, that the Hanover Company in good faith and without notice of the Allen & Wheeler mark has expended much money and effort in building up its trade in the southeastern market, so that "Tea Rose" there means Hanover Company's flour and nothing else, the Allen & Wheeler Company is estopped to assert trademark infringement as to that territory.

[420] The extent and character of that territory, and its remoteness from that in which the Allen & Wheeler mark is known, are circumstances to be considered. Alabama alone—to say nothing of the other states in question—has an area of over 50,000 square miles, and by the census of 1910 contained a population of more than 2,000,000. Its most northerly point is more than 250 miles south of Cincinnati, which is the nearest point at which sales of Allen & Wheeler "Tea Rose" are shown to have been made, and these at a time antedating by approximately forty years the commencement of the present controversy. We are not dealing with a case where the junior appropriation of a trademark is occupying territory that would probably be reached by the prior user in the natural expansion of his trade, and need pass no judgment upon such a case. Under the circumstances that are here presented, to permit the Allen & Wheeler Company to use the mark in Alabama, to the exclusion of the Hanover Company, would take the trade and good will of the latter company—built up at much expense and without notice of the former's rights—and confer it upon the former, to the complete perversion of the proper theory of trademark rights.

The case is peculiar in its facts; and we have found none precisely like it. The recent case of Theodore Rectanus Co. v. United Drug Co. (C. C. A. 6th C.) 226 Fed. 545, 549, 553, is closely analogous.

We come now to No. 23. The court of appeals (122 C. C. A. 483, 204 Fed. 211) denied relief to the Hanover Company against Metcalf under the head of trademark infringement partly upon the ground that Allen & Wheeler were the first appropriators of the mark, and that it had been continuously used by that firm and its successor down to the time of the suit, but principally upon the ground that, irrespective of whether this use was so general or continuous as to exclude other appropriations, the evidence [421] showed a use of the same brand by the Steeleville Company commencing in the year 1895, and carried on in the states of Illinois, Tennessee, Indiana, Arkansas, and Mississippi, with occasional shipments into Alabama,—a use so extensive and continuous as to exclude the claim of the Hanover Company to either first appropriation or exclusive use in any of the territory from which it sought to expel Metcalf; and that "the Steeleville Milling Company's first use and its extensive and continuous use established by the evidence in the territory of its selection gave it the unqualified right to extend unhampered its trade in flour under the Tea Rose brand into any part of the United States, and that, too, without incurring the legal odium of unfair competition." Relief under the head of unfair competition was denied upon the ground that the Hanover Company had not clearly shown that it had established by prior adoption the exclusive right to dress its goods in the manner claimed.

Upon the question of trademark rights as between the Hanover and the Steeleville companies (leaving Allen & Wheeler out of the question), the proofs are somewhat conflicting. There is evidence that Hanover's use of the Tea Rose brand antedated the year 1893, and probably began as early as 1886. The extent and particulars of such use, prior to the year 1903, are not made to appear. On the other hand, Steeleville appears to have adopted the brand in the year 1895, and used it in trade in Illinois, Tennessee, Mississippi, Louisiana, and Arkansas; the extent and particulars of the use not being shown. Sharp competition appears to have been carried on between the two companies in selling flour under the Tea Rose brand at Meridian, Mississippi, in the years 1903 to 1905, with the result that the Hanover Company, claiming that its use of the mark for flour had antedated that of the Steeleville Company, succeeded in obtaining a favorable decision in an informal arbitration by officials of the Millers [422] National Federation; and for this or some other reason Steeleville appears to have retired and left the Hanover Company in complete control of the Meridian market. Aside from the business done by the Steeleville Company at Meridian, there is no proof of business done by it in the southeastern states, except that it made an isolated sale of Tea Rose flour to a merchant at Whistler, Alabama, in the year 1899, the quantity not stated, and two isolated sales, involving a small quantity in each case, one to a retailer in Tupelo, Mississippi, in the year 1910, the other to a retailer in West Point, Mississippi, in January, 1912.

As we regard the proofs, they do not sustain the view of the circuit court of appeals for the fifth circuit either as to first use or as to extensive, continuous, or exclusive use of the Tea Rose brand by the Steeleville Company, and there is nothing in the history of the use of the brand in the disputed territory to deprive the Hanover Company of its right to be protected at least against unfair competition at the hands of the Steeleville Company or of Metcalf as its representative.

That there was such unfair competition, commenced by Metcalf shortly before the bringing of the suit, the proofs clearly show. Repeating that since the year 1904 the Hanover Company had extensively advertised its Tea Rose flour throughout the state of Ala-

bama and parts of Mississippi, Georgia, and Florida, with the result that its sales of that flour in those markets amounted to more than $150,000 a year, while the Hanover Star Milling Company had come to be known as the Tea Rose mill, and the words "Tea Rose" in the flour trade in that territory meant flour of the Hanover Company's manufacture and nothing else, and that, except for isolated sales in Mississippi in 1910 and 1912, already mentioned, no Tea Rose flour other than that of the Hanover Company had been sold in that territory for a number of [423] years, it further should be stated that Hanover Tea Rose was distributed in Butler County and adjoining counties, in Alabama by the McMullan Grocery Company, whose place of business was at Greenville. They had built up a large trade for this flour in Butler county and the neighboring counties of Conecuh, Covington, Lowndes, and Crenshaw. The McMullan Company had the exclusive sale of the Hanover Company's Tea Rose flour, so that Metcalf, who likewise did business at Greenville, was unable to procure it for distribution to his customers. A short time before the suit was commenced, however, he announced to the public and the trade in Butler county that he had secured Tea Rose flour, and on receiving a consignment from the Steeleville Company, which was labeled "Tea Rose" and put up in packages closely resembling those used by the Hanover Company,—so closely that, according to the undisputed evidence, they are "calculated to and do in fact deceive the ordinary and casual purchaser of flour into the belief that he is purchasing the article of that name manufactured by the said Hanover Star Milling Company,"—Metcalf put large banners on his mules and dray, advertising to the public that he had received a shipment of Tea Rose flour, and that it was "Steeleville Milling Company's Tea Rose flour, best quality." Metcalf and his traveling salesman who marketed the greater part of this consignment, and several parties who purchased it in lots of from one to ten barrels, deposed that it was not sold under a representation that it was manufactured by the Hanover Company, but, on the contrary, that it was Tea Rose flour manufactured by the Steeleville Milling Company. But Metcalf's purpose to take advantage of the reputation of the Hanover Company's Tea Rose flour is so manifest, and the tendency of the similarity of the brand and accompanying design, and of the make-up of the packages, to mislead ultimate consumers, is so evident, that it seems to [424] us a case of unfair competition is made out. The circumstances strongly indicate a fraudulent intent to palm off the Steeleville Tea Rose flour upon customers as being the same as the Tea Rose flour made by complainant, the reputation of which is shown to be so well established. The mere substitution of "Steeleville" in the place of "Hanover" on the labels is not convincing either that the intent is innocent or that the result will be innocuous, since it is accompanied with the words "Tea Rose" (shown to have acquired a secondary meaning), and with the distinctive wrapping, both indicative in that market of complainant's flour. Complainant is thus shown to be entitled to an injunction against Metcalf, irrespective of its claim to affirmative trademark rights in that territory. Coats v. Merrick Thread Co. 149 U. S. 562, 566, 37 L. ed. 847, 850, 13 Sup. Ct. Rep. 966; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 674, 45 L. ed. 365, 379, 21 Sup. Ct. Rep. 270. Adjudication of the latter claim may be made, if necessary, upon final hearing, when the proofs will presumably be more complete than they now are.

It results that the decree under review in No. 23 should be reversed, and the cause remanded for further proceedings in conformity with this opinion, and that the decree in No. 30 should be affirmed.

Decree in No. 23 reversed.

Appeal in No. 30 dismissed.

Decree in No. 30 affirmed.

Mr. Justice Holmes, concurring:

I am disposed to agree that the decree dismissing the bill of the Hanover Star Milling Company should be reversed and that the decree denying a preliminary injunction to the Allen & Wheeler Company should be affirmed, and I agree in the main with the reasoning of the court, so far as it goes. But I think it necessary to go farther even on the assumption that we are dealing with [425] the question of trademarks in the several states only so far as commerce among the states is not concerned. The question before us, on that assumption, is a question of state law, since the rights that we are considering are conferred by the sovereignty of the state in which they are acquired. This seems to be too obvious to need the citation of authority, but it is a necessary corollary of the Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550. Those cases decided that Congress cannot deal with trademarks as used in commerce wholly between citizens of the same state. It follows that the states can deal with them, as in fact they sometimes do by statute (Mass. Rev. Laws, chap. 72, §§ 2, 3), and when not by statute by their common law.

As the common law of the several states has the same origin for the most part, and as their law concerning trademarks and un-

fair competition is the same in its general features, it is natural and very generally correct to say that trademarks acknowledge no territorial limits. But it never should be forgotten, and in this case it is important to remember, that when a trademark started in one state is recognized in another it is by the authority of a new sovereignty that gives its sanction to the right. The new sovereignty is not a passive figurehead. It creates the right within its jurisdiction, and what it creates it may condition, as by requiring the mark to be recorded, or it may deny. The question, then, is what is the common law of Alabama in cases like these. It appears to me that if a mark previously unknown in that state has been used and given a reputation there, the state well may say that those who have spent their money innocently in giving it its local value are not to be defeated by proof that others have used the mark earlier in another jurisdiction more or less remote. Until I am compelled to adopt a different view I shall assume that that is the common law of the state. It appears to me that the foundation of the right as stated by the court requires that conclusion. See, [426] further, Chadwick v. Covell, 151 Mass. 190, 193, 194, 6 L.R.A. 839, 21 Am. St. Rep. 442, 23 N. E. 1068. Those who have used the mark within the state are those who will be defrauded if another can come in and reap the reward of their efforts on the strength of a use elsewhere over which Alabama has no control.

I think state lines, speaking always of matters outside the authority of Congress, are important in another way. I do not believe that a trademark established in Chicago could be used by a competitor in some other part of Illinois on the ground that it was not known there. I think that if it is good in one part of the state, it is good in all. But when it seeks to pass state lines, it may find itself limited by what has been done under the sanction of a power co-ordinate with that of Illinois and paramount over the territory concerned. If this view be adopted we get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them. We have sharp lines drawn upon the fundamental consideration of the jurisdiction originating the right. In most cases the change of jurisdiction will not be important because the new law will take up and apply the same principles as the old; but when, as here, justice to its own people requires a state to set a limit, it may do so, and this court cannot pronounce its action wrong.

60 L. ed.

[427] JOHN E. EATON, Trustee in Bankruptcy of the Estate of Fannie Leighton Luke, Plff. in Err.,

v.

BOSTON SAFE DEPOSIT & TRUST COMPANY, Trustee under the Will of John W. Leighton, Deceased, and Fannie Leighton Luke.

(See S. C. Reporter's ed. 427-429.)

Bankruptcy — assets — spendthrift trust.

The equitable life interest of the beneficiary in a trust created by a bequest of a fund to a trustee to pay the entire net income thereof to the beneficiary for life "free from the interference or control of her creditors" did not pass to her trustee in bankruptcy, under the bankrupt act of July 1, 1898 (30 Stat. at L. 566, chap. 541, Comp. Stat. 1913, § 9654), § 70a (5), vesting in the trustee all property that the bankrupt "could by any means have transferred," where the local law treats such restrictions against interference or control by creditors as limiting the character of the equitable property, and inherent in it.

[For other cases, see Bankruptcy, VI. a, in Digest Sup. Ct. 1908.]

[No. 466.]

Submitted February 28, 1916. Decided March 13, 1916.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a judgment which, on a petition by a testamentary trustee for instructions, adjudged that the equitable life interest of the *cestui que trust* did not pass to her trustee in bankruptcy. Affirmed.

See same case below, 220 Mass. 484, L.R.A. —, —, 108 N. E. 64.

The facts are stated in the opinion.

Mr. Gilbert E. Kemp submitted the cause for plaintiff in error.

The life estate of the bankrupt was of such a character as to pass to the trustee in bankruptcy.

Collier, Bankr. 10th ed. 1914, pp. 1004, 1005; 1 Loveland, Bankr. p. 823; Clark v. Williams, 190 Mass. 219, 76 N. E. 723; Remington, Bankr. 2d ed. §§ 966, 972; Re Jersey Island Packing Co. 2 L.R.A.(N.S.) 560, 71 C. C. A. 75, 138 Fed. 625.

The trustee in bankruptcy is not a creditor.

Masten v. Amerman, 51 Hun, 244, 4 N. Y. Supp. 681; Collier, Bankr. 10th ed. pp. 1002, 1003; Cowan v. Burchfield, 180 Fed. 614; Re Rodgers, 60 C. C. A. 567, 125 Fed. 169; Re Burnett, 201 Fed. 162; Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. ed. 418, 30 Sup. Ct. Rep. 368; Thompson v. Fairbanks

196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

Courts have not the power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute.

Re Gerber, 108 C. C. A. 511, 186 Fed. 693; Remington, Bankr. 2d ed. 1077.

So far as the effect of the decision of the Massachusetts court in the case at bar is considered as establishing a rule of property, it should be borne in mind that this decision was given contrary to the express terms of, and during the operation of, the present bankrupt law; and under such circumstances a new rule of property cannot be created.

Re Gerber, supra.

The state court has not construed the provisions of any exemption law of the state. It has merely asserted what it regards as a declaration or principle of law. This court is not bound, however, by rules of procedure, to follow the state court's decision.

Remington, Bankr. 2d ed. § 1043; Page v. Edmunds, 187 U. S. 596, 47 L. ed. 318, 23 Sup. Ct. Rep. 200; Re Gerber, supra.

The rights of a bankrupt to property as exempt are those given him by the state statutes.

Smalley v. Laugenour, 196 U. S. 93, 97, 49 L. ed. 400, 401, 25 Sup. Ct. Rep. 216; Richardson v. Woodward, 44 C. C. A. 235, 104 Fed. 873.

Mr. Raymond H. Oveson submitted the cause for defendants in error. Messrs. Alexander Kendall and Matthew Hale were on the brief:

It is settled law in Massachusetts that a donor may, in creating an equitable estate, carve out and create such equitable rights in property as his fancy may dictate, without regard to the rights appertaining to the several estates known to the law. He may give a qualified interest, and the cestui que trust acquires no interest other than the strictly limited one created by the terms of the trust.

Dunn v. Dobson, 198 Mass. 142, 84 N. E. 327; Hale v. Bowler, 215 Mass. 354, 102 N. E. 415.

As a result of the recognition of such a power in a donor, the doctrine of spendthrift trusts has developed in Massachusetts and in almost every other state. Under this doctrine it is competent for a settlor to create a trust estate for the life of the cestui que trust, with a proviso that the said interest of the cestui que trust shall be beyond the control of creditors. The question of whether a spendthrift trust is created depends solely upon the testator's intent. If such an intent is shown, such a trust is at once created.

Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Nickerson v. Van Horn, 181 Mass. 562, 64 N. E. 204; Baker v. Brown, 146 Mass. 371, 15 N. E. 783; Sanger v. Bourke, 209 Mass. 481, 486, 95 N. E. 894.

No particular terms or technical language is necessary.

Baker v. Brown, 146 Mass. 371, 15 N. E. 783; Berry v. Dunham, 202 Mass. 139, 88 N. E. 904.

The estate in question in this case is a spendthrift trust. As such, it has all the incidents of this limited estate; for example:

(1) It cannot be appropriated by creditors.

Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504.

(2) It cannot be reached by an assignee in insolvency.

Billings v. Marsh, 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000.

(3) It does not pass to a trustee in bankruptcy.

Spindle v. Shreve, 9 Biss. 199, 4 Fed. 136; Re McKay, 143 Fed. 671; Munroe v. Dewey, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340.

That an equitable estate can be created that will be free from the interference or control of creditors is set forth in the following cases:

Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; Hyde v. Woods, 94 U. S. 523, 24 L. ed. 264; Potter v. Couch, 141 U. S. 296, 318, 35 L. ed. 721, 733, 11 Sup. Ct. Rep. 1005; Shelton v. King, 229 U. S. 90, 57 L. ed. 1086, 33 Sup. Ct. Rep. 686.

It is clear that § 70a of the bankruptcy act provides that the trustee of the bankrupt shall be vested with the title of the bankrupt, except in so far as it is to property over which his creditors have no control. What part of his property is withdrawn from the reach of creditors is a question of the law of the state having jurisdiction,—in this case, Massachusetts.

Re McKay, supra; Nichol v. Levy, 5 Wall. 433, 18 L. ed. 596; Spindle v. Shreve, 111 U. S. 542, 28 L. ed. 512, 4 Sup. Ct. Rep. 522.

The Federal act introduces no new class of creditors, nor does it give to creditors any greater rights against the property of the debtor than they have under the state law, except in cases of preferences and fraudulent conveyances.

Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857; Re Cohn, 171 Fed. 568; Holden v. Stratton, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; Norcross v. Nathan, 99 Fed. 414.

Courts of other states which have developed the doctrine of spendthrift trusts along the same lines as Massachusetts has, hold that such an estate is not assignable, even though that is not expressly stipulated, as that would prevent the object of the testator from being carried out.

Bennett v. Bennett, 217 Ill. 434, 4 L.R.A. (N.S.) 470, 75 N. E. 339; Re Mehaffey, 139 Pa. 276, 20 Atl. 1056.

To give the beneficiary power to assign her interest would necessitate the implication of the power on her part to defeat the purpose clearly expressed in the will.

Perkins v. Hays, 3 Gray, 410.

Even had the testator provided that the interest of the cestui que trust was to be assignable by her voluntary act, as well as being beyond the control of creditors, then if these are inconsistent, and if it must be nonassignable in order to be beyond the reach of creditors, the court would have to pick out one of these objects and sacrifice the other.

Malcolm v. Malcolm, 3 Cush. 472.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill for instructions, brought by the Trust Company, the principal defendant in error, to ascertain whether a fund bequeathed to it in trust for Mrs. Luke, [428] co-defendant in error, passed to her trustee in bankruptcy. The bequest was of $75,000, "The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline, during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least three thousand dollars a year during her life, said income to be free from the interference or control of her creditors." It is established law in Massachusetts that such trusts are valid and effective against creditors (Broadway Nat. Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504), and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy (Billings v. Marsh, 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000; Munroe v. Dewey, 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340). The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the supreme court of the state to be assignable, and that therefore it passed under § 70 a (5) of the bankruptcy act, vesting in the trustee all property that the bankrupt "could by any means have transferred." [30 Stat. at L. 566, chap. 541, Comp. Stat. 1913, § 9654.] The supreme judicial court, however, held that the above-cited cases governed, and that the property did not pass. 220 Mass. 484, L.R.A. —, —, 108 N. E. 64.

If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass. There would be an analogy at least with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit, § 70 a (3), and there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the [429] fund was assignable was based on two cases, and we presume was meant to go on farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. Ames v. Clarke, 106 Mass. 573. The other case does not go beyond a dictum that carries the principle no farther. Huntress v. Allen, 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether, if that power were absolute, the restriction still should be upheld, as in case of a statutory exemption that leaves the bankrupt free to convey his rights, it is unnecessary to decide.

The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. Dunn v. Dobson, 198 Mass. 142, 140, 84 N. E. 327; Lathrop v. Merrill, 207 Mass. 6, 9, 92 N. E. 1019. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases (Page v. Edmunds, 187 U. S. 596, 602, 47 L. ed. 318, 321, 23 Sup. Ct. Rep. 200), it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here (Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254; Shelton v. King, 229 U. S. 90, 99, 57 L. ed. 1086, 1089, 33 Sup. Ct. Rep. 686). The policy of the bankruptcy act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they

yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule.

Decree affirmed.

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[430] WALTER J. CAREY, Appt.,
v.
E. REEDER DONOHUE, Trustee in Bankruptcy of John E. Humphreys and Harriet A. Humphreys.

(See S. C. Reporter's ed. 430–438.)

Bankruptcy — preferential transfers — computing four months' period — when is recording "required."

The recording of a conveyance by an insolvent is not "required" by law, within the meaning of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 562, chap. 541), § 60a, as amended by the act of February 5, 1903 (32 Stat. at L. 799, chap. 487), and § 60b, as amended by the act of June 25, 1910 (36 Stat. at L. 842, chap. 412, Comp. Stat. 1913, § 9644), avoiding preferential transfers by an insolvent recorded or registered within four months before the bankruptcy proceedings are begun, if by law recording or registering is required, where, under the applicable local law (Ohio Gen. Code, § 8543), the failure to record a deed does not render it invalid as to the grantor's creditors, but only as to subsequent bona fide purchasers without notice.

[For other cases, see Bankruptcy, 214–222, in Digest Sup. Ct. 1908.]

[No. 179.]

Argued January 17, 1916. Decided March 13, 1916.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which, on a second appeal, affirmed a decree of the District Court for the Southern District of Ohio, setting aside in favor of a trustee in bankruptcy a conveyance made by the bankrupt. Reversed and remanded for further proceedings.

See same case below on first appeal, 126 C. C. A. 254, 209 Fed. 328; on second appeal, 129 C. C. A. 664, 213 Fed. 1021.

The facts are stated in the opinion.

Mr. Morison R. Waite argued the cause, and, with Mr. John Randolph Schindel, filed a brief for appellant:

In Ohio a deed is good, although unrecorded, against all except bona fide purchasers without notice.

Irvin v. Smith, 17 Ohio, 226; Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Kemper v. Campbell, 44 Ohio St. 210, 6 N. E. 566; Blackburn v. Blackburn, 8 Ohio, 81.

Congress, in enacting §§ 60a and 60b of the bankruptcy act must have had in mind the status given to a trustee in bankruptcy by § 47a, cl. 2, and meant that those instruments were by law required to be recorded or registered which would otherwise be unavailing against the trustee in bankruptcy having that status.

Re Hunt, 139 Fed. 283; Little v. Holley-Brooks Hardware Co. 67 C. C. A. 46, 133 Fed. 874; Meyer Bros. Drug Co. v. Pipkin Drug Co. 69 C. C. A. 240, 136 Fed. 396; Re McIntosh, 80 C. C. A. 250, 150 Fed. 546; Re Boyd, 130 C. C. A. 288, 213 Fed. 774; Rydberg v. Smith, 110 C. C. A. 68, 188 Fed. 196; Re Klein, 116 C. C. A. 603, 197 Fed. 241; Re Mosher, 224 Fed. 739.

Mr. E. R. Donohue argued the cause, and, with Messrs. David Davis and W. G. Durrell, filed a brief for appellees:

Failure by Carey from August 6, 1910, to November 15, 1910, to record the deed, was, of itself, so far as the creditors of the bankrupt are concerned, fraudulent.

Clayton v. Exchange Bank, 57 C. C. A. 656, 121 Fed. 630, 191 U. S. 567, 48 L. ed. 305, 24 Sup. Ct. Rep. 840.

The question at bar is one that has been before the courts in numerous cases in the several districts of the United States, and the following cases are to the point and sustain the contention of the trustee:

Re Beckhaus, 100 C. C. A. 561, 177 Fed. 141; Loeser v. Savings Deposit Bank & T. Co. 18 L.R.A.(N.S.) 1233, 78 C. C. A. 597, 148 Fed. 975; English v. Ross, 140 Fed. 630; Ragan v. Donovan, 189 Fed. 138; Mattley v. Giesler, 110 C. C. A. 90, 187 Fed. 970; Dulany v. Morse, 39 App. D. C. 523; First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33; Carey v. Donohue, 126 C. C. A. 254, 209 Fed. 328.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt of certain real estate. Upon appeal from a decree in favor of the

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NOTE.—When the local law is deemed to require the registering or recording of a transfer, within the meaning of § 60a of the bankruptcy act.

The decision in CAREY v. DONOHUE settles this hitherto mooted question by rejecting the view taken by the circuit courts of appeals for the sixth, seventh and eighth circuits in favor of that reached in the second, fifth and ninth circuits. A full discussion of the opposing cases may be found in the notes to First Nat. Bank v. Connett, 5 L.R.A.(N.S.) 148, and Loeser v. Savings Deposit Bank & T. Co. 18 L.R.A.(N.S.) 1233.

trustee, it was held by the circuit court of appeals that the case had been tried, and the decree was based, upon the theory of preference voidable under the bankruptcy act, and for the purpose of appropriate amendment to conform the bill to the proof, the decree was reversed and the cause was remanded. 126 C. C. A. 254, 209 Fed. 328. The amendment was made accordingly, and the decree was re-entered and affirmed. 129 C. C. A. 664, 213 Fed. 1021.

The petition in involuntary bankruptcy was filed on January 3, 1911, and the adjudication was had on January 24, 1911. The following facts appear from the findings: On August 6, 1910, John E. Humphreys (the bankrupt) executed and delivered to Walter J. Carey (the appellant) the deed in question. It was left for record on November 15, 1910, with the recording officer of the proper county, and was recorded. Humphreys was insolvent at the time of the execution of the deed, and Carey at that time had reasonable cause to believe that such transfer to him, if made, would effect a preference, being given in payment of an antecedent debt. On December 31, 1910, Carey conveyed the property to innocent purchasers, this deed being left for record on January 3, 1911. It was held that the latter conveyance placed the property itself beyond the reach of the court; and judgment was given in favor of the trustee and against Carey for the [432] value of the property as found by a jury, with provision for the payment by the trustee to the wife of the bankrupt of the estimated value of her inchoate right of dower.

We are not concerned with the provisions of the Ohio statute relating to preferences (General Code, §§ 11,104, 11,105),—a statute which provides a different test of liability from that of § 60[1] of the Federal act pursuant to which the recovery was had. (126 C. C. A. 254, 209 Fed. pp. 331, 332.) The sole question presented for the consideration of this court is whether the deed executed by the bankrupt was one which was "required" to be recorded within the meaning of this section. If it was not, there could be no recovery of the property under § 60, as the deed was [433] executed and delivered more than four months before the petition in bankruptcy was filed. If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover, as the recording was within the four months' period and the other conditions of recovery were satisfied.

The provision for the recording of the deed is found in § 8543 of the General Code of Ohio, which follows the requirement for the recording of mortgages and powers of attorney. The section reads:

"Section 8543. All other deeds and instruments of writing for the conveyance or encumbrance of lands, tenements, or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

Referring to this section, the supreme court of Ohio said in Dow v. Union Nat. Bank, 87 Ohio St. 173, 181, 100 N. E. 328: "This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record, and there being mere neglect, unaccompanied by any fraudulent conduct or representation on the part of the grantee, no right can accrue to anyone

[1] The applicable provisions of § 60 are as follows:

"Sec. 60. Preferred Creditors—a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. [32 Stat. at L. 799, 800, chap. 487, § 13, Comp. Stat. 1913, § 9644.]

"b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." [36 Stat. at L. 842, chap. 412, § 11, Comp. Stat. 1913, § 9644.]

other than such bona fide purchaser." Accordingly, it was held that the mere failure to record a deed did not render it invalid as to creditors of the grantor although they became such on the faith of his representation that he was still the owner of the property conveyed. This decision applied the ruling in Wright v. Franklin Bank, 59 Ohio St. 80, 92, 93, 51 N. E. 876, where it was said: "Lands held by a properly executed but unrecorded deed are also free from the debts of the grantor, whether attempted [434] to be reached in an assignment for the benefit of creditors made by him, or upon an attachment, judgment, or execution against him. The title under such a deed is good as against everything except a subsequent bona fide purchaser without notice. . . . Mortgages so executed, whether on an estate in real property or on only an interest therein, take effect from the time of the delivery to the recorder, and deeds so executed, conveying the estate or only an interest therein, that is, an equity, take effect from delivery, except as against subsequent bona fide purchasers without notice, and as against such the deed must be also recorded." In the present case, the court of appeals was satisfied that in equity the instrument (which was absolute in form) should be treated as a mortgage, but the court did not think this to be important because of the holding of the Ohio court that an instrument in this form, "unlike a legal mortgage, operates upon delivery to transfer title and so is required to be recorded as a deed." 126 C. C. A. 260, 261, 209 Fed. pp. 334, 335; Kemper v. Campbell, 44 Ohio St. 210, 218, 6 N. E. 566; Wright v. Franklin Bank, 59 Ohio St. p. 95, 51 N. E. 876; Cole v. Merchants Nat. Bank, 15 Ohio C. C. (N. S.) 315, 347.

Under these decisions, then, we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt, whether a general creditor, or a lien creditor, or a judgment creditor with execution returned unsatisfied; that is, as against any class of persons represented by the trustee or with whose "rights, remedies, and powers" he was to be deemed to be vested. Bankruptcy act, § 47a. This fact, the appellant contends, makes recovery impossible under § 60; while the appellees insist that the provision in the interest of subsequent bona fide purchasers constitutes a requirement of recording which entitles a trustee to recover for the benefit of creditors. With respect to the construction of the [435] clause in question, there has been diversity of opinion in the circuit courts of appeals. In the sixth, seventh, and eighth circuits, the view has been taken that the word "required" refers "to the character of the instrument giving the preference" without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. See Loeser v. Savings Deposit Bank & T. Co. (C. C. A. Sixth) 18 L.R.A. (N.S.) 1233, 78 C. C. A. 597, 148 Fed. 975, 979 (followed by the decision in the present case); Re Beckhaus (C. C. A. Seventh) 100 C. C. A. 561, 177 Fed. 141 (see Re Sturtevant [C. C. A. Seventh] 110 C. C. A. 68, 188 Fed. 196); First Nat. Bank v. Connett (C. C. A. Eighth) 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33, 36; Mattley v. Giesler (C. C. A. Eighth) 110 C. C. A. 90, 187 Fed. 970, 971. A different conclusion has been reached in the second, fifth, and ninth circuits. See Re Boyd (C. C. A. Second) 130 C. C. A. 288, 213 Fed. 774; Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A. Fifth) 69 C. C. A. 240, 136 Fed. 396; Re McIntosh (C. C. A. Ninth) 80 C. C. A. 250, 150 Fed. 546; also Re Hunt (D. C. N. Y.) 139 Fed. 283.

In its original form, § 60 made no reference to record. 30 Stat. at L. 562, chap. 541, Comp. Stat. 1913, § 9644. The four months ran from the time of the giving of the preference, and if this period had elapsed when the bankruptcy proceeding was instituted, there could be no recovery under § 60, whether the transfer had, or had not, been recorded. See Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Rogers v. Page, 72 C. C. A. 164, 140 Fed. 596, 599. But a different rule was established for computing the time within which a petition in bankruptcy might be filed. In § 3b, it was provided that the four months' period should not expire "until four months after (1) the date of the recording or registering of the transfer . . . when the act consists in having made a transfer . . . for the purpose of giving a preference . . . if by [436] law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer." 30 Stat. at L. 546, 547, chap 541, Comp. Stat. 1913, § 9587. This distinction between the test of the right to institute bankruptcy proceedings and the test of the right to recover from one who had received a transfer alleged to be a preference lay in the terms of the act and could not rightly be ignored. It was urged that the result

was to encourage secret preferential transactions; but the wisdom of the prescribed condition of recovery from the preferred creditor, and the advisability of conforming the provision of § 60 to that of § 3b was a matter for legislative, not judicial, consideration. To secure this conformity, an amendment to § 60 was proposed in Congress in the year 1903. As passed by the House of Representatives, it added to § 60a the following clause: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted, or if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." Cong. Rec. 57th Cong. 1st Sess. vol. 35, pt. 7, pp. 6938, 6943. The Senate struck from this proposed amendment all that follows the words, "if by law such recording or registering is required," and as thus limited the amendment was adopted by Congress. Cong. Rec. 57th Cong. 2d Sess. vol. 36, pt. 1, p. 1036; act of Feb. 5, 1903, chap. 487, 32 Stat. at L. 797, 799, 800, Comp. Stat. 1913, § 9644; Re Hunt, 139 Fed. p. 286. There is no basis for the assumption that the words which the House of Representatives had desired to add were ultimately deemed to be surplusage, for these words had an obviously distinct significance and they had been included in § 3b, which in this respect remained unchanged. [437] We cannot but regard the action of Congress as a deliberate refusal to conform the requirements of § 60 to those of § 3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit. It should also be observed that § 60 was again under consideration by Congress in the year 1910, and it was again amended [36 Stat. at L. 842, chap. 412, § 11, Comp. Stat. 1913, § 9644]; but the last sentence of § 60a, as inserted in 1903, was left unaltered. And the same conditional clause—"if by law recording or registering thereof is required"—was used in the amended subdivision b (ante, 727, note). Whatever argument is made for an extension of the clause, in order more completely to conform it to the language of § 3b, we must disregard as addressed to a matter solely of legislative policy.

As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was "required" to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of [438] the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the bankruptcy act. See Senate Report, No. 691, Sixty-first Cong. 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the bankruptcy act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause "if by law recording or registering thereof is required" had any reference to requirements in the interest of persons of this description. The limitation of the provision to those transfers which are "required" to be recorded under the applicable law is not to be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, *alio intuitu*, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interested in the bankrupt estate, and in whose behalf, or in whose place, the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60.

In this view, the decree must be reversed

and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

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[439] PECOS & NORTHERN TEXAS RAILWAY COMPANY, Plff. in Err.,
v.
MRS. M. A. ROSENBLOOM, for Herself and in Behalf of Milton Rosenbloom et al.

(See S. C. Reporter's ed. 439-441.)

Trial — sufficiency of evidence to go to jury — employment in interstate commerce — employers' liability.

Evidence that a railway ticket clerk, when killed in the switching yard by a moving car, was, in pursuance of his duty, taking the numbers of the cars in a freight train which were, with one exception, moving in interstate commerce, is sufficient to take to the jury the question whether or not he was then engaged in interstate commerce.

[For other cases, see Trial, VI. b, in Digest Sup. 1908.]

[No. 613.]

Submitted February 24, 1916. Decided March 13, 1916.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which affirmed a judgment of the Court of Civil Appeals of that state, affirming a judgment of the District Court of Potter County in favor of plaintiff in an action for death. Reversed and remanded for further proceedings.

See same case below in court of civil appeals, — Tex. Civ. App. —, 141 S. W. 175; in supreme court, — Tex. —, 173 S. W. 215, on rehearing 177 S. W. 952.

Messrs. J. W. Terry, Gardiner Lathrop, A. H. Culwell, Alexander Britton, and Evans Browne submitted the cause for plaintiff in error.

Mr. James D. Williamson submitted the cause for defendants in error. Messrs. J. A. Stanford and H. H. Cooper were on the brief.

Memorandum opinion by Mr. Justice McReynolds, by direction of the court:

In November, 1909, M. A. Rosenbloom was instantly killed by a ballast car being pushed by an engine along track No. 5 in the railway company's switch yard at [440] Amarillo, Texas. Proceeding in behalf of herself, as next friend for her two minor children, and for the use and benefit of his parents, the deceased's widow instituted this suit for damages in the district court, Potter county, Texas. The jury returned a verdict for $7,000—apportioned $2,000 respectively to the the widow and each child, and $500 to each parent; judgment thereon was sustained by the court of civil appeals (141 S. W. 175) and by the state supreme court, — Tex. —, 173 S. W. 215.

Among other things the amended petition alleges: That Rosenbloom was employed by the railway as ticket clerk and required to be in and at the switch yard in order to take and preserve a record of numbers on outgoing cars and to seal those which needed it. That when the accident occurred a long freight train was leaving the yard on its regular run along switch track No. 4; as required by his duties, Rosenbloom was walking between tracks 4 and 5, and near the train, observing and noting car numbers; while so engaged and exercising due care a ballast car, negligently pushed along track No. 5, struck him with great violence and caused his death.

It conclusively appears from the evidence that the freight train on track 4 consisted of thirty odd cars moving, with one exception, in interstate commerce. The petition declares that, in pursuance of his duty, deceased was taking the numbers of these cars; there was some direct evidence to the same effect; and certainly enough had been shown to support a finding that when killed he was engaged in interstate commerce. The trial court refused the following instruction:

"If M. A. Rosenbloom, at the time of his death, was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably [441] carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues."

Upon a clearly erroneous assumption that there was nothing on which to base such request, the supreme court approved its refusal. The record discloses no proper reason for thus denying plaintiff in error a right claimed under the Federal employers' liability act. If when struck deceased was em-

Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

ployed in interstate commerce, the right of recovery depended upon that act; and it only permits suit by a personal representative for the benefit of surviving widow or husband and children if there be such. (Chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657; chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662). It is unnecessary to take up other points presented by counsel; the purpose and effect of the Federal legislation has been much discussed in our recent opinions. Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Pennsylvania Co. v. Donat, 239 U. S. 50, ante, 139, 36 Sup. Ct. Rep. 4; Southern R. Co. v. Lloyd, 239 U. S. 496, ante, 402, 36 Sup. Ct. Rep. 210; Shanks v Delaware, L. & W. R. Co. 239 U. S. 556, ante, 436, 36 Sup. Ct. Rep. 188.

The judgment below is reversed and the cause remanded to the Supreme Court of Texas for further proceedings not inconsistent with this opinion. Reversed.

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[442] UNITED STATES OF AMERICA, Appt.,
v.
UNITED STATES STEEL CORPORATION et al.

(See S. C. Reporter's ed. 442-444.)

Appeal — record — testimony in narrative form.

1. The requirement of equity rule 75, that the testimony be reduced to narrative form, will not be enforced on an appeal to the Federal Supreme Court, where the testimony embraces thirty volumes, containing more than 12,000 pages, of which about one half are devoted to testimony taken before the rule became operative, the testimony, by agreement of the parties, having been printed and bound as it was taken, and the requisite number of copies being on hand, digests and full indexes having been prepared, and all references to the testimony which the court below made in its opinion being to the testimony as contained in the bound volumes.

[For other cases, see Appeal and Error, V. 1, in Digest Sup. Ct. 1908.]

Appeal — filing record — extension of time.

2. The Federal Supreme Court will extend the time for filing the record on appeal where it thinks that such extension is desirable in order that ample opportunity be afforded to file a record which shall be made up conformably to the court's views.

[For other cases, see Appeal and Error, V. g, in Digest Sup. Ct. 1908.]

[No. —.]

Submitted March 14, 1916. Decided March 20, 1916.

APPLICATION for an order extending the time to docket the case and file the record on an appeal from the District Court of the United States for the District of New Jersey. Time extended sixty days from March 15, 1916.

Solicitor General Davis for the application.

Messrs. Richard V. Lindabury and David A. Reed opposed.

Mr. Chief Justice White delivered the opinion of the court:

The United States applied to the court below to extend the time for filing the record from March 15th, 1916, the existing date, to July 1st, to give it time to complete the reduction of the testimony to a narrative form, conformably to equity rule 75.[1] [443] The defendant opposed the request on the ground that there was doubt as to the possibility of adequately reducing the testimony, and on the further ground that it desired the testimony brought up in original shape, and because, under all the circumstances of the case, it should not be governed by equity rule 75. The court declined to pass upon the application, but suggested that the parties submit to this court the question whether equity rule 75 was, under the circumstances, imperatively applicable, stating, however, that it had found great advantage in disposing of the case from having the original testimony before it, and was of the opinion that a like advantage would be experienced by this court if the original testimony was brought up. The application before us was then made,

NOTE.—On the practice and procedure governing the transfer of causes to the Federal Supreme Court on writ of error or appeal—see note to Wedding v. Meyler, 66 L.R.A. 833.

[1] [Equity rule 75 deals with the reduction and preparation of the record on appeal. See 226 U. S. 671, 57 L. ed. 1655.—Ed.]

and is resisted on the grounds which were urged against it below.

The facts are these: The testimony was taken before an examiner and embraces 30 volumes, containing 12,151 pages. Of these, 14 volumes, or about 5,969 pages, embrace testimony taken before equity rule 75 became operative. By agreement between the parties, as the testimony was taken it was printed and bound, and the requisite number of copies of the volumes are on hand to serve as part of the record in this court on the appeal. To facilitate the court below, digests and full indexes were prepared by counsel, and all the references to the testimony made by the court below in its opinion are directed to the testimony as contained in the bound volumes.

Under the facts which we have stated, we are of opinion that the case is an exception to equity rule 75, and should not be controlled by it, and hence that the testimony in its original form as contained in the volumes already printed should constitute a part of the record on appeal, and therefore there is no reason to grant the request for time based upon the contrary assumption. While this is true, however, in order that there may be ample opportunity [444] to file the record made up conformably to the views which we have just stated, the time for filing the record, which was extended by this court on March 15th, pending this application, will be now extended sixty days from that date.

And it is so ordered.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
J. H. WILES, as Administrator of the Estate of Dennis E. Wiles, Deceased.

(See S. C. Reporter's ed. 444–448.)

Master and servant — employers' liability — comparative negligence — proximate cause.

There is no room for the application of the rule of comparative negligence established by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where the rear brakeman of a parted freight train, disregarding his duty to protect the rear of his train by going back a short distance and giving the warning signals which the carrier's rules required, remained in the caboose and was killed there when a passenger train, which he knew was closely following, ran into the standing train, since his was the causal negligence, even if negligence could be imputed to the carrier from the pulling out of the drawbar which caused the train to break in two, there being no claim that the passenger train was negligently run.

[For other cases, see Master and Servant, II. c; Proximate Cause, in Digest Sup. Ct. 1908.]

[No. 196.]

Submitted January 26, 1916. Decided March 20, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, reversing a judgment of the District Court for the County of Ottertail, directed the entry of judgment for plaintiff in an action brought under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 125 Minn. 348, 147 N. W. 427, 5 N. C. C. A. 60.

The facts are stated in the opinion.

Mr. E. C. Lindley submitted the cause for plaintiff in error. Mr. M. L. Countryman was on the brief:

The undisputed facts show that the sole proximate cause of the collision and the death of plaintiff's decedent was his failure to perform his duty as a flagman The pulling out of a drawbar, and the stopping of the train, caused thereby, merely created a condition out of which arose his duty to act.

Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44, 19 L. ed. 65; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661, 1 Am. Neg. Rep. 661; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Fezler v. Williams & S. F. R. Co. 85 Minn. 252, 88 N. W. 746; Schreiner v. Great Northern R. Co. 86 Minn. 245, 58 L.R.A. 75, 90 N. W. 400; Ellington v. Great Northern R. Co. 96 Minn. 176, 104 N. W. 827, 19 Am. Neg. Rep. 342; Mehalek v. Minneapolis St. P. & S. Ste. M. R. Co. 105 Minn. 128, 117 N. W. 250; Nelson v. Chicago, M. & St. P. R. Co. 30 Minn. 74, 14 N. W. 360; Groff v. Duluth Imperial Mill Co. 58 Minn. 333, 59 N. W. 1049; Johanson v. Howells, 55 Minn. 61, 56 N. W. 460; Weisel v. Eastern R. Co. 79 Minn. 245, 82 N. W. 576, 7 Am. Neg. Rep. 635; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640, 16 Am. Neg. Cas. 314; Strobeck v. Bren, 93 Minn. 428, 101 N. W. 795; Russell v. German F. Ins. Co. 100 Minn. 528, 10 L.R.A. (N.S.) 326, 111 N. W. 400; Cooley, Torts, 2d

Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

ed. pp. 73–76; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785.

The evidence wholly fails to establish negligence in the pulling out of the drawbar. Under the Federal liability act, negligence must be affirmatively proven, and the doctrine of *res ipsa loquitur* cannot be invoked.

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Southern Railway Carolina Div. v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Peirce v. Kile, 26 C. C. A. 201, 53 U. S. App. 291, 80 Fed. 865; Bowes v. Hopkins, 28 C. C. A. 524, 56 U. S. App. 217, 84 Fed. 767; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 745; Mexican C. R. Co. v. Townsend, 52 C. C. A. 369, 114 Fed. 737; O'Connell v. Pennsylvania Co. 55 C. C. A. 483, 118 Fed. 989; Mountain Copper Co. v. Van Buren, 59 C. C. A. 279, 123 Fed. 61; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737, 19 Am. Neg. Rep. 637; Butler v. Frazee, 25 App. D. C. 392.

Mr. **W. R. Duxbury** submitted the cause for defendant in error. Mr. Lyle Pettijohn was on the brief:

This court will not scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof.

Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79.

The application of the doctrine *res ipsa loquitur* depends upon and is determined by the circumstances; and, the circumstances warranting, it applies as well in cases between employer and employee as in other relations.

Byers v. Carnegie Steel Co. 16 L.R.A. (N.S.) 214, 86 C. C. A. 347, 159 Fed. 347; Lucid v. E. I. DuPont De Nemours Powder Co. L.R.A. —, —, 118 C. C. A. 61, 199 Fed. 377; Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566; Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905.

Mr. Justice **McKenna** delivered the opinion of the court:

Action for damages for the killing of one Dennis E. Wiles, brought by the administrator of his estate, who is also his father and next of kin. It was brought under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662).

Wiles was a freight brakeman in the employ of the railway company in interstate commerce, the company being an interstate common carrier.

There was a verdict for plaintiff in the sum of $650. Upon motion of defendant the court, expressing the view that Wiles's negligence was the proximate cause of the accident which resulted in his death, rendered judgment that, notwithstanding the verdict, plaintiff take nothing by his action, that the same be dismissed, and that the railway company recover of plaintiff $36.52 costs.

The judgment was reversed by the supreme court of the state and judgment ordered to be entered on the verdict.

The only issue is as to the negligence of the railway company and the contributory negligence of the deceased, and the causal relation, if either existed, to the death of the deceased.

The determining facts of the case are as follows:

Deceased was a rear brakeman on a freight train of the railway company proceeding easterly between Grotto and [446] Skykomish, Washington. After having passed a curve in the road the train broke in two by the drawbar pulling out of the sixth car from the engine, which caused the train to stop instantly. It was run into shortly after (from 3 to 5 minutes, it was testified) by a passenger train drawn by two engines. The night was pretty dark and the weather a little misty. At the place of collision the track was obstructed by a very sharp curve and a bluff on the right-hand side for about five box-car lengths, and the rear end of the freight train at that place could not be seen more than five box-car lengths away. On the left-hand side of the engine, which is the fireman's side, the track could not be seen more than a car length ahead because that would be on the outside of the curve. The engineer of the passenger train did not know of the existence of the freight train ahead and no negligence is attributed to him. The deceased

and the conductor of the freight train were in the caboose and both were killed. What caused the pulling out of the drawbar was not shown, nor was there proof that it was defective, or that the company was negligent in the care or use of it.

The head brakeman of the freight train testified that the train stopped immediately upon the pulling out of the drawbar, that he descended from the train and hastened back to the caboose for a chain, and that he saw the headlight of the passenger train as it came around the curve. He further testified that it was Wiles's duty to have gone back to protect the rear end of his train at the time the passenger train was due out of the station in the rear, and that this applied whether the delayed inferior train which was ahead was running or standing still; that it was the duty of Wiles to have gone back a sufficient distance to guarantee full protection to the rear of his train, and that the engineer of the freight train, at the time the train broke in two, signaled the rear brakeman to go back and protect the rear end of his train. The same testimony as [447] to the duty of Wiles was given by another witness. It appeared also from the testimony that the freight train was losing time by slipping, and that Wiles knew the time that the passenger train was due to leave Grotto station, and he should have dropped off or dropped fuses on the track to notify the engineer of the passenger train that the freight was running slow. The fuses are of red and yellow lights; the red means to stop for ten minutes, the yellow means to bring the train under control and keep it under control until the next station is reached.

The rules of the railway company were put in evidence as follows:

"Rule 99. When a train stops or is delayed by any circumstance under which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled he may return to his train, first placing two torpedoes on the rail six rail lengths apart, or a lighted fusee in the center of the track when conditions require."

"Rule 100. If the train should part while in motion trainmen must, if possible, prevent damage to the detached portions. The signals prescribed by 13D and 15F must be given."

13D is the lantern signal or hand signal, either one; 15F is the whistle signal. Rule 100 applied to what should be done by the members of the train crew for the protection of the separated portions of the train itself. Rule 99 applied to what should be done for the protection of other trains approaching.

The supreme court applied the rule of *res ipsa loquitur* and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar, and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court, entering judgment for the company notwithstanding the verdict.

[448] The application of the doctrine to cases like that at bar is disputable. Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Looney v. Metropolitan R. Co. 200 U. S. 480, 486, 50 L. ed. 564, 568, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627. We, however, do not have to go farther than to indicate the dispute. The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles,—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

In the present case there was nothing to extenuate Wiles's negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

[449] CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,

v.

A. P. BOND, Administrator of the Estate of William L. Turner, Deceased.

(See S. C. Reporter's ed. 449–457.)

Master and servant — when relation exists — independent contractor — employers' liability.

1. A control over results only, which is inconsistent with the existence of any relation of master and servant to which the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), could apply, is what was reserved to an interstate railway carrier in a contract with a person called the original contractor, by which he is to handle at the railway company's coal chutes the coal required for its engines, furnishing the necessary labor for that purpose, is to break the coal in suitable sizes, is to unload wood from car to storage piles, and is to load cinders on cars and unload sand, where the manner of the work is under his control, to be done by him and his employees, and he is made responsible for the faithful performance of his agreement, incurring the penalty of instant termination of the contract for nonperformance, the contract providing for payment on the basis of tons, cords, or yards, and the "contractor" expressly assuming all liability for injuries to himself or to his property, or to his employees or third persons, and there being an explicit provision that the carrier "reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

[For other cases, see Master and Servant, I. a, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — contract exemption.

2. No evasion of the provision of the employers' liability act of April 22, 1908 (35 Stat. at L. 66, chap. 149, Comp Stat. 1913, § 8661), § 5, that "any contract, rule, regulation, or device whatsoever, the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void," results from the making of a contract by an interstate railway carrier under which the work of handling at the railway company's coal chutes the coal required for its engines, and of breaking the coal into suitable sizes, and of unloading wood from cars to storage piles, and of loading cinders from right of way on cars, and of unloading sand from cars at designated points, is to be performed by an independent contractor who expressly assumes all liability for injury to himself or his property, or to his employees or to third persons.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 486.]

Argued and submitted February 23, 1916. Decided March 20, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court for Garfield County, in that state, in favor of plaintiff in an action brought under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, — Okla. —, 148 Pac. 103.

The facts are stated in the opinion.

Mr. R. J. Roberts argued the cause, and, with Messrs. J. G. Gamble, M. L. Bell, C. O. Blake, W. H. Moore, and K. W. Shartel, filed a brief for plaintiff in error:

The deceased was an independent contractor

New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 656, 21 L. ed. 220, 222, 7 Am. Neg. Cas. 309; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Casement v. Brown, 148 U. S. 615, 37 L. ed. 582, 13 Sup. Ct. Rep. 672; Weinman v. De Palma, 232 U. S. 571, 58 L. ed. 733, 34 Sup. Ct. Rep. 370; Arthur v. Texas & P. R. Co. 71 C. C. A. 391, 139 Fed. 127; Fuller v. Citizens' Nat. Bank, 15 Fed. 875; Cox v. Philadelphia, 165 Fed. 559; Riedel v. Moran, Fitzsimmons Co. 103 Mich. 262, 61 N. W. 509; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; Louisville & N. R. Co. v. Smith, 134 Ky. 47, 119 S. W. 241; Salliotte v. King Bridge Co. 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; Morning v. Cramp, 170 Fed. 364; United Gas Improv. Co. v. Larsen, 105 C. C. A. 486, 182 Fed. 620; Boardman v. Creighton, 95 Me. 154, 49 Atl. 663; Pioneer Fireproof Constr. Co. v. Hansen, 176 Ill. 100, 52 N. E. 17; Sullivan v. New Bedford Gas & Edison Light Co. 190 Mass. 288, 76 N. E. 1048; Porter v. Tennessee Coal, Iron & R. Co. 177 Ala. 406, 59 So. 255; Texas Traction Co. v. George, — Tex. Civ. App. —, 149 S. W. 438; Chicago, R. I. & P. R. Co. v. Bennett, 36 Okla. 358, L.R.A. —, —, 128 Pac. 705; Chas. T. Derr Constr. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253; Branstrator v. Keokuk & W. R. Co. 108 Iowa, 377, 79 N. W. 130; Atchison T. & S. F. R. Co. v. Dickens, 7 Ind. Terr. 16, 103 S. W. 750; Richmond v. Sitterding, 65 L.R.A. 445, note; Cockran v. Rice, Ann. Cas. 1913B,

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

573, note; Messmer v. Bell & C. Co. 19 Ann. Cas. 3, note; Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Good v. Johnson, 38 Colo. 440, 8 L.R.A.(N.S.) 896, 88 Pac. 439; Larsen v. Home Teleph. Co. 164 Mich. 295, 129 N. W. 894; Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Giacomini v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396; Omaha Bridge & Terminal R. Co. v. Hargadine, 5 Neb. Unof. 418, 98 N. W. 1071, 76 Neb. 729, 107 N. W. 864; Dublin v. Taylor, B. & H. R. Co. 92 Tex. 535, 50 S. W. 120; Vickers v. Kanawha & W. V. R. Co. 64 W. Va. 474, 20 L.R.A.(N.S.) 793, 131 Am. St. Rep. 929, 63 S. E. 367.

Messrs. J. G. Gamble, R. J. Roberts, M. L. Bell, C. O. Blake, W. H. Moore, K. W. Shartel, and T. P. Littlepage also filed a brief for plaintiff in error.

Mr. John C. Moore submitted the cause for defendant in error:

Turner was an employee, and not an independent contractor.

Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; 4 Words & Phrases, title "Independent Contractors;" Moll, Independent Contractors, 77.

[450] **Mr. Justice McKenna** delivered the opinion of the court:

Action for damages caused by the railway company by the killing of the deceased, William L. Turner, through the negligence, it is alleged, of the company. It was brought in the district court of Garfield county, Oklahoma, and invoked the benefits of the employers' liability act of Congress of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662). The case was removed on petition of the railway company to the United States district court for the western district of Oklahoma, and remanded by that court to the state court. There an amended petition was filed by plaintiff in the action, to which an answer was filed.

After answer the case was tried to a jury, which returned a verdict for the sum of $7,583, distributed in certain proportions among those dependent upon the deceased. Judgment was entered upon the verdict and sustained by the supreme court of the state.

The case went to the jury upon the effect of certain contracts between deceased and the company, whether he was the company's servant or a contractor with it, and whether, if he was the servant of the company, it was guilty of negligence, or whether he was guilty of contributory negligence.

The facts are not much in dispute. The company is an interstate common carrier and its line runs through the limits of the city of Enid, Garfield county, state of Oklahoma. Within the city there are six parallel tracks which run nearly from the north to the south, bearing as they proceed a little to the west. At the south end, near their termination, are located coal chutes, into the pockets or tipples of which coal is shoveled from cars set on the chutes for the use of all engines, local and interstate. The city of Enid has the power to establish and [451] did establish by ordinance a speed limit of 10 miles an hour for all trains within its limits, beyond which it was unlawful to proceed.

The relation of Turner to the railroad company was under two contracts, one dated November 1, 1910, the other October 1, 1911. In the first contract the railroad company is party of the first part and Turner party of the second part and is called "contractor." The covenants of one are made the consideration for the covenants of the other, and Turner, as contractor, agrees first "to furnish all the labor required and necessary to handle; and (a) to handle all the coal required by the company at Enid, from either open or closed cars, or both, and to place the same in coal-chute pockets of the company; to gather up all coal that falls from the coal-chute pockets to the ground, and place the same on cars or engines, as desired by the company. (b) To break all coal to the size of 4-inch cubes or less before delivery to chutes for engine use, and to unload all coal for stationary boilers. (c) To unload wood from cars to storage piles located on company's right of way in Enid. (d) To load cinders from the right of way to cars at points designated by the company. (e) To unload sand from cars furnished by the company at points designated by it.

2d. The company agrees to pay for the services enumerated in certain designated numbers of cents per ton, or cord, or yard, as the case may be, to be paid upon estimates and records of the company.

3d. Contractor agrees to maintain a sufficient supply of coal in the coal chutes and break or crack all coal to suitable sizes.

4th. Contractor expressly assumes all liability for injuries to or death of persons in his employ, or loss or injury to his property, whether caused by the negligence of the company, its agents or employees, and he covenants to save the company harmless on account thereof, or for [452] or on account of any injury to or death of any person employed by him when and while such persons may be in or about the cars, engines, and tracks of the company, "and any injury to said contractor while performing any services under this contract which might be or

have been delegated to his agent or employees." And the contractor expressly assumes all liability for injury to or death of third persons, including the employees of the company, occasioned by any of his acts, and the company shall not be liable to him in case of his death or injury while employed in the work set forth.

5th. Punctuality of performance is stipulated for; (6th) the contract to continue until terminated, as it may be by either party upon fifteen days' notice; (7th) or upon failure of contractor to perform his duties, at the option of the company, without being liable in damages therefor, of which failure the company shall be the sole judge; (8th) the company to furnish the necessary tools for the performance of the stipulated services.

9th. It is "agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

10th. The company shall keep a record of all coal delivered, and shall make settlements and pay the contractor for handling the coal upon the basis of such handling, and the contractor shall make daily reports of the cars unloaded by him, and shall receive, collect, and deliver to the duly authorized representative of the company a ticket from each engineman, hostler, or other employee, showing the number of tons of coal delivered to any engine; (11th) payment of the work to be made monthly; and (12th) the contract and all the terms and conditions, rights and obligations thereof, to inure to the heirs, administrators, executors, legal representatives, [453] assigns, and lessees of both parties, but assigning or subletting shall not be without the written consent of the company.

Under the other contract Turner was required to cooper all cars which the roundhouse foreman directed him to prepare to fit the cars to hold grain in transit, the foreman to be the sole judge whether the preparation was in accordance with the contract. The manner of preparation is detailed and the price to be paid therefor in cents, the company to furnish the materials.

There are provisions as in the other contract to save the company from liability to persons or property. The contract was to continue until terminated upon thirty days' notice.

This contract is pertinent only for illustration, and otherwise may be put out of view. The deceased was killed, it is the contention, while performing services under the first contract.

Turner had a contract with the Enid Mill & Elevator Company to unload coal, and, directly after 4 o'clock on the day he was killed, having finished a particular service at which he and one of his employees had been engaged, remarked that he would "go down and gather up the tickets and order a car of coal for the morning," and started down the tracks toward the chutes.

He next appeared about 5:25 o'clock at the cinder pile of the Enid Mill & Elevator Company at what is designated as the "White Mill," and there had a conversation with an employee of that company, and asked him, the employee, if he thought he would have enough coal for the boiler room to run until Monday night. While they were talking a passenger train signaled its approach to the station and Turner said, "That is 24; I must take my coal tickets to the freight house and turn them in and order coal for the chutes." He then started towards the freight house.

[454] The trial court thought the testimony was indefinite of Turner's intention and hesitated to decide that he was engaged in services to the railway company rather than to the Enid Mill & Elevator Company, but finally left it to the jury to decide.

From the "White Mill" Turner passed along the tracks of the railroad and was seen by a witness walking between tracks 3 and 4 with his hands behind him, and while so walking, and when he was at a point east of the north end of the freight house, an engine and two box cars and a flat car, backing on the track to his left in the direction in which he was going, and running at about 25 miles an hour, and in excess of the speed limit prescribed in the ordinance, ran over and killed him. It is a reasonable conjecture that the character of the day and the noise and confusion of the approaching passenger train so distracted his attention that he did not hear the approach of the backing cars and warning yells of the brakeman, and apprehended no danger.

Besides excessive speed there were other elements of negligence by the company which the plaintiff relied upon.

We may pass by the assignments of error based on the rulings upon the evidence and in giving and refusing instructions. The determining consideration is the relation in which Turner stood to the company, whether he was an employee of it or an independent contractor.

The trial court submitted the question to the decision of the jury; the supreme court, considering the contract of November 1, 1910, hereinbefore set out, and certain testimony, decided that Turner was an employee of the company. The court said: "Not only did the contract reserve to the com-

pany the right to control and direct deceased in his work, but it might be well to know, although we are only passing on the face of the contract, that the company, pursuant to the power therein reserved, did that very thing, which confirms us in our opinion, gathered [455] from the face of the contract, that the same was not capable of execution without such direction and control. Such amounts to a practical construction of the contract by the company. Mr. Bowman, station agent and yardmaster of defendant, testified:

"'Q. From whom did Turner get instructions about handling work performed by him?

"'A. Under his contract from us.

"'Q. You directed him what to do?

"'A. Yes, either me or my chief clerk.

"'Q. So that he was under your supervision and control all the time?

"'A. In so far as his contracts were concerned, yes, sir.

"'Q. He performed his duties in accordance with what you directed him to do?

"'A. Yes, sir.

"'Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island coal?

"'A. Yes, sir.'" [— Okla. —, 148 Pac. 107.]

To which testimony this must be added:

"'Q. Did you have anything to do with directing him in detail as to how he performed the terms of his contract?

"'A. No, sir.'"

We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of [456] his employees. It was a judgment only over results and a necessary sanction of the obligations which he had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect.

The whole instrument shows system and particular care. It is not the engagement of a servant submitting to subordination and subject momentarily to superintendence, but of one capable of independent action, to be judged of by its results. And the covenants were suitable for the purpose, only consistent with it, not consistent with a temporary employment. This is manifest from the provision for payment, from the careful assignment of liabilities, and the explicit provision that Turner "shall be deemed and held as the original contractor, and the railroad company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished."

The railroad company, therefore, did not retain the right to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; New Orleans M. & C. R. Co. v. Hanning, 15 Wall. 649, 656, 21 L. ed. 220, 222, 7 Am. Neg. Cas. 309; Standard Oil Co. v. Anderson, 212 U. S. 215, 227, 53 L. ed. 480, 486, 29 Sup. Ct. Rep. 252.

The case falls, therefore, under the ruling in Casement v. Brown, 148 U. S. 615, 622, 37 L. ed. 582, 585, 13 Sup. Ct. Rep. 672.

We do not think that the contract can be regarded as an evasion of § 5 of the employers' liability act, which provides "that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: . . ." [35 Stat. at L. 66, chap. 149, Comp. Stat. 1913, § 8661.]

Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct [457] and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences.

Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

SOUTHERN WISCONSIN RAILWAY COMPANY, Plff. in Err.,
v.
CITY OF MADISON.

(See S. C. Reporter's ed. 457-462.)

Error to state court — Federal question — impairing contract obligations.

1. Whether a municipal ordinance may be upheld without impairing the obligations of an admitted contract is a Federal question for the purpose of sustaining the appellate jurisdiction of the Supreme Court over a state court, although the answer to the question depends upon the construction of the contract.

[For other cases, see Appeal and Error, 1673-1716, in Digest Sup. Ct. 1908.]

Error to state court — decision on non-Federal ground.

2. A decision of the highest state court, upholding the imposition of a paving obligation upon a street railway company, is reviewable in the Federal Supreme Court on writ of error, where a municipal ordinance requiring a street railway company, under a penalty, to do the work, was set up and attacked as impairing contract obligations, and was expressly upheld by the state court, even though the state court's opinion be read as asserting that the duty existed under the street railway company's franchise alone, irrespective of the later ordinance, since such ordinance was present, impelling, so far as might be, the decision reached, and was given effect by the decision.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

Error to state court — following decision below — impairing contract obligations.

3. The Federal Supreme Court will not disturb a decision of the highest state court that a municipal ordinance requiring a street railway company to bear the cost of an asphalt pavement between its rails and for a distance of 1 foot outside does not impair the obligations of its charter, which requires it to keep such space in proper repair, so as not to interfere with travel over the same, and which makes the grant subject to such reasonable rules and regulations respecting the streets and highways and operation of cars as the common council may enact, where the state court found that the designated space needed repairs, and that the crushed stone then used was not suitable for the purpose, and would have interfered with the asphalt laid by the city in the rest of the street.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 260.]

Argued March 6 and 7, 1916. Decided March 20, 1916.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court for Dane County, in that state, in favor of a municipality in a suit to recover the cost of paving from a street railway company. Affirmed.

See same case below, 156 Wis. 352, L.R.A.—, —, 146 N. W. 492.

The facts are stated in the opinion.

Mr. **Burr W. Jones** argued the cause, and, with Mr. E. J. B. Schubring, filed a brief for plaintiff in error:

A municipal by-law or ordinance, enacted by virtue of power for that purpose, delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution.

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 549, 555, 58 L. ed. 721, 725, 34 Sup. Ct. Rep. 364; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 563, 41 L. ed. 1114, 1116, 17 Sup. Ct. Rep. 653; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 350, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 216, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 266, 36 L. ed. 963, 967, 13 Sup. Ct. Rep. 90; Ross v. Oregon, 227 U. S. 150, 162, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97, Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on the Supreme Court of the United States on a writ of error to a state court—see note to Hooker v. Los Angeles, 63 L.R.A. 471.

As to what is the record for the purpose of showing the jurisdiction of the Supreme Court of the United States of a writ of error to a state court—see note to Home for Incurables v. New York, 63 L.R.A. 329.

On error to state courts in cases presenting questions of impairment of contract obligations—see note to Osborne v. Clarke, 51 L. ed. U. S. 619.

Cas. 1914C, 224; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 536, 48 L. ed. 1102, 1109, 24 Sup. Ct. Rep. 756; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 590, 52 L. ed. 630, 633, 28 Sup. Ct. Rep. 341; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 320, 51 L. ed. 198, 202, 27 Sup. Ct. Rep. 83; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 81, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585; Southwest Missouri Light Co. v. Joplin, 101 Fed. 23.

The passage of the ordinance of June 11, 1910, was such state legislation as impaired the obligation of the contract and raised a Federal question when properly presented in the record.

St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 147, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 74, 77, 44 L. ed. 673, 679, 680, 20 Sup. Ct. Rep. 545; McCullough v. Virginia, 172 U. S. 104, 117, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; Northwestern University v. Illinois, 99 U. S. 309, 313 25 L. ed. 387; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 495, 38 L. ed. 793, 796, 14 Sup. Ct. Rep. 968.

The state court by its decision gives effect to the ordinance.

Bridge Proprietors v. Hoboken Land & Improv. Co. 1 Wall. 116, 140–147, 17 L. ed. 571, 575–577; Houston & T. C. R. Co. v. Texas, 177 U. S. 66, 74–77, 44 L. ed. 673, 679, 680, 20 Sup. Ct. Rep. 545; McCullough v. Virginia, 172 U. S. 102, 116, 117, 43 L. ed. 382, 387, 388, 19 Sup. Ct. Rep. 134; Northwestern University v. Illinois, 99 U. S. 309, 320, 25 L. ed. 387, 388; Given v. Wright, 117 U. S. 648 29 L. ed. 1021, 6 Sup. Ct. Rep. 907; West Chicago Street R. Co. v. Illinois, 201 U. S. 506, 519, 50 L. ed. 845, 850, 26 Sup. Ct. Rep. 518; Mercantile Trust & D. Co. v. Collins Park & Belt R. Co. 99 Fed. 812.

The city cannot assail its own ordinance to defeat jurisdiction.

Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756.

At common law the duty to repair and repave streets rests upon the municipality.

Hammond v. Mukwa, 40 Wis. 41; Klatt v. Milwaukee, 53 Wis. 201, 40 Am. Rep. 759, 10 N. W. 162.

The obligation to repair or repave can therefore not rest upon the plaintiff in error unless such duty is expressly imposed by the franchise.

Chicago Union Traction Co. v. Case, 129 Ill. App. 466; New York v. Bleecker Street & F. Ferry R. Co. 130 App. Div. 830, 115 *N. Y. Supp. 592;* Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88.

The franchise does not impose upon the street railway company the duty to pave or repave the railway zone, but simply to keep the same in such repair as not to interfere with travel over the same, and to keep the same in proper order and cleanliness.

Blount v. Janesville, 31 Wis. 648.

The franchise should be construed as if the rule of the Blount Case, supra, was stated in the text.

Ennis Waterworks v. Ennis, 233 U. S. 652, 58 L. ed. 1139, 34 Sup. Ct. Rep. 767.

With the franchise ordinance which required paving, before their eyes, the council deliberately omitted that provision in the new ordinance.

Smith v. Eau Claire, 78 Wis. 457, 47 N. W. 830; Indianapolis & E. I. R. Co. v. New Castle, 43 Ind. App. 467, 87 N. E. 1067.

The obligation to repair does not require repaving.

Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. ed. 594, 596; Dill. Mun. Corp. 5th ed. § 1276; State ex rel. Kansas City v. Corrigan Consol. Street R. Co. 85 Mo. 263, 55 Am. Rep. 361, 86 Mo. 67; Williamsport v. Williamsport Pass. R. Co. 206 Pa. 65, 55 Atl. 836; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Philadelphia v. Hestonville, M. & F. Pass. R. Co. 177 Pa. 371, 35 Atl. 718; United R. & Electric Co. v. Baltimore, 121 Md. 558, 88 Atl. 617; Baltimore v. Scharf, 54 Md. 499; Hurley v. Trenton, 66 N. J. L. 538, 49 Atl. 518.

A charter granted to a street railway company to construct and operate a street railway within the corporate limits of a city constitutes a contract between the railway company and the city.

Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L.R.A. 772, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88.

The liability of the street railway company being fixed by its charter, neither the city council nor the state legislature can alter it without the consent of the company.

Western Paving & Supply Co. v. Citizens' Street R. Co. supra; Coast-Line R. Co. v. Savannah, 30 Fed. 646; Chicago v. Sheldon, supra.

Mr. William Ryan argued the cause and filed a brief for defendant in error:

The contention made and passed upon in the state courts cannot be enlarged by as-

signments of error to bring the case to this court.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21.

The ordinance is administrative, and not legislative in character, and the city could have, with the same force and effect, directed the mayor or street superintendent to order and direct the street railway company to do the work in question.

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. 125 U. S. 18, 32, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741; Ross v. Oregon, 227 U. S. 150, 163, 57 L. ed. 458, 463, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224.

The franchise of 1892 requires the street railway company to pave the railway zone when the city repairs the remainder of the street, under the facts found by the trial court in this case.

Central Land Co. v. Laidley, 159 U. S. 103, 110, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 123; Blair v. Chicago, 201 U. S. 400, 472, 50 L. ed. 801, 831, 26 Sup. Ct. Rep. 427; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Elliott, Roads & Streets, 3d ed. §§ 987, 988; Madison v. Southern Wisconsin R. Co. 156 Wis. 368, L.R.A. —, —, 146 N. W. 492; New York v. Harlem Bridge, M. & F. R. Co. 186 N. Y. 304, 78 N. E. 1072; Danville v. Danville R. & Electric Co. 114 Va. 382, 43 L.R.A.(N.S.) 463, 76 S. E. 913; Norfolk & P. Traction Co. v. Norfolk, 115 Va. 169, 78 S. E. 545, Ann. Cas. 1914D, 1067; State ex rel. Jacksonville v. Jacksonville Street R. Co. 29 Fla. 590, 10 So. 590; Columbus Street R. & Light Co. v. Columbus, 43 Ind. App. 265, 86 N. E. 83; Conway v. Rochester, 157 N. Y. 33, 51 N. E. 395; Mechanicville v. Stillwater & M. Street R. Co. 35 Misc. 513, 71 N. Y. Supp. 1102; Binninger v. New York, 177 N. Y. 199, 69 N. E. 390; State ex rel. Roundtree v. Gibson County, 80 Ind. 478, 41 Am. Rep. 821.

To give § 3 of the franchise of 1892 the meaning contended for by plaintiff in error would render its inclusion in the franchise of no value whatever, for the reason that it is a common-law duty of a street railway company to make such repairs irrespective of ordinance or franchise provision to that effect.

Reading v. United Traction Co. 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380; Reading v. United Traction Co. 202 Pa. 571, 52 Atl. 106; Memphis, P. P. & Belt R. Co. v. State, 87 Tenn. 746, 11 S. W. 946; Harrisburg v. Harrisburg Pass. R. Co. 1 Pearson (Pa.) 298; Citizens' Street R. Co. v. Ballard, 22 Ind. App. 151, 52 N. E. 720; Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 535, 10 L.R.A. 770, 25 Am. St. Rep. 462, 26 N. E. 188, 28 N. E. 88; Montgomery Street R. Co. v. Smith, 146 Ala. 316, 39 So. 757.

The Pennsylvania decisions go further and hold that this common-law duty requires the railway company to pave or repave the railway zone when it is in fact out of repair and the city improves the rest of the street.

Reading v. United Traction Co. 215 Pa. 255, 64 Atl. 446, 7 Ann. Cas. 380; Reading v. United Traction Co. 202 Pa. 573, 52 Atl. 106; Gallagher v. Philadelphia Rapid Transit Co. 51 Pa. Super. Ct. 488; McKeesport v. Pittsburg, M. & C. R. Co. 55 Pa. Super. Ct. 47.

The provisions of the earlier franchise granted by the city to a different party from the grantee of the franchise of 1892 are not to be considered in determining the meaning of the provisions of the later franchise.

Oberbeck v. Sportsman's Park & Club Asso. 17 Mo. App. 310; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 543, 9 L. ed. 773, 822.

The street railway company has not met its obligations under the franchise.

Brooklyn v. Brooklyn City R. Co. 47 N. Y. 475, 7 Am. Rep. 469; Binninger v. New York, 177 N. Y. 199, 69 N. E. 390; Philadelphia v. Ridge Ave. Pass. R. Co. 143 Pa. 472, 22 Atl. 695.

The city acted within its authority under the power expressly reserved in the franchise to make reasonable rules and regulations respecting the streets and highways, and consequently the ordinance of June 11, 1910, does not impair the obligation of the contract, nor take the property of the company without due process of law.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 397, 46 L. ed. 592, 611, 22 Sup. Ct. Rep. 410.

The enactment of the ordinance of June 11, 1910, under the reservation contained in the franchise and statute, invaded no contract rights of the plaintiff in error, but dealt only with matters which are the subject of police regulation.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 77, 59 L. ed. 1204, 1211, 35 Sup. Ct. Rep. 678; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 561, 58 L. ed. 721, 727, 34 Sup. Ct. Rep. 364; Detroit v. Detroit United R. Co. 172 Mich. 496, 138 N. W. 215; St. Helena v. San Francisco, N. & C. R. Co. 24 Cal. App. 71, 140 Pac. 600, 605; Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442,

53 Atl. 960, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 127, 59 L. ed. 157, 160, 35 Sup. Ct. Rep. 82; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; Chicago, M. & St. P. R. Co. v. Minneapolis, 232 U. S. 430, 58 L. ed. 671, 34 Sup. Ct. Rep. 400; Baltimore v. Baltimore Trust & G. Co. 166 U. S. 673, 684, 41 L. ed. 1160, 1164, 17 Sup. Ct. Rep. 696.

[459] Mr. Justice Holmes delivered the opinion of the court:

This is a suit brought by the city of Madison to recover the cost of asphalt pavement between the rails of the defendant's track and 1 foot on the outside of them, for a certain distance along University avenue in that city. The declaration, after stating the ordinances under which the defendant and its predecessors had built and operated the street railway concerned, sets out an ordinance of June 11, 1910, requiring the defendant, under a penalty, to do the work above described. The defendant answered that to make it pay the cost would deprive it of its property and contract rights under its franchise without due process of law and the equal protection of the laws, contrary to the Constitution of the United States. The judge before whom the case was tried found that the designated space had become so out of repair as to interfere with travel, and that the crushed stone then used was not a proper pavement, and would interfere with the asphalt laid down by the city, and gave judgment for the plaintiff. The supreme court accepted the defendant's position, that its charter was a contract, but met the argument based upon it by a construction that warranted the later ordinance, and judgment for the plaintiff was affirmed. 156 Wis. 352, L.R.A.—, —, 146 N. W. 492.

As our opinion is that the judgment should be affirmed, we shall not dwell upon a motion to dismiss made by the defendant in error. The court expressly upheld the later ordinance, and whether that ordinance can be upheld without impairing the obligation of the admitted contract of the charter is a Federal question none the less that the answer depends upon the construction of the instrument. Even if the opinion below be read as asserting that the duty existed by the charter alone, irrespective of the later ordinance, still as the ordinance was set up and relied upon in the declaration and was present impelling, [460] so far as might be, the decision reached, and was given effect by that decision, we should not dismiss the case. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 L. ed. 1124, 24 Sup. Ct. Rep. 767. We lay on one side a suggestion that runs counter to the opinion below and to common sense, that the later ordinance, when it requires the defendant to do the work under a penalty of not exceeding $50 a day, is not a legislative command, but merely a notice to perform a duty already in force.

Up to 1892 the defendant's franchise was held under a charter that, after providing for the disposition to be made of snow on the track, continued: "And said company shall keep the space between the rails and for the distance of 1 foot on the outside side of the rails in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at its own cost and expense." The charter then went on to provide that whenever a street in which were tracks should be paved or macadamized, the railway company should pave or macadamize the above-mentioned space and keep it in equally good and corresponding condition. In 1892, a new ordinance was passed authorizing the company to build and operate a road in the city and to use electricity as a motive power upon its tracks then or thereafter authorized and constructed. It had the above-quoted provision as to keeping the space in repair, and the grant was made "subject to such reasonable rules and regulations respecting such streets and highways and operation of cars as the said council may from time to time enact," but the ordinance did not repeat the provision as to paving. The supreme court held that the requirement to keep the space in repair was enough, and, by a diminished majority, that the ordinance of 1910 fell within the reasonable rules and regulations that the company was bound to obey.

If there had been no ordinance of 1910, but the suit [461] had been brought simply upon the alleged duty under the charter of 1892, and the city had recovered, as it might have upon the present interpretation of that instrument, there would have been no question for this court. Fisher v. New Orleans, 218 U. S. 438, 440, 54 L. ed. 1099, 1100, 31 Sup. Ct. Rep. 57. While this consideration has not required us to dismiss the writ of error, it suggests reasons of more than usual force for following that interpretation. Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point. Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 243, 244, 50 L. ed. 170, 173, 174, 26 Sup. Ct.

Rep. 23. We appreciate the argument to be drawn from the omission of the paving clause in the charter of 1892, and the possible reason for its omission in the fact that the experiment of substituting electricity for horse power then was relatively new. But it is also possible that the clause was deemed superfluous, if, indeed, the omission should be considered at all. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 543, 544, 9 L. ed. 773, 822, 823. It is to be remembered that this requirement is a widespread one with regard to street railways. Reading v. United Traction Co. 202 Pa. 571, 573, 52 Atl. 106, 215 Pa. 250, 255, 64 Atl. 446, 7 Ann. Cas. 380. There are persuasive decisions that the obligation to keep the space "in proper repair so as not to interfere with travel over the same" extends to what was demanded of the defendant in this case. New York v. Harlem Bridge, M. & F. R. Co. 186 N. Y. 304, 78 N. E. 1072; State ex rel. Milwaukee v. Milwaukee Electric R. & Light Co. 151 Wis. 520, 139 N. W. 396, Ann. Cas. 1914B, 123. The reasons for construing such ordinances strictly in favor of the public are reiterated in the present case. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 33, 34, 50 L. ed. 353, 359, 26 Sup. Ct. Rep. 224; Blair v. Chicago, 201 U. S. 400, 472, 473, 50 L. ed. 801, 831, 832, 26 Sup. Ct. Rep. 427. Both of the grounds taken by the court below get some support from [462] decisions of this court. Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379, 389, 51 L. ed 237, 241, 27 Sup. Ct. Rep. 74; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 397, 46 L. ed. 592, 611, 22 Sup. Ct. Rep. 410. In view of the finding that the pavement needed repair and that crushed stone would not have been suitable for the purpose and would have been additionally unsuitable when the rest of the street was paved with asphalt, we do not feel prepared to declare the judgment wrong.

Judgment affirmed.

CUYAHOGA RIVER POWER COMPANY, Appt.,
v.
CITY OF AKRON.

(See S. C. Reporter's ed. 462-464.)

Federal courts — jurisdiction — Federal question.

A Federal district court has jurisdiction without diversity of citizenship of a bill brought by a hydroelectric power company to prevent a municipality from appropriating the company's asserted paramount rights through the enforcement of an ordinance for the appropriation of the waters of a stream, where the bill, after setting out various passages from the state statutes and Constitution, and averring that the city has no constitutional power to take the company's property and franchises, or any property for a water supply, alleges that the city does not contemplate instituting proceedings against the company, but intends to take the latter's property and rights without compensation; that it is building a dam and has taken steps that will destroy the company's rights; that it is insolvent; that the purpose of the ordinance and statutes referred to is to appropriate and destroy those rights without compensation; and that in so acting it violates the contract and due process of law clauses of the Federal Constitution.

[For other cases, see Courts, V. c, in Digest Sup. Ct. 1908.]

[No. 465.]

Argued October 20, 1915. Decided March 20, 1916.

APPEAL from the District Court of the United States for the Northern District of Ohio to review a decree dismissing, for want of jurisdiction, a bill by a hydroelectric power company to prevent a municipality from appropriating the waters of a stream. Reversed.

See same case below, 210 Fed. 524.

The facts are stated in the opinion.

Mr. Carroll G. Walter argued the cause, and, with Messrs. Wade H. Ellis, R. Golden Donaldson, and Charles A. Collin, filed a brief for appellant.

Mr. John L. Wells also argued the cause for appellant.

Mr. Charles A. Collin also filed a separate brief for appellant:

The claim that the action of the appellee in diverting the waters of the Cuyahoga river is the action of the state, and, if carried out, would violate the provisions of the 14th Amendment to the Constitution of the United States by taking the property of the appellant without due process of law, constitutes a Federal question.

Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 326, 330, 57 L. ed. 857, 860, 33 Sup. Ct. Rep. 510; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Appleby v. Buffalo, 221 U. S. 524, 55 L. ed. 838, 31 Sup. Ct. Rep. 699; United States v. Reynolds, 235 U. S. 133, 149, 59 L. ed. 162, 168, 35 Sup. Ct. Rep. 86; McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 160, 59 L. ed. 169, 173, 35 Sup. Ct. Rep. 69; Yick Wo v. Hopkins, 118 U. S. 356, 373, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 287,

288, 57 L. ed. 510, 515, 33 Sup. Ct. Rep. 312; Raymond v. Chicago Union Traction Co. 207 U. S. 20, 35, 52 L. ed. 78, 87, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Ex parte Young, 209 U. S. 123, 155, 52 L. ed. 714, 727, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Portland R. Light & P. Co. v. Portland, 210 Fed. 669.

The bill having presented a Federal question, the district court was under a duty to take jurisdiction of the case and decide all questions in the case, regardless of which way those questions should ultimately be determined.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; Willcox v. Consolidated Gas Co. 212 U. S. 19, 39, 40, 53 L. ed. 382, 394, 395, 4 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311, 319, 322, 51 L. ed. 198, 202, 203, 27 Sup. Ct. Rep. 83; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 32, 50 L. ed. 353, 358, 26 Sup. Ct. Rep. 224; Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 82, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410.

Mr. Charles F. Choate, Jr., argued the cause, and, with Mr. Jonathan Taylor, filed a brief for appellee:

The bill of complaint is the sole source to which the court may look for jurisdictional allegations.

Memphis v. Cumberland Teleph. & Teleg. Co. 218 U. S. 624, 54 L. ed. 1185, 31 Sup. Ct. Rep. 115; Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 188, 46 L. ed. 144, 146, 22 Sup. Ct. Rep. 47; Bienville Water Supply Co. v. Mobile, 175 U. S. 109, 44 L. ed. 92, 20 Sup. Ct. Rep. 40.

Only those allegations which make up the plaintiff's case, and which are not mere anticipations of the defense to be offered by the defendant, may be looked to.

Florida, C. & P. R. Co. v. Bell, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; Metcalf v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

The allegations of the bill are, in brief, that the state statutes under which the plaintiff purports to act have been repealed, and that therefore the defendant is acting without any authority whatever. On this ground alone the district court was justified in refusing to entertain jurisdiction.

Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by an Ohio corporation against a city of Ohio, to prevent the latter from appropriating the waters of the Cuyahoga river and its tributaries above a certain point. It alleges that the plaintiff was incorporated under the laws of Ohio for the purpose of generating hydroelectric power by means of dams and canals upon the said river, and of disposing of the same; that it has adopted surveys, maps, plans, and profiles to that end, has entered upon, located, and defined the property rights required, has instituted condemnation proceedings to acquire a part at least of such property, has sold bonds and spent large sums and has gained a paramount right to the water and necessary land. The bill also alleges that the city has passed an ordinance appropriating the water, and directing its solicitor to take proceedings in court for the assessment of the compensation to be paid. The district court dismissed the bill for want of jurisdiction on the ground that it presented no Federal question, because, if the plaintiff had any rights, they could be appropriated only by paying for them in pursuance of the verdict of a jury and a judgment of a court. It made the statutory certificate, and the case comes here by direct appeal. 210 Fed. 524.

It appears to us that sufficient attention was not paid to other allegations of the bill. After setting out various passages from the statutes and Constitution of Ohio, and concluding that the city has no constitutional power to take the property and franchises that the plaintiff is alleged to own, or any property for a water supply, it alleges that the city does not intend to institute any proceedings against the plaintiff, but intends to take its property [464] and rights without compensation; that it is building a dam and has taken steps that will destroy the plaintiff's rights; that it is insolvent; that the purpose of the ordinance and certain statutes referred to is to appropriate and destroy those rights without compensation; that the defendant purports to be acting under the ordinance, and that in so acting it violates art. I, § 10, and the 14th Amendment of the Constitution of the United States. It is established that such action is to be regarded as the action of the state. Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. Whether the plaintiff has any rights that the city is bound to respect can be decided only by taking jurisdiction of the case; and the same is true of other questions raised.

Therefore it will be necessary for the District Court to deal with the merits, and to that end the decree must be reversed.

Decree reversed.

GREAT NORTHERN RAILWAY COMPANY, Plff. in Err.,
v.
O. B. KNAPP.

(See S. C. Reporter's ed. 464-466.)

Error to state court — following decision below — question for jury.

Only in case of palpable error should the Federal Supreme Court disturb, on writ of error to a state court, a judgment in an action brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), which presents no question as to the interpretation of any provision of that statute, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury, the state courts, trial and appellate, having held that there were.

[For other cases, see Appeal and Error, VIII. m, 6, in Digest Sup. Ct. 1908.]

[No. 690.]

Argued February 24, 1916. Decided March 20, 1916.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

Error to state court in cases arising under the Federal employers' liability act.

A contention in a state court in an action based solely upon a Federal statute, like the employer's liability act, that there was no evidence tending to show liability under that statute, presents a Federal question which, when denied, will support a writ of error from the Federal Supreme Court to the highest state court. St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

Federal questions which will give jurisdiction to the Federal Supreme Court of a writ of error to a state court in a case arising under the Federal employers' liability act of April 22, 1908, are presented by contentions that the trial court erred in refusing to instruct a verdict on the ground that there was no evidence tending to show either negligence or that the carrier or the deceased, at the time of the particular transaction from which the injury arose, was engaged in interstate commerce, and in further refusing to instruct the jury that a state statute limiting the amount of recovery was controlling. Chicago, R. I. & P. R. Co. v. Devine, 239 U. S. 52, ante, 140, 36 Sup. Ct. Rep. 27.

A decision of a state court adverse to plaintiff in error's contention that, by the true construction of the Federal employers' liability and safety appliance acts, it could rely upon the common-law defense of assumption of risk, is reviewable in the Federal Supreme Court. Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

A writ of error will lie from the Federal Supreme Court to review a decision of the highest state court, which sustained the action of the trial court in overruling certain contentions made by the plaintiff in error, asserting a construction of the Federal employers' liability act of April 22, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475.

The contentions of the defendant railway company, sued in the state courts under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the employers' liability act of April 22, 1908, and that, if liable, it was liable only to his personal representatives, and not to the plaintiffs,—present Federal questions which, when decided by the state court, will support a writ of error from the Federal Supreme Court. St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

Whether or not the two years' limitation prescribed by the employers' liability

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court for Meeker County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, on first appeal, 130 Minn. 405, 153 N. W. 848.

The facts are stated in the opinion.

Mr. A. L. Janes argued the cause, and, with Messrs. M. L. Countryman and E. C. Lindley, filed a brief for plaintiff in error:

The master is not bound to see that his instrumentalities are absolutely safe and suitable, nor to see that they are as safe as human skill and foresight can make them, nor to provide appliances which make accidents impossible. He fulfils his duty to his employee when he provides machinery reasonably safe and suitable for the work being done.

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Reese v. Philadelphia & R. R. Co. 239 U. S. 463, ante, 384, 36 Sup. Ct. Rep. 134.

Even assuming negligence in failing to guard the set screws, such failure cannot be held to be a proximate cause of the accident.

Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 195.

The undisputed facts in this case present a particularly clear case of assumption of

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act of April 22, 1908, for actions under that act, was in effect disregarded by permitting the amendment of the complaint so as to state distinctly that, at the time of the injury, the defendant was engaged and the plaintiff employed in interstate commerce, is a Federal question subject to re-examination by writ of error to a state court, however much the allowance of the amendment otherwise might have rested in discretion, or have been a matter of local procedure. Seaboard Air Line R. Co. v. Renn, 241 U. S. 291, post, 1006, 36 Sup. Ct. Rep. 567.

No question under the laws of the United States which may be reviewed by writ of error to a state court may be based upon the fact that the applicability of the Federal employers' liability act of April 22, 1908, first appeared from an amendment to the declaration, which alleged the same facts except that it did not allege, as did the amendment, that plaintiff was injured on an interstate trip. Kansas City Western R. Co. v. McAdow, 240 U. S. 51, ante, 520, 36 Sup. Ct. Rep. 252.

The contention in a suit in a state court based upon the Federal employers' liability act of April 22, 1908, that the jury was misled concerning the doctrine of assumption of risk by two statements by the court, which, standing alone, may be confusing, may have sufficient strength to serve as the basis of a writ of error from the Federal Supreme Court, although that court may agree with the state court in thinking that the statements in question could not have produced a mistaken conception in the minds of the jury, when considered with the express instruction concerning the doctrine of assumption of risk as applied to the case at bar. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

The contention that a right or immunity under the Federal employers' liability act of April 22, 1908, was denied by the ruling of a state court that a declaration stating a good cause of action under that act could serve as the basis of recovery under the state law after first eliminating the allegation that the injury occurred in interstate commerce, which the proof demonstrated was unwarranted, is so lacking in merit as not to serve as the basis for a writ of error from the Federal Supreme Court to the state court. Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

The want of merit in the contention that a state statute limiting the amount of recovery is controlling in a suit arising under the Federal employers' liability act of April 22, 1908, is so well established by previous decisions of the Federal Supreme Court concerning the exclusive operation and effect of that statute over the subject with which it deals that the presence of such question in the case will not prevent the Federal Supreme Court from granting a motion to affirm the judgment on a writ of error to a state court. Chicago, R. I. & P. R. Co. v. Devine, 239 U. S. 52, ante, 140, 36 Sup. Ct. Rep. 27.

The contention on a writ of error to a state court in a case arising under the employers' liability act of April 22, 1908, that the trial court should have instructed a verdict in favor of the railway company, on the ground that there was no evidence tending to show either negligence or that the company or the deceased, at the time of the particular transaction from which the injury arose, was engaged in interstate commerce,—is too lacking in substance to prevent the granting of a motion to affirm, where what is really involved is a mere dispute concerning the weight of conflicting tendencies of proof. Ibid.

The Federal question presented by the contention that error was committed by the state trial court in not taking from the jury a case based upon the Federal employers' liability act of April 22, 1908, and in not instructing the jury to render a verdict for the defendant, upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration, manifestly cannot be said to be so frivolous as not to serve as the basis of a writ of error from the Federal Supreme Court, where the highest state court was divided on the ques-

risk as that defense existed at common law and is interpreted by the Federal courts.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 65, 68, 48 L. ed. 96, 99, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Butler v. Frazee, 211 U. S. 459, 466, 53 L. ed. 281, 285, 29 Sup. Ct. Rep. 136; Kirkpatrick v. St. Louis & S. F. R. Co. 87 C. C. A. 35, 159 Fed. 855; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A. (N.S.) 387, 115 C. C. A. 515, 195 Fed. 725; Brown v. Hitritz, 113 C. C. A. 84, 192 Fed. 528; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645, 9 Am. Neg. Rep. 670; Murphy v. American Rubber Co. 159 Mass. 266, 34 N. E. 268; Shea v. Kansas City, Ft. S. & M. R. Co. 76 Mo. App. 29; McIntire v. White, 171 Mass. 170, 50 N. E. 524; Feely v. Pearson Cordage Co. 161 Mass. 426, 37 N. E. 368; Storrs v. Michigan Starch Co. 126 Mich. 666, 86 N. W. 134; Disano v. New England Steam Brick Co. 20 R. I. 452, 40 Atl. 7, 4 Am. Neg. Rep. 219; Omaha Packing Co. v. Sanduski, 19 L.R.A.(N.S.) 355, 84 C. C. A. 89, 155 Fed. 897; Balle v. Detroit Leather Co. 73 Mich. 158, 41 N. W 216; Goudie v. Foster, 202 Mass. 226, 88 N. E. 663; Saversnick v. Schwarzschild & S. Co. 141 Mo. App. 509, 125 S. W. 1192; Schultz v. Chicago, R. I. & P. R. Co. 145 Mo. App. 262, 129 S. W. 1051; Wilson v. Chess & W. Co. 117 Ky. 567, 78 S. W. 453; M. Rumely Co. v. Myer, 40 Ind. App. 460, 82 N. E. 97; Steffen v. Illinois

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tion, and some members of the Federal Supreme Court consider that the proposition affords adequate ground for reversal. Seaboard Air Line R. Co. v. Padgett, supra.

A controlling Federal question is necessarily involved in a judgment of a state court refusing to measure the liability of the defendant interstate railway carrier in an action by an employee to recover damages for personal injuries, by the employers' liability act of April 22, 1908, where, although the pleadings contained no reference to that act, evidence was admitted over the plaintiff's objection which showed that the train on which he was riding at the time of the injury was engaged in interstate commerce, whereupon the defendant carrier insisted that the case was governed by that statute, and that its application and enforcement would defeat any recovery. Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907, and the employers' liability act of April 22, 1908, and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, *i. e.*, defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court. St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 57 Sup. Ct. Rep. 858.

A mere ruling by the highest state court in a suit based solely upon the hours of service act of March 4, 1907, and the employers' liability act of April 22, 1908, that there was testimony tending to show negligence, affords no basis for the contention that the judgment, which affirmed a judgment below in favor of plaintiff, was rested upon that ground, so as to deprive the Federal Supreme Court of jurisdiction of a writ of error to the state court, on the theory that the case was decided on an independent non-Federal ground. Ibid.

An immunity from liability under the employers' liability act of April 22, 1908, must be regarded as sufficiently asserted for the purpose of sustaining a writ of error from the Federal Supreme Court to the highest court of a state, whether the question was properly raised in the trial court, according to the local practice, or not, where such immunity was expressly claimed, and the highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right. North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914C, 159.

An objection by an interstate railway carrier, sued for the death of an employee, that, if liable at all, it was, under the Federal employers' liability act of April 22, 1908, liable only to personal representatives of the deceased, and not to the plaintiffs, who were his widow and parents, was interposed in time, so that the state courts erred in overruling it, where the petition stated a case under the state statute, and the carrier, having called attention to the Federal statute by special exceptions, and having suggested that the state statute might not be the applicable one, made the specific objection, grounded on the Federal statute, after the evidence disclosed that the real case was controlled by such statute. St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156.

The objection that a carrier sued for the death of an employee was estopped to rely upon the Federal employers' liability act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the Federal question was sufficiently raised, and decided it. St. Louis, I. M. & S. R. Co. v. Hesterly, 228

Steel Co. 140 Ill. App. 551; Swift & Co. v. Campbell, 97 Ill. App. 360; Scharenbroich v. St. Cloud Fiber-Ware Co. 59 Minn. 116, 60 N. W. 1093; Kyner v. Portland Gold Min Co. 106 C. C. A. 245, 184 Fed. 43; Haines v. Spencer 92 C. C. A. 658, 167 Fed. 266; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524, 15 Am. Neg. Rep. 483; E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; American Dredging Co. v. Walls, 28 C. C. A. 441, 55 U. S. App. 460, 84 Fed. 428; Ford v. Mt. Tom Sulphite Pulp Co. 172 Mass. 544, 48 L.R.A. 96, 52 N. E. 1065; Connelly v. Hamilton Woolen Co. 163 Mass. 156, 39 N. E. 787; Brown v. Tabor Mill Co. 22 Wash. 317, 60 Pac. 1126; Archibald v. Cygolf Shoe Co. 186 Mass. 213, 71 N. E. 315; Labatt, Mast. & S. 2d ed. § 1313, p. 3687; Mississippi River Logging Co. v. Schneider, 20 C. C. A. 390, 34 U. S. App. 743, 74 Fed. 201.

The defense of assumption of risk was applied by the supreme court of the state of Minnesota to the facts of this case as that court had modified this defense when applied to cases arising under the safety appliance acts of that state.

Snyder v. Waldorf Box Board Co. 110 Minn. 42, 124 N. W. 450; Glockner v. Hardwood Mfg. Co. 109 Minn. 32, 122 N. W. 465, 123 N. W. 807, 18 Ann. Cas. 130; Falconer v. Sherwood, 118 Minn. 361, 136 N. W. 1039.

The supreme court of the state of Minnesota confused the defense of assumption of risk and of contributory negligence.

U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

A decision of a state court, having substantial support in the record, that the pleadings and evidence in an action for death against an interstate railway company demonstrate that the deceased was in the employ of an express company rather than of the railway company, and that therefore the defendant's liability was not controlled by the Federal employers' liability act of April 22, 1908, involves no denial of any asserted Federal right, and is not reviewable in the Federal Supreme Court. Missouri, K. & T. R. Co. v. West, 232 U. S. 682, 58 L. ed. 795, 34 Sup. Ct. Rep. 471.

The contention that an agreement by a railway employee that his acceptance of "benefits for injury" from a railway company's relief department shall release the company from all liability for damages growing out of such injury, although it may be invalid as to such company under the Federal employers' liability act of April 22, 1908, § 5, operates to discharge another railway company as a joint tort feasor from its common-law liability, presents no Federal question which may be reviewed by the Federal Supreme Court on writ of error to a state court, where the latter court held that the release, being invalid as to the employing company, was not available as a defense to the other company. Chicago & A. R. Co. v. Wagner, 239 U. S. 452, ante, 379, 36 Sup. Ct. Rep. 135.

Questions of general law, raised in an action under the Federal employers' liability act of April 22, 1908, which involve no construction of the Federal statute, and neither directly nor indirectly affect any Federal right, will not be reviewed on a writ of error from the Federal Supreme Court to a state court. Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

The Federal Supreme Court, when reviewing a judgment of a state court in an action in which the right to recover was based upon the Federal employers' liability act of April 22, 1908, cannot consider merely incidental questions, not Federal in character, *i. e.*, those which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse, the right of the defendant to be shielded from responsibility under that statute, because, when properly applied, no liability on his part from the statute would result. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

Questions in a suit under the Federal employers' liability act of April 22, 1908, which relate to matters of pleading, to the admissibility of evidence, to the sufficiency of exceptions, and to various rulings of the trial courts, involving no construction of the Federal statute, cannot be considered on a writ of error from the Federal Supreme Court to a state court. Central Vermont R. Co. v. White, supra.

The excessiveness of an award for pain and suffering of a deceased railway employee in an action brought under the employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, is a question of fact which is not open to revision in the Federal Supreme Court on writ of error to a state court. St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754.

The question whether the declaration in an action against a railway company for the wrongful killing of an employee permitted a recovery at common law is one of local law in the absence of any showing bringing the injury within the Federal employers' liability act of April 22, 1908, and is, therefore, not open for review in the Federal Supreme Court on writ of error to a state court. Osborne v. Gray, 241 U. S. 16, post, 865, 36 Sup. Ct. Rep. 486.

The ruling of the highest court of a state that the failure of the original declaration in a suit under the Federal employers' liability act of April 22, 1908, to show that the employee was engaged in interstate

Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492. 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A.(N.S.) 387, 115 C. C. A. 515, 195 Fed. 725.

Plaintiff in error in this case was entitled to a directed verdict.

Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A.(N.S.) 389, 115 C. C. A. 515, 195 Fed. 730; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 648, 9 Am. Neg. Rep. 670; Morse v. Minneapolis & St. L. R. Co. 30 Minn. 465, 16 N. W. 358; Manore v. Kilgore-Peteler Co. 107 Minn. 347, 120 N. W. 340; Mattson v. Chicago, St. P. M. & O. R. Co. 103 Minn. 239, 114 N. W. 759; O'Neil v. Great Northern R. Co. 101 Minn. 467, 112 N. W. 625.

Mr. Tom Davis argued the cause, and, with Messrs. Ernest A. Michel and John I. Davis, filed a brief for defendant in error:

Assumption of risk is a waiver of defects and dangers by an employee, and a consent under an express or implied contract to assume them, whether he is careful or negligent in his conduct; the doctrine being based on the maxim *Volenti non fit injuria*.

Miller v. White Bronze Monument Co.

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commerce at the time of his injury, was cured by a charge in the plea and admission in the replication that he was so employed, is binding on the Federal Supreme Court on writ of error to the state court. Central Vermont R. Co. v. White, supra.

The objection that an instruction, in an action under the Federal employers' liability act of April 22, 1908, on the assumption of risk, did not state as an element the appreciation by the employee of the danger of the situation as necessary to his assumption of risk, is not available on writ of error from the Federal Supreme Court to a state court, where the objection made at the trial was the general one that the instruction did not correctly state the common-law doctrine of assumption of risk, and in the state court of last resort the attack was based upon the sole ground that assumption of risk was not available as a defense under the Federal statute. Jacobs v. Southern R. Co. 241 U. S. 229, post, 970, 36 Sup. Ct. Rep. 588.

Whether state or congressional legislation governs a personal-injury action brought by an employee against an electric railway company need not be determined by the Federal Supreme Court on writ of error to a state court to review a judgment in favor of the employee, where the state and Federal statutes are so similar that the railway company's liability does not appear to be affected by the question which of them governed the case. Kansas City Western R. Co. v. McAdow, 240 U. S. 51, ante, 520, 36 Sup. Ct. Rep. 252.

The refusal of a state trial court, sustained by the state court of last resort, to take from the jury an action under the Federal employers' liability act of April 22, 1908, by directing a verdict for defendant, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous. Louisville & N. R. Co. v. Stewart, 241 U. S. 261, post, 989, 36 Sup. Ct. Rep. 586.

Without a clear conviction of error, the Federal Supreme Court will not reverse, on writ of error to a state court, the ruling of both courts below that there was evidence tending to show that the "next of kin," for whose benefit an action under the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, was brought to recover damages for the negligent killing of their intestate by his interstate railway employer, were so dependent on the deceased as to justify a recovery under the Federal statute. Seaboard Air Line R. Co. v. Kenney, 240 U. S. 489, post, 762, 36 Sup. Ct. Rep. 458.

The concurrent determination of the state trial and appellate courts that the evidence showed that a deceased railway employee, for whose death an action was brought under the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, assumed the risk of danger which resulted in his injury and death, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous. Baugham v. New York, P. & N. R. Co. 241 U. S. 237, post, 977, 36 Sup. Ct. Rep. 592.

A judgment under the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, which includes a recovery both for the decedent's conscious pain and suffering and for the pecuniary loss sustained by the relatives or next of kin for whose benefit the action was brought, will not be reversed by the Federal Supreme Court on writ of error to a state court because the jury was not required to specify in its verdict the amount awarded on account of each distinct liability, where the verdict seems in harmony with local practice, and has been approved by the courts below. Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844.

Reversible error is committed by the highest court of a state in ruling that evidence of contributory negligence in an action under the Federal employers' liability act of April 22, 1908, as amended by the act of April 5, 1910, which it found that the trial court had rejected for a wrong reason, *viz.*, because contributory negligence was not pleaded, was nevertheless properly excluded because it was not offered for the specific

141 Iowa, 701, 118 N. W. 518, 18 Ann. Cas. 957; Words & Phrases, 2d series, 324–327.

The general definition as given by most of the courts is that assumption of risk rests on contract, either express or implied. However, some of the courts hold that assumption of risk is based, not upon the contract, but on the principle expressed by the maxim *Volenti non fit injuria.*

Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

The maxim *Volenti non fit injuria* means that he who consents cannot receive an injury.

Rigsby v. Oil Well Supply Co. 115 Mo. App. 297, 91 S. W. 460; 4 Words & Phrases, 2d ed. 1200.

Whether assumption of risk is based on the contract, voluntary or implied, as most of the courts seem to hold, or whether it is based on the maxim *Volenti non fit injuria*, the deducible rule, from all the decisions, seems to be that assumption of risk is the voluntary contract or consent of a servant to take the chances of the known or obvious dangers of his employment, and to relieve his master from liability therefor. And the meaning of the doctrine is that the employee has waived his right to hold his employer responsible for the risk.

Wood v. Victor Mfg. Co. 66 S. C. 482, 45 S. E. 81, 14 Am. Neg. Rep. 629; 1 Words & Phrases, 2d series, 328.

And, in assumption of risk there is an election deliberately to assume the risk of injury or danger likely to result, in the ordinary course of employment.

Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

The distinction between assumption of risk and contributory negligence has been pointed out in a large number of cases, and the two defenses are entirely separate and distinct.

Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360; Hooper v. Columbia & G. R. Co. 21 S. C. 547, 53 Am. Rep. 691; Wood v. Victor Mfg. Co. 66 S. C. 482, 45 S. E. 81, 14 Am. Neg. Rep. 629; Bodie v. Charleston & W. C. R. Co. 61 S. C. 478, 39 S. E. 715, 10 Am. Neg. Rep. 473; 1 Words & Phrases, 2d series, 328, 329; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

Whether his act be assumption of risk or contributory negligence, it was for the jury to determine whether it would bar a recovery, and not for the court. And where the trial court upheld the verdict of the jury, and the supreme court of Minnesota unanimously affirmed the trial court, there should be an affirmance by the United States Supreme Court.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Jones v. East Tennessee, V. & G. R. Co. 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118; Dunlap v. Northeastern R. Co. 130 U. S. 649, 32 L. ed. 1058, 9 Sup. Ct. Rep. 647; Louisville & N. R. Co. v. Woodson, 134 U. S. 614, 33 L. ed. 1032, 10 Sup. Ct. Rep. 628; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Daley v. American Printing Co. 150 Mass. 77, 22 N. E. 439; Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; Kreigh v. Westinghouse, C. K. & C. Co. 214 U. S. 258, 53 L. ed. 989, 29 Sup. Ct. Rep. 619; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369; Union P. R. Co. v.

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purpose of mitigating the damages, where there was no settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered. Kansas City Southern R. Co. v. Jones, 241 U. S. 181, post, 943, 36 Sup. Ct. Rep. 513.

A verdict found on the first trial of an action for death under the Federal employers' liability act of April 22, 1908, upon an instruction that the jury should find, if anything, "such a sum as will fairly compensate his estate for his death," cannot be reinstated by the Federal Supreme Court on a cross writ of error to a state court of last resort, which, having set aside a verdict for plaintiff, rendered on the first trial, and the judgment based upon it, affirmed, on a second appeal, a judgment for plaintiff in a lesser amount, rendered on the second trial. Louisville & N. R. Co. v. Stewart, supra.

Ten per cent damages may be added by a state court of last resort in affirming a judgment for plaintiff in an action under the Federal employers' liability act of April 22, 1908, where the defendant obtained a supersedeas, and the local law makes 10 per cent the cost of it to all persons if the judgment is affirmed. Ibid.

Interest may be allowed by a state upon a judgment for plaintiff under the Federal employers' liability act of April 22, 1908, from the time when it was rendered, if it provides appellate proceedings and the judgment is affirmed, as, but for such proceedings, interest would run as of course until the judgment was paid. Ibid.

McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Supreme Lodge, K. P. v. Beck, 181 U. S. 50, 45 L. ed. 741, 21 Sup. Ct. Rep. 532; Marande v. Texas & P. R. Co. 184 U. S. 173, 46 L. ed. 487, 22 Sup. Ct. Rep. 340; Reese v. Philadelphia & R. R. Co. 239 U. S. 463, ante, 384, 36 Sup. Ct. Rep. 134; Leach v. Burr, 188 U. S. 510, 47 L. ed. 567, 23 Sup. Ct. Rep. 393.

The employee assumes the ordinary and usual risk of the employment, but not the risk of the negligence of his employer.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

In the present appeal there is nothing which appears as negligence *per se*, and it is undoubtedly a question of fact whether the employee assumed the risk, even though the evidence is undisputed. It was for the jury to make a proper deduction from the testimony.

Davidson S. S. Co. v. United States, 205 U. S. 187, 51 L. ed. 764, 27 Sup. Ct. Rep. 480; Sioux City & P. R. Co. v. Stout, 17 Wall. 657, 21 L. ed. 745; Butler v. Frazee, 211 U. S. 459, 53 L. ed. 281, 29 Sup. Ct. Rep. 136.

The common-law rule of assumption of risk has not been modified or in any way changed by the safety appliance act of the state of Minnesota, relative to guarding dangerous machinery.

Anderson v. C. N. Nelson Lumber Co. 67 Minn. 79, 69 N. W. 630; Glockner v. Hardwood Mfg. Co. 109 Minn. 30, 122 N. W. 465, 123 N. W. 807, 18 Ann. Cas. 130; Schutt v. Adair, 99 Minn. 7, 108 N. W. 811, 20 Am. Neg. Rep. 598.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought under the Federal employers' liability act. The plaintiff (defendant in error) was the station agent at Dassel, Minnesota. It was a part of his duty to attend the pump house some distance from the station, once or twice a day, and keep filled the water tank for locomotives. The water was pumped by means of a gasolene engine, and the pump and engine were in a small room. In proceeding to start the pump at the time in question, the plaintiff's arm was caught in the clutch of the engine and cut off. As the supreme court of the state put it, the plaintiff claimed that "he lost his balance, either through a slip upon the greasy floor or a jerk by his coat being drawn into the fly wheel or shaft, and in striking out to catch himself his hand and part of the arm came between the crank of the shaft and top of the hood which partially but inadequately guarded it." The state court deemed the evidence to be "very clear" that it was practicable to interpose safeguards "so as to fully protect from danger those who had to pass by." The plaintiff alleged negligence in his employer, in failing to provide suitable [466] protection; the company denied negligence and insisted upon the defense of assumption of risk. The trial court held that upon the evidence these questions were for the jury, and there was a verdict for the plaintiff. On motion, a new trial was ordered unless the plaintiff should remit a portion of the damages, and, this being done, judgment was entered, which was affirmed by the supreme court of the state. 130 Minn. 405, 153 N. W. 848.

It was conceded that when the injury was received, plaintiff was engaged in work pertaining to the defendant's business as a common carrier in interstate commerce, and that the Federal act applied. The court recognized that, if assumption of risk by the plaintiff was made out, it would bar recovery under the act. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475. The court charged the jury accordingly, and there was no exception by the defendant to the charge, or request on its part for any additional instructions,—the defendant contenting itself with its motion for dismissal or for a direction of a verdict in its favor. The case, then, is one in which there is no question as to the interpretation of any provision of the Federal act, or as to the definition of legal principle in its application, but simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury. The state courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 673, 59 L. ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, 355, ante, 324, 327, 36 Sup. Ct. Rep. 126.

Judgment affirmed.

[467] E. B. JOHNSON, H. B. Johnson, and First National Bank Building Company, Plffs. in Err.,

v.

F. E. RIDDLE.

(See S. C. Reporter's ed. 467–483.)

Courts — conclusiveness of decisions of Land Department.

1. The findings of the Indian inspector assigned to the Indian Territory respecting matters of fact in a contest over the preferential right to purchase a Chickasaw town-site lot, affirmed on appeal by the Secretary of the Interior, are binding upon the courts, in the absence of gross mistake or fraud.

[For other cases, see Courts, I. e, 6, in Digest Sup. Ct. 1908.]

Public lands — town sites — preferential right to purchase — rights of occupancy.

2. Any existing rights of occupancy of a Chickasha town-site lot, except such as coincided with the ownership of permanent improvements thereon, terminated upon the taking effect of the provisions of the Atoka Agreement of April 23, 1897, embraced in the Curtis act of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 29, conferring a preferential right of purchase upon owners of such improvements on Choctaw and Chickasaw town-site lots—or, at least, when its town-site provisions were put in operation at Chickasha.

[For other cases, see Public Lands, I. d, in Digest Sup. Ct. 1908.]

Estoppel — by tenant — landlord's title.

3. A tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law.

[For other cases, see Estoppel, III. e, in Digest Sup. Ct. 1908.]

Public lands — charging patentee as trustee for equitable owner.

4. A title acquired by the exercise of the preferential right of purchase conferred by the Atoka Agreement of April 23, 1897, embraced in the Curtis act of June 28, 1898 (30 Stat. at L. 495, chap. 517), § 29, upon the owners of permanent improvements upon Choctaw and Chickasaw town-site lots, will not be impressed with a trust in favor of the lessor of such lots or those claiming under him because the purchaser's ownership of the improvements was derived from the lessee's transferee, who, by withholding possession from the lessor, after refusing to pay the rent, deprived the latter of any opportunity to enter and erect improvements himself, both lessor and lessee being trespassers in disregard of Indian rights.

[For other cases, see Public Lands, 1065–1074, in Digest Sup. Ct. 1908.]

Judgment — res judicata — title.

5. The legal or equitable title to the soil was not involved in an action of unlawful detainer which concerned only the right of possession as between landlord and tenant.

[For other cases, see Judgment, III. j, 4, b, in Digest Sup. Ct. 1908.]

[No. 161.]

Argued January 12, 1916. Decided March 20, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Carter County, in that State, in favor of plaintiff in a suit over the title to a Chickasaw town-site lot. Affirmed.

See same case below, 41 Okla. 759, 139 Pac. 1143.

The facts are stated in the opinion.

Mr. C. B. Ames argued the cause, and, with Mr. Alger Melton, filed a brief for plaintiffs in error:

The decision of the town-site board, as approved by the Secretary of the Interior, was based on an erroneous proposition; to wit, that the effect of the Atoka Agreement was to terminate the relation of landlord and tenant.

Ellis v. Fitzpatrick, 3 Ind. Terr. 656, 64 S. W. 567, 55 C. C. A. 260, 118 Fed. 430; Fraer v. Washington, 60 C. C. A. 194, 125 Fed. 280; Shy v. Brockhause, 7 Okla. 35, 54 Pac. 306; G. W. Walker Trading Co. v. Grady Trading Co. 1 Ind. Terr. 191, 39 S. W. 354; Kelly v. Johnson, 1 Ind. Terr. 184, 39 S. W. 352; Williams v. Works, 4 Ind. Terr. 587, 76 S. W. 246.

Under the Atoka Agreement as embodied in the Curtis act, which provides that the owner of the improvements shall have the right to buy one residence and one business lot at 50 per cent of the appraised value, a tenant who has wrongfully withheld possession of such a lot from his landlord, thereby preventing his landlord from erecting improvements thereon, cannot acquire title to the lot as against the landlord.

Rector v. Gibbon, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605; Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Ricks v. Reed, 19 Cal. 551; Goode v. Gaines, 145 U. S. 141, 36 L. ed. 654, 12 Sup. Ct. Rep. 839; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Hagar v. Wikoff, 2 Okla. 580, 39 Pac. 281; Downman v. Saunders, 3 Okla. 227, 41 Pac. 104.

The tenant, having acquired a deed in violation of the rights of his landlord, holds the title as trustee for his landlord.

Rector v. Gibbon, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; Wallace v. Adams, 74 C. C. A. 540, 143

NOTE.—On the right of tenant to show that landlord parted with or lost his title to a third person during tenancy—see note to Raines v. Hindman, 38 L.R.A.(N.S.) 863.

Fed. 716; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; Trice v. Comstock, 61 L.R.A. 176, 57 C. C. A. 646, 121 Fed. 620; Bertram v. Cook, 32 Mich. 518.

Mr. Joseph W. Bailey argued the cause, and Messrs. C. B. Stuart, A. C. Cruce, and W. A. Ledbetter filed a brief for defendant in error:

The final decision of the Land Department on a question of fact between contestants over public lands, and the deduction drawn by said officers, and the final conclusion reached upon the evidence, are conclusive and binding upon the court.

Greenameyer v. Coate, 212 U. S. 434, 53 L. ed. 587, 29 Sup. Ct. Rep. 345; Potter v. Hall, 189 U. S. 292, 48 L. ed. 817, 23 Sup. Ct. Rep. 545; Marquez v. Frisbie, 101 U. S. 473, 479, 25 L. ed. 800, 802; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; Johnson v. Towsley, 13 Wall. 72, 20 L. ed. 485; Warren v. Van Brunt, 19 Wall. 646, 22 L. ed. 219; United States v. Minor, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836; Baldwin v. Starks, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; Gardner v. Bonestell, 180 U. S. 362, 364, 45 L. ed. 574, 575, 21 Sup. Ct. Rep. 399; Johnson v. Drew, 171 U. S. 100, 43 L. ed. 91, 18 Sup. Ct. Rep. 800.

The Supreme Court, in the review of cases from the state courts, will follow the findings of facts of those courts.

Gardner v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632.

Neither defendants nor their predecessors in interest had any legal or equitable right, as against the Chickasaw and Choctaw Nations and the government, or any claim preventing the government from disposing of the property in any way it might see proper, since they did not own the improvements.

Gonzales v. French, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. Rep. 102; Frisbie v. Whitney, 9 Wall. 187, 19 L. ed. 668; Yosemite Valley Case (Hutchings v. Low) 15 Wall. 77, 21 L. ed. 82; Shepley v. Cowan, 91 U. S. 331, 23 L. ed. 424; Campbell v. Weyerhaeuser, 88 C. C. A. 412, 161 Fed. 332; Norton v. Evans, 27 C. C. A. 168, 49 U. S. App. 669, 82 Fed. 804; Burke v. Southern P. R. Co. 234 U. S. 669, 58 L. ed. 1527, 34 Sup. Ct. Rep. 907.

A court of chancery does not make titles where there are none, but only will compel persons who obtained the legal title unjustly and by fraud to restore it to those who, under the law, are entitled thereto.

Willet v. Overton, 2 Root, 338, 1 Am. Dec. 72.

In equity as well as in law the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary; and a complete equitable title must be shown to entitle the plaintiff to recover, as in law a complete legal title must be shown.

Grand Gulf R. & Bkg. Co. v. Bryan, 8 Smedes & M. 234; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677.

The general rule that the tenant is estopped from questioning and disputing his landlord's title has exceptions which are as well founded as the rule itself.

Welder v. McComb, 10 Tex. Civ. App. 85, 30 S. W. 822; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576; Wood v. Chambers, 3 Rich. L. 150; Camp v. Camp, 5 Conn. 291, 13 Am. Dec. 60; Dodge v. Phelan, 2 Tex. Civ. App. 441, 21 S. W. 309; Wild v. Serpell, 10 Gratt. 405; Ryder v. Mansell, 66 Me. 167; Bigler v. Furman, 58 Barb. 545; McGuffie v. Carter, 42 Mich. 497, 4 N. W. 211; Jackson ex dem. Russell v. Rowland, 6 Wend. 666, 22 Am. Dec. 557; Rhyne v. Guevara, 67 Miss. 139, 6 So. 736; Devacht v. Newsam, 3 Ohio, 57; Harvey v. Harvey, 26 S. C. 608, 2 S. E. 3; Bartley v. McKinney, 28 Gratt. 750; Willson v. Cleaveland, 30 Cal. 192; Tewksbury v. Magraff, 33 Cal. 237; Page v. Kinsman, 43 N. H. 328; Towne v. Butterfield, 97 Mass. 105; Wolf v. Johnson, 30 Miss. 513; McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358; Martin v. Reynolds, 9 Dana, 328; Farris v. Houston, 74 Ala. 162; Robertson v. Biddell, 32 Fla. 304, 13 So. 358; Winn v. Strickland, 34 Fla. 610, 15 So. 606; Tilghman v. Little, 13 Ill. 239; St. John v. Quitzow, 72 Ill. 334; Kinney v. Doe, 8 Blackf. 350; Casey v. Gregory, 13 B. Mon. 505, 56 Am. Dec. 581; Giles v. Ebsworth, 10 Md. 333; Robinson v. Troup Min. Co. 55 Mo. App. 662; Russell v. Allard, 18 N. H. 222; Den ex dem. Howell v. Ashmore, 22 N. J. L. 261; Horner v. Den, 25 N. J. L. 106; Lawrence v. Miller, 1 Sandf. 516; Hilton v. Bender, 4 Thomp. & C. 270; Franklin v. Hurlbert, 1 Tex. App. Civ. Cas. (White & W.) 466, 18 Am. & Eng. Enc. Law, 2d ed. pp. 421, 422; Peyton v. Stith, 5 Pet. 485, 8 L. ed. 200; Smith v. Mundy, 18 Ala. 182, 52 Am. Dec. 221; Bishop v. Blair, 36 Ala. 80; Hughes v. Watt, 28 Ark. 153; Arnold v. Woodward, 14 Colo. 164, 23 Pac. 444; Wellborn v. Hood, 68 Ga. 824; Wykoff v. Miller, 48 La. Ann. 475, 19 So. 478; Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265; McCreary v. McCreary, 90 Mich. 478, 51 N. W. 545; Crockett v. Althouse, 35 Mo. App. 404; Mattis v. Robertson, 1 Neb. 3; Utica

Bank v. Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189; Benton v. Benton, 95 N. C. 559; Henning v. Warner, 109 N. C. 406, 14 S. E. 317; Doe ex dem. Smart v. Smith, 13 N. C. (2 Dev. L.) 258; Boyer v. Smith, 3 Watts, 449; Juneman v. Franklin, 67 Tex. 411, 3 S. W. 562; Hillock v. Sutton, 2 Ont. Rep. 548; Adams v. Binkley, 4 Colo. 247; Clarke v. Clarke, 51 Ala. 498; Otis v. McMillan, 70 Ala. 46; Caldwell v. Smith, 77 Ala. 157; Randolph v. Carlton, 8 Ala. 606; Pope v. Harkins, 16 Ala. 321; McDevitt v. Sullivan, 8 Cal. 592; Wheelock v. Warschauer, 21 Cal. 309; Rodgers v. Palmer, 33 Conn. 156; Wells v. Mason, 5 Ill. 84; Stout v. Merrill, 35 Iowa, 47; Swann v. Wilson, 1 A. K. Marsh. 99; Gregory v. Crab, 2 B. Mon. 234; Logan v. Steele, 7 T. B. Mon. 104; Elms v. Randall, 2 Dana, 100; Presstman v. Silljacks, 52 Md. 647; Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498; Emmes v. Feeley, 132 Mass. 346; Hilbourn v. Fogg, 99 Mass. 11; Indian Land & Trust Co. v. Clement, 22 Okla. 40, 109 Pac. 1089; Dale v. Parker, 143 Mo. App. 492, 128 S. W. 510; Grundin v. Carter, 99 Mass. 15; Miles v. Ransford, 1 Mich. 338, 51 Am. Dec. 95; Jones v. Madison County, 72 Miss. 777, 18 So. 87; Barclay v. Pickles, 38 Mo. 143; Stagg v. Eureka Tanning & Curring Co. 56 Mo. 317; State use of Meier v. Thiemann, 15 Mo. App. 307; Hoag v. Hoag, 35 N. Y. 469; Ryerss v. Farwell, 9 Barb. 615; Lane v. Young, 66 Hun, 563, 21 N. Y. Supp. 838; Van Etten v. Van Etten, 69 Hun, 499, 23 N. Y. Supp. 711; Lodge v. Martin, 31 App. Div. 13, 52 N. Y. Supp. 385; Boyd v. Sametz, 17 Misc. 728, 40 N. Y. Supp. 1070; Lancashire v. Mason, 75 N. C. 455; West Shore Mills Co. v. Edwards, 24 Or. 475, 33 Pac. 987; Newell v. Gibbs, 1 Watts & S. 496; Sparks v. Walton, 4 Phila. 72; Hill v. Miller, 5 Serg. & R. 355; Smith v. Crosland, 106 Pa. 413; Bowser v. Bowser, 8 Humph. 23; Orleans County Grammar School v. Parker, 25 Vt. 696; Pierce v. Brown, 24 Vt. 165; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875; Hodgen v. Guttery, 58 Ill. 431; Green v. Dietrich, 114 Ill. 636, 3 N. E. 800; Carson v. Crigler, 9 Ill. App. 83; Hodges v. Shields, 18 B. Mon. 831; Kelley v. Kelley, 23 Me. 193; Walker v. Harrison, 75 Miss. 665, 23 So. 392; Pickett v. Ferguson, 86 Tenn. 642, 8 S. W. 386; Lang v. Carothers, 21 Tex. Civ. App. 118, 51 S. W. 271.

Can the defendants now, in a court of equity, be heard to complain of not securing their asserted rights under the law before the proper authorities authorized to hear and determine their claim?

Bassett v. Mitchell, 3 Okla. 177, 41 Pac. 601; Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270; Marshall v. Means, 12 Ga. 61, 56 *Am. Dec.* 444; Ross v. Singleton, 1 Del. Ch. 149, 12 Am. Dec. 86; Magniac v. Thomson, 15 How. 281, 304, 14 L. ed. 696, 705; Ross v. Stewart, 22 Okla. 611, 106 Pac. 870, 227 U. S. 532, 57 L. ed. 627, 33 Sup. Ct. Rep. 345.

Mr. Justice Pitney delivered the opinion of the court:

This was an action of ejectment, commenced before the admission of Oklahoma as a state, in the United States court for the southern district of the Indian Territory, and brought to a conclusion in the state courts. There have been many changes of interest *pendente lite*, and corresponding changes of parties. The original plaintiffs were Riddle, now defendant in error, and one Cook, whose interest Riddle has since acquired. The interests of the original defendants have been acquired by plaintiffs in error through mesne conveyances that will be stated below. The subject of the action is a town lot in the town of Chickasha, in the Chickasaw district of the Choctaw Nation, to which plaintiff claimed title by purchase under the town-site provisions of the Atoka Agreement with the Choctaw and Chickasaw tribes, found in the act of Congress known as the Curtis act (June 28, 1898, chap. 517, 30 Stat. at L. 495, 505, 508), followed by a patent executed, after the commencement of the action, in accordance with the supplemental agreement with the same tribes (act of July 1, 1902, chap. 1362, § 51, 32 Stat. at L. 641, 653), and [470] set up in a supplemental complaint. The defendants admitted the legal title to be in Riddle, but by cross complaint sought to have him declared a trustee for their benefit and decreed to convey the title to them. A judgment refusing to declare such a trust, and awarding the lot to Riddle, was affirmed by the supreme court of Oklahoma (41 Okla. 759, 139 Pac. 1143), and the case is brought here, under § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], upon the ground that the decision was against rights set up by plaintiffs in error under the provisions of the Agreement.

The facts are as follows: Some years prior to the making of the Agreement, one Fitzpatrick, a white man not entitled to citizenship in any Indian tribe, made a lease of the lot in controversy, then vacant and unimproved, to one Barnhart, who went into possession and erected a substantial house and other improvements, which were to belong to him, subject to the payment of a ground rent to Fitzpatrick. There is nothing to show what right Fitzpatrick claimed, or that in fact he had any right to seize upon vacant tribal lands and contract concerning them as he did. In the year 1897,

Barnhart sold the improvements and transferred the possession of the lot to one Ellis, who entered into possession and made further improvements. About April 1, 1898, Ellis refused to pay rent, and on July 7, in the same year, Fitzpatrick brought a suit for unlawful detainer against him in the United States court, alleging, in an amended complaint filed in February, 1899, that he desired possession for the purpose of being able to place upon the lot such improvements as would protect his right to the land under the provisions of the Agreement. Fitzpatrick prevailed in the United States court, and, on appeal, in the court of appeals for the Indian Territory (Ellis v. Fitzpatrick, 3 Ind. Terr. 656, 64 S. W. 567), and also in the circuit court of appeals for the eighth circuit, whose decision was rendered October 27, 1902 (55 C. C. A. 260, 118 Fed. 430). [471] Meanwhile Ellis retained possession by means of a supersedeas bond.

In February, 1902, the town-site commission for the Chickasaw Nation, organized pursuant to the provisions of the Atoka Agreement, visited Chickasha for the purpose of appraising town lots and awarding them to persons having the preferential right to purchase under the terms of the Agreement. Ellis having conveyed his rights to Riddle and Cook, the lot was scheduled to them, and on June 12, 1902, they were notified that they had the right to purchase it. A week later they availed themselves of this right by paying to the United States Indian agent the proper percentage of the appraised value to make up the full purchase price of the lot, and took from him a proper receipt.

Pending the unlawful detainer suit, Fitzpatrick conveyed whatever interest he had in the lot to a Mrs. Cross, and she conveyed an undivided half interest to one Bourland. In January, 1903, after the decision of the circuit court of appeals, Bourland and Cross obtained possession of the lot with the improvements, and in the following month the present action of ejectment was commenced by Riddle and Cook against Fitzpatrick and the persons in possession. Thereafter Bourland and Cross conveyed their interest to E. B. and H. B. Johnson, the present plaintiffs in error, and they were substituted as defendants. Riddle bought the interest of Cook, and thus became the sole plaintiff. Pending the action, a contest was instituted, either by Bourland and Cross or by the Johnsons, against Riddle and Cook, concerning the award and scheduling of the lot to the latter. The town-site commission having been abolished by the Secretary of the Interior pursuant to act of March 3, 1905, chap. 1479, 33 Stat. at L. 1048, 1059, the contest was heard before the United States Indian inspector assigned to the Indian Territory, upon whom this duty was imposed by regulations approved [472] by the Secretary. Rep. Ind. Inspec. 1905, pp. 5, 22, 23; House Doc. No. 5, 59th Cong. 1st Sess. vol. 19, pp. 705, 722, 723. The inspector made full findings of fact, and in an elaborate opinion decided in favor of contestees. Upon appeal this decision was affirmed by the Commissioner of Indian Affairs, and upon appeal to the Secretary of the Interior it was again affirmed. These decisions proceeded upon findings to the effect that, at the time of the ratification of the Atoka Agreement and at the time the town site of Chickasha was laid out by the town-site commission, and when the plats prepared by the commission were finally approved by the Secretary of the Interior, Ellis was the owner of permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, on said lot; that none of these improvements was in any way in issue in the unlawful detainer suit, and Ellis's ownership of them was not denied or disputed, but, on the contrary, was admitted by Fitzpatrick in his pleadings, and they were in no way adjudicated upon in that suit; that Riddle and Cook afterwards purchased the improvements from Ellis, and having received notice from the townsite commission, as already mentioned, of their right to purchase the lot under the provisions of the Atoka Agreement, they forwarded to the United States Indian agent the proper percentage of the appraisement to make up the full purchase price of the lot, and received his receipt for the same. After the final determination of the contest before the Department of the Interior, a patent was issued to Riddle and his associate, dated in May, 1907.

The Atoka Agreement between the United States and the Choctaw and Chickasaw tribes, negotiated April 23, 1897, amended by § 29 of the Curtis act (June 28, 1898, chap. 517, 30 Stat. at L. 495, 505), and thereby submitted for ratification by the members of the tribes, was ratified by a majority of votes at a special election held on August 24, 1898, [473] the result of which was ascertained and proclaimed on August 30th by a board of commissioners for that purpose, designated by the act, and the agreement thus became effective. (See 6th Ann. Rep. Dawes Comm., September 1, 1899, House Doc. No. 5, 56th Cong. 1st Sess. vol. 19, p. 9; Homer's Const. and Laws of Chickasaw Nation, 1899, p. 420.) It contains provisions respecting town sites (30 Stat. at L. 508, chap. 517), of wh

pertinent portions are set forth in the margin.[1]

Regulatory provisions, embodied in an act of May 31, 1900 (chap. 598, 31 Stat. at L. 221, 237, 238), [474] were assented to by the Choctaws and Chickasaws in the supplemental agreement (act of July 1, 1902, chap. 1362, 32 Stat. at L. 641, 652), and other regulations were thereby added. Authority to appraise town lots, improved or unimproved, to ascertain the ownership and value of the improvements, and to dispose of the lots in conformity to the provisions of the Agreement, was thereby conferred upon the town-site commission, subject to the supervision of the Secretary of the Interior. (See Ross v. Stewart, 227 U. S. 530, 534, 57 L. ed. 626, 628, 33 Sup. Ct. Rep. 345.) Their unfinished duties were devolved upon the Secretary by the act of 1905, under whose authority the Indian inspector acted, as already shown. The supreme court of Oklahoma therefore was correct in holding that the findings of the inspector respecting matters of fact, affirmed on final appeal by the Secretary, were binding upon the courts, in the absence of gross mistake or fraud (neither of which is here present), and that the judicial inquiry is limited to determining whether there was clear error of law that resulted in awarding the preferential right of purchase, and ultimately issuing the patent, to the wrong party. Johnson v. Towsley, 13 Wall. 72, 85, 20 L. ed. 485, 487; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. ed. 800, 801; Gonzales v. French, 164 U. S. 338, 342, 41 L. ed. 458, 459, 17 Sup. Ct. Rep. 102; Ross v. Day, 232 U. S. 110, 116, 58 L. ed. 528, 529, 34 Sup. Ct. Rep. 233.

Since the findings are to the effect that the improvements upon the lot were owned by Ellis, and by defendant in error through a purchase from him, the contentions of the plaintiffs in error are reduced to these: that the decision of the Indian inspector, approved by the Secretary of the Interior, to the effect that the Atoka Agreement terminated the relation of landlord and tenant, was based upon an erroneous construction of the Agreement, and ignored the equities of the landlord as against the tenant; that under a correct construction of the provisions permitting the owner of the improvements to buy a town lot [475] at a fraction of the appraised value, a tenant who wrongfully withheld possession of such a lot from his landlord, thereby preventing him from erecting improvements thereon, could not acquire title to the lot as against the landlord; and that a tenant who, under the provisions of the Agreement, but in violation of the rights of his landlord, has acquired a deed for such a lot, holds the title as trustee for the landlord.

The Atoka Agreement of course is to be read in the light of the conditions out of which it arose. The Choctaw Indians acquired the territory in question under a treaty with the United States made at Dancing Rabbit Creek in the year 1830 (7 Stat. at L. 333). In accordance with the provisions of the treaty, and pursuant to authority conferred by act of May 28, 1830 (chap. 148, § 3, 4 Stat. at L. 412), a patent was issued by the President of the United States, March 23, 1842, granting the land to the Choctaw Nation, "in fee simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it, liable to no transfer or alienation, except to the United States, or with their consent." (Durant's Const. & Laws of

[1] "Town Sites. It is further agreed that there shall be appointed a commission for each of the two nations. . . . Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. . . . When said towns are so laid out, each lot on which permanent, substantial and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one half *per* centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one fourth of the purchase price, and the balance in three equal annual instalments, and when the entire sum is paid shall be entitled to a patent for the same. . . . If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one half per cent of said appraised value of the lot and shall pay the sixty-two and one half per cent of said appraised value into the United States Treasury. . . . All lots not so appraised shall be sold from time to time at public auction. . . ."

Choctaw Nation, 1894, p. 31.) In 1837 the Choctaws entered into a treaty with the Chickasaws, by which the latter were privileged to form a district within the limits of the Choctaw country, "to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws." This received the approval of the President and Senate of the United States. 11 Stat. at L. 573, 575. In the year 1855 a new treaty was made between the United States and these tribes (11 Stat. at L. 611), by which the boundaries of their country were defined and the United States guaranteed the lands embraced within the specified limits "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that [476] each and every member of either tribe shall have an equal, undivided interest in the whole; Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same." The westerly part of the country was established as a district for the Chickasaws, the easterly part for the Choctaws. After the Civil War, and in the year 1866, a new treaty was made, by the 11th article of which it was recited that the land described in the treaty of 1855 "is now held by the members of said nations in common, under the provisions of the said treaty." 14 Stat. at L. 769, 774. A plan for a survey, division, and allotment of the land was proposed by the same article, but this came to naught because of the nonassent of the Choctaw people. Woodward v. DeGraffenried, 238 U. S. 284, 294, 59 L. ed. 1310, 1318, 35 Sup. Ct. Rep. 764. Thus matters remained until, in the course of time, the influx of white people into this and other parts of the Indian Territory created a new situation of great complexity, calling for a readjustment of the affairs of the Five Civilized Tribes. In 1893 the Dawes Commission was appointed, under authority of an act of Congress (chap. 209, § 16, 27 Stat. at L. 645), to enter into negotiations with those tribes for the purpose of extinguishing the tribal titles to lands. The annual reports of the Commission, a reference list of which is printed in 238 U. S. 296, give a complete and instructive account of its labors. The first of these reports, dated November 20, 1894, shows that among the original propositions submitted to the several tribes as a basis of negotiations it was suggested that town sites should be the subject of special agreements, such as would secure to the Indians and to investors "a just protection and adjustment of their respective rights." In explanation it was stated: "There are towns in the Territory ranging in population from a few people to 5,000 inhabitants. Nearly all of [477] them are noncitizens. . . . Many large and valuable stone, brick, and wooden buildings have been erected by noncitizens of these towns, and the lots on which they stand are worth many thousands of dollars. These town sites are not susceptible of division among the Indians, and the only practicable method of adjusting the equities between the tribes who own the sites and those who constructed the buildings is to appraise the lots without the improvements and the improvements without the lots and allow the owners of the improvements to purchase the lots at the appraised value, or to sell lot and improvements, and divide the money according to the appraisement." House Ex. Doc. pt. 5, 53d Cong. 3d Sess. vol. 14, pp. lxii., lxv.

The first agreement to be negotiated by the Commission was with the Choctaws under date December 18, 1896, but the Chickasaws refused to concur in this, and another was negotiated at Atoka, April 23, 1897, with both tribes. In its original form it is appended to the Fourth Report of the Commission, dated October 11, 1897 (House Doc. No. 5, 55th Cong. 2d Sess. vol. 12, pp. cxvii., cxxii.). It provided that a town-site commission should be appointed for each of the two nations; that each existing town site should be laid out and platted, and that "each lot on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the Commission . . . at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy the same at 62½ per cent of the said market value, within sixty days from date of notice served on him that such lot is for sale." It further provided that if the owner of the improvements should fail to purchase, the lot with improvements should be sold at auction, the [478] purchaser to pay the price to the owner of the improvements, less 62½ per cent of the appraised value of the lot, which was to be paid into the United States Treasury for the benefit of the Indians. This agreement, with some amendments, was ratified by Congress in § 29 of the Curtis act, and afterwards ratified by the voters of the two tribes, as already mentioned. The provision as to purchase of town lots was amended only by giving to the owner of the improvements the right to buy one residence and

one business lot at 50 per centum and the remainder of such improved property at 62½ per centum, of the appraised market value.

The same act contained, in its 15th section (30 Stat. at L. 500, chap. 517) a provision for the appointment of a town-site commission for each of the Chickasaw, Choctaw, Creek, and Cherokee tribes; allowing "the owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings," to deposit in the United States Treasury one half of the appraised value of the lot, excluding improvements, as a tender to the tribe of the purchase money for the lot; and permitting improved lots to be sold at auction if the owner of the improvements thereon failed to deposit the purchase-money within a limited time, in which case the purchaser at auction might, by appropriate proceedings in the United States court, require the owner of the improvements to either accept their appraised value or remove the improvements from the lot. The same section provided for the sale of unimproved lots, the purchase-money to be deposited with like effect as in the case of improved lots; and authorized the tribes to make deeds to the purchasers conveying the title to such town lots, whereupon the purchase-money was to become the property of the tribe. These provisions would appear to have been superseded, as to the Choctaw and Chickasaw tribes, by their acceptance [479] of the Atoka Agreement, and are mentioned only to show that in § 15, as in the Agreement, it was the owner of the improvements, and he alone, who was recognized as entitled to be considered in the sale of the town lots.

It is not necessary to say that the Agreement, when thus ratified by Congress and by the tribes, became the law of the land, and superseded all customs, if such there were, that had sanctioned the making of leases to noncitizens. By its terms towns, so far as they had been established within the domain of the tribes, were recognized, and provision was made for platting them, and for selling the lots, both improved and unimproved, the proceeds to become the property of the tribes. It was recognized that the money expended by white men in constructing the buildings and other permanent improvements had increased the value not only of the improved lots, but of all lands within the town; and hence a preferential right of purchase was conferred upon "the owner of the improvements on each lot." But there is nothing in the history of the matter, any more than in the language employed, to give the least countenance to the suggestion that prior rights of occupancy were intended to be recognized in *this Agreement*. Ownership of improvements actually upon the soil was adopted as the sole foundation of the newly conferred right to acquire title to the soil itself. And these improvements must be "permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses." The exclusion of these latter, indicative merely of occupancy, is highly significant.

The provisions of the Agreement respecting the sale of town lots could not be carried into effect without terminating existing rights of occupancy, if such there were, saving as these coincided with the ownership of permanent improvements. Hence, if Fitzpatrick had any right to the soil, it came to an end either when the Agreement took effect in August, 1898, or, at latest, when its town-site provisions [480] were put in operation at Chickasha. It is insisted that Ellis, as tenant, was estopped to deny his landlord's title, and that Riddle is in no better case. Blight v. Rochester, 7 Wheat. 535, 547, 5 L. ed. 516, 519. But a tenant is not estopped to show that his landlord's title has expired or has been terminated by operation of law. England ex dem. Syburn v. Slade, 4 T. R. 682; Blake v. Foster, 8 T. R. 487, 5 Revised Rep. 419; Neave v. Moss, 1 Bing. 360, 8 J. B. Moore, 389, 2 L. J. C. P. 25; Hopcroft v. Keys, 9 Bing. 613, 2 Moore & S. 760; Doe ex dem. Higginbotham v. Barton, 11 Ad. & El. 307; Den ex dem. Howell v. Ashmore, 22 N. J. L. 261, 265; Shields v. Lozear, 34 N. J. L. 496, 500, 3 Am. Rep. 256; Hilbourn v. Fogg, 99 Mass. 11; Lamson v. Clarkson, 113 Mass. 348, 18 Am. Rep. 498.

The argument that Ellis, by withholding possession of the lot from Fitzpatrick, prevented him from erecting improvements such as would have satisfied the requirements of the Atoka Agreement so as to confer upon Fitzpatrick the preferential right to purchase the lot, and hence that Ellis and those claiming under him are estopped to purchase the land for themselves, and must be held to have acquired it in trust for Fitzpatrick and those claiming under him, cannot prevail. The facts do not show that Ellis's refusal to pay rent, and his resistance to the forcible entry and detainer suit, were other than bona fide. Nor does it appear that Fitzpatrick, even before the Atoka Agreement, had any right of possession of the land as against the Indians. So far as the facts appear, he had no rights at all, except as against the tenant, and against him only because of the estoppel. In order to show that the tenant, by withholding possession, deprived the landlord of the opportunity of exercising a valuable right, it must be made to appear that, with the tenant out of the way, the right would

have existed. But, if Ellis had given up possession, Fitzpatrick would have had no more right than any other white man to enter and erect improvements,—that is to say, none at all. At most, he would have had a mere opportunity, without right, [481] and the deprivation of this cannot furnish a foundation for impressing a trust upon the title afterwards acquired by Ellis's grantee by direct purchase from the owners of the paramount title. Even were it made to appear that there was error in adjudging the title to the patentee, this would not raise a trust in favor of the contestant unless he could show that by the law, properly administered, the title ought to have been awarded to him. Bohall v. Dilla, 114 U. S. 47, 51, 29 L. ed. 61, 63, 5 Sup. Ct. Rep. 782; Sparks v. Pierce, 115 U. S. 408, 413, 29 L. ed. 428, 429, 6 Sup. Ct. Rep. 102.

What, then, was the nature of Fitzpatrick's equity? Under the facts found, both he and Ellis were trespassers upon the lands of the Indians, in disregard of rights secured to the latter by treaty with the United States, and in violation of § 2118, Rev. Stat. (Comp. Stat. 1913, § 4108). The lease created a mere estoppel between trespassers. The rights, if they may be called rights, of lessor and lessee alike, were terminated by the force of the Agreement. Individual ownership of the land originated with that instrument, and can be only such as by its terms was created. It was competent for Congress, or for the Indian tribes, with the concurrence of Congress, to deal as they deemed proper with the practical situation resulting from the building of towns by white men within their borders. They chose to confer a preferential right of purchase, at a discount from the appraised value, not upon the "occupant," or "possessor," or "landlord," or "tenant," but upon "the owner of the improvements" other than those of a temporary nature. This did not cut off any pertinent equity, but it rendered all equities impertinent except such as related to the ownership of the improvements.

The Atoka Agreement, while accepting existing improvements of a substantial nature as part consideration for the purchase of town lots, contained no recognition of legitimacy in the previous occupation of the soil by white men, nor any official ratification of their intrusion upon the Indian lands. It laid aside, as immaterial, the question [482] whether improvements had been constructed with or without rightful possession of the land. In this respect it differed from the Original Creek Agreement of March 8, 1900 (act of March 1, 1901, chap. 676, 31 Stat. at L. 861, 866), the proposed Cherokee agreement of April 9, 1900 (act of March 1, 1901, chap. 675, 31 Stat. at L. 848, 853), which failed of ratification by the tribe (8th Ann. Rep. Dawes Comm. Oct. 1, 1901; House Doc. No. 5, 57th Cong. 1st Sess. vol. 24, p. 11), and the Cherokee agreement of July 1, 1902 (chap. 1375, 32 Stat. at L. 716, 723), which was ratified by the tribe (10th Ann. Rep. Dawes Comm. Sept. 30, 1903; House Doc. No. 5, 58th Cong. 2d Sess. vol. 20, p. 115).

If Fitzpatrick had had any equitable right or interest in the improvements upon the lot in controversy, a very different question would be presented. But he had none.

We are referred to two decisions of the United States court of appeals for the Indian Territory that are said to uphold the legal validity of grants of leasehold interests in lands in the Choctaw and Chickasaw country prior to the Atoka Agreement. Kelly v. Johnson (1897) 1 Ind. Terr. 184, 189, 39 S. W. 352, 354; G. W. Walker Trading Co. v. Grady Trading Co. (1897) 1 Ind. Terr. 191, 196–198, 39 S. W. 354, 356. These cases, however, go no further than to hold that a possessory right might pass by transfer from a citizen of one of the Indian tribes to a noncitizen, and would protect the latter against forcible entry by others not showing a better right to the possession, nor acting under authority of the tribe, and that a lease of such lands with improvements estopped the lessee to question the lessor's title. See also Wilson v. Owens (1897) 1 Ind. Terr. 163, 38 S. W. 976, affirmed in 30 C. C. A. 257, 57 U. S. App. 500, 86 Fed. 571; Hockett v. Alston, 49 C. C. A. 180, 110 Fed. 910, reversing s. c. 3 Ind. Terr. 432, 58 S. W. 675; Williams v. Works, 4 Ind. Terr. 587, 76 S. W. 246; Fraer v. Washington, 60 C. C. A. 194, 125 Fed. 280. These decisions leave untouched the authority of Congress, with [483] or without the consent of the tribe, to terminate all possessory interests and dispose of the fee in any manner deemed proper.

Much reliance is placed upon the decision of this court in Rector v. Gibbon, 111 U. S. 276, 28 L. ed. 427, 4 Sup. Ct. Rep. 605, which turned upon the effect of an act of Congress in relation to the Hot Springs Reservation in the state of Arkansas (act of March 3, 1877, chap. 108, 19 Stat. at L. 377). The statute was passed to relieve the peculiar hardship resulting from a decision of the court of claims, affirmed by this court (Hot Springs Cases, 92 U. S. 698, 713, 715, 716, 23 L. ed. 690, 696, 697), holding invalid, for reasons more or less technical, certain land titles set up against the United States, some of them under claims of pre-emption and one under a New Madrid location, followed in each case by long years of possession. Rector v. Gibbon

construed the legislation in the light of the circumstances out of which it arose, and so as to relieve those who had made improvements or claimed possession under the titles that had been found defective. It has no proper bearing upon the questions presented in the case at bar. Lamb v. Davenport, 18 Wall. 307, 21 L. ed. 759; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; and Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626, cited by plaintiffs in error, are likewise aside from the point.

It is, perhaps, unnecessary to mention that the matter at issue here is not concluded by the decision in Ellis v. Fitzpatrick, 3 Ind. Terr. 656, 64 S. W. 567, s. c. affirmed in 55 C. C. A. 260, 118 Fed. 430, for that case concerned only the right of possession as between landlord and tenant, and Ellis's ownership of the improvements was admitted in the pleadings. The legal or equitable title to the soil was not involved.

From the views above expressed, it results that the judgment of the Supreme Court of Oklahoma must be affirmed.

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[484] HARRIET A. BARLOW, Plff. in Err.,
v.
NORTHERN PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 484–489.)

Public lands — railroad land grant — when grant attaches — completion of grade — filing map.

A definite location of the right of way of a railway company which entitles it to the benefit of the act of March 3, 1875 (18 Stat. at L. 482, chap. 152, Comp. Stat. 1913, § 4921), granting to railroads a right of way through the public lands, is made by the completion of the grading ready for the ties and rails, although a profile map of the road has not been filed in the appropriate local land office.

[For other cases, see Public Lands, I. c, 2, c, in Digest Sup. Ct. 1908.]

[No. 257.]

Argued March 3, 1916. Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which affirmed a judgment of the District Court of Foster County, in that state, in favor of plaintiff in a suit to quiet title. Affirmed.

See same case below, 26 N. D. 159, 143 N. W. 903.

The facts are stated in the opinion.

Mr. S. E. Ellsworth argued the cause, and, with Mr. John Knauf, filed a brief for plaintiff in error.

Mr. Charles Donnelly argued the cause, and Messrs. Charles W. Bunn and Emerson Hadley filed a brief for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

In Jamestown & N. R. Co. v. Jones, 177 U. S. 125, 44 L. ed. 698, 20 Sup. Ct. Rep. 568, there came under consideration the construction of the act of Congress of March 3, 1875, entitled, "An Act Granting to Railroads the Right of Way through the Public Lands [485] of the United States," chap. 152, 18 Stat. at L. 482, Comp. Stat. 1913, § 4921. The case involved a controversy between the railroad which was entitled to the benefit of the act and Jones, a homestead entryman holding a patent of the United States in consequence of rights initiated after the railroad had constructed its line, but before it had filed a map of its right of way in the appropriate local land office. The railroad claimed that its right of way across the land covered by Jones's patent was paramount, and Jones asserted that his right under the patent was dominant. Giving sanction to a previous course of administrative construction dealing with unsurveyed public land, it was held that an appropriation of the right of way by a construction of the road under the statute gave the railroad the paramount right, and that the provision of the statute concerning the filing of a map and profile in the local land office was intended not to deprive of the power to fix and secure the right of way by construction in advance of filing such map and profile, but simply to afford the means of securing the right of way in advance of construction. The two methods of securing the right, the one by construction of the road, and the other in anticipation of construction by filing a map, were decided to in no wise conflict the one with the other, as both afforded a means of securing the right which the statute gave. The opinion pointed out that although the previous administrative rulings were concerned only with unsurveyed lands, they were equally applicable under the statute to surveyed lands, and it was thus concluded: "It follows from these views that the grant to plaintiff in error (the railroad company) by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error (Jones) was subject thereto."

Note.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 23 L. ed. U. S. 794.

In Minneapolis, St. P. & S. Ste. M. R. Co. v. Doughty, 208 U. S. 251, 52 L. ed. 474, 28 Sup. Ct. Rep. 291, the controversy was between the railway company and a settler holding a patent of the United [486] States whose right had been initiated before the construction of the railroad, but after a preliminary survey which had been made by the railroad as a means of ultimately determining upon what line it would build its road, the stakes of such survey being, at the time the settler initiated his right, across the land in question. The claim of the settler was that a mere entry of the railroad for the purpose stated was not a construction within the meaning of the Jones Case, while that of the railroad was "that an entry upon the land to locate the road is as necessary as an entry on the land to build the road, and, being there, the railroad 'could not become a trespasser, either as to the government or as to the plaintiff.'" It was decided that as a mere preliminary step for the purpose of determining where the road should be located was not, in and of itself, the equivalent of a definite location of the line and a permanent appropriation of the right of way, the case was not covered by the rule of the Jones Case and the right of the settler was paramount.

Which of these rulings is here controlling is the single question arising for decision on this record, as will be at once seen by the following statement of the case:

The suit was commenced by the railroad to quiet its title to its right of way across a quarter section of land which had been patented by the United States to the defendant. The latter not only by answer, but by counterclaim, asserted the paramount nature of his right. The court below, affirming the action of the trial court, held that the rights of the railroad were paramount upon the conclusion that the facts found clearly brought the case within the rule established in the Jones Case. 26 N. D. 159, 143 N. W. 903. The facts as thus established were these:

"'On the said 22d day of July, A. D. 1883, intending to make entry of the said land herein described when the same was surveyed, and to acquire title to the same by [487] virtue of compliance with the preemption laws of the United States, said Frederick G. Barlow [the predecessor in title of the plaintiff in error] settled upon said land and took up his residence thereon. At the time of such settlement there was not a railroad track or line of railroad in operation across said land at any place, nor had plat or profile of the section of railroad extending across said land hereinbefore referred to been filed in the United States district land office at Fargo.' We find from the evidence that although Barlow entered upon the land upon the 22d day of July A. D. 1883, the grading of the road across said land was completed prior to May 31, 1883; that is to say, nearly two months before his settlement. We also find the rails were laid upon the grade between August 10 and 15, 1883, and that trains were operated on said road and across said land soon after."

That under these facts the court below was right in holding that the controversy was foreclosed by the ruling in the Jones Case we think is too clear for anything but statement. The contention that the case is controlled by the Doughty, and not the Jones Case, because the road was not complete and operating when the entryman initiated his rights, although it was then graded and was virtually ready for the ties and rails, if acceded to, would render the statute inefficacious, and dominate the substance of things by the mere shadow. The first, because as it is impossible to conceive of the completion of the road by the placing of ties and the laying of rails without presupposing the prior doing of the work of grading, it would follow that the recognition of the right of an entryman to appropriate adversely to the railroad after the grading had been done, and before the laying of the ties and rails, would render the performance of the latter useless, and would deprive the railroad, therefore, of all practical power to appropriate. The second, because, as pointed out in Stalker v. Oregon [488] Short Line R. Co. 225 U. S. 142, 56 L. ed. 1027, 32 Sup. Ct. Rep. 636, the decision in the Jones Case rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to manifest that the railroad company had exercised its judgment as to where its line was to be established, and had done such work of construction as "necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given." (p. 150.) And it is obvious that this standard, when complied with, would serve not only to demonstrate the fixed intention of the railroad to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior appropriation. The distinction between the doctrine of the Jones Case and that of the Doughty Case is therefore that which necessarily must obtain between permanent work of construction of a railroad on a line definitely selected and

fixed by it, and mere tentative work of surveying, done by a railroad for the purpose of enabling the line which it was proposed to construct to be ultimately selected The broad distinction between this case and the Doughty Case, both as to the fundamental rights given by the statute and the protection to innocent parties, was thus lucidly pointed out by the court below in its opinion:

"There can be no doubt, indeed, that the route was fixed, both on account of the physical construction and the difficulty of a subsequent removal, . . . The entryman in this case can have no more grounds for complaint than could the entryman in the case of Stalker v. Oregon Short Line R. Co. supra. It would be absurd to hold that one who enters upon land and sees upon it a railroad grade which is only eighteen days from physical completion, and, as we have a right to believe, but a link in miles of [489] road stretching across the same prairie, was not aware of this prior railroad occupation."

We have not stopped to consider an intimation contained in the argument that the court erred in its finding of fact as to the state of construction of the road at the time the entry by Barlow was made, because without at all questioning our power to review the facts in so far as necessary to dispose of the Federal contention, we consider the suggestion wholly without merit, first, because we would not in any event disregard the finding of fact of the court below except upon conviction of clear error committed, for which the record here affords no ground whatever; and second, because as the finding of the court below was also the finding of the trial court, the request invites us to disregard the findings of both courts on a matter of fact in the absence of any ground for a conviction that error of fact was clearly committed.

Affirmed.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
S. W. KENNEY, Administrator of Beb Isaac Capehart, alias Beb Isaac Eason.

(See S. C. Reporter's ed. 489–497.)

Death — action under Federal employers' liability act — beneficiaries — next of kin.

1. The "next of kin," for whose benefit an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), may be maintained to recover damages for the negligent killing of their intestate by his interstate railway employer, are those who are the next of kin under the local law.

[For other cases, see Death, II. b, in Digest Sup. Ct. 1908.]

Judgment — res judicata — questions necessarily involved.

2. A ruling of a state court that the "next of kin," for whose benefit an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), may be maintained to recover damages for the negligent killing of an illegitimate child by his interstate railway employer, are, under the local law, the legitimate children of the same mother, she being dead, negatives the existence of any right to trace the parentage of the illegitimate child so as to make the asserted father the parent under the Federal statute.

[For other cases, see Judgment, III. j, 2, in Digest Sup. Ct. 1908.]

Error to state court — following decision below.

3. Without a clear conviction of error, the Federal Supreme Court will not reverse, on writ of error to a state court, the ruling of both courts below that there was evidence tending to show that the "next of kin," for whose benefit an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), was brought to recover damages for the negligent killing of their intestate by his interstate railway employer, were so dependent on the deceased as to justify a recovery under the Federal statute.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 269.]

Argued March 10, 1916. Decided April 3, 1916.

Note.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

On error to state court in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Bertie County, in that state, in favor of plaintiff in an action for death, brought under the Federal employers' liability act. Affirmed.

See same case below, 167 N. C. 14, L.R.A. —, —, 82 S. E. 968.

The facts are stated in the opinion.

Mr. Murray Allen argued the cause and filed a brief for plaintiff in error:

Allegation and proof of the existence of beneficiaries, as defined by the Federal employers' liability act, are essential to a right to recover damages for the death of an employee.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Garrett v. Louisville & N. R. Co. 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; Melzner v. Northern P. R. Co. 46 Mont. 277, 127 Pac. 1002; Illinois C. R. Co. v. Doherty, 153 Ky. 363, 47 L.R.A.(N.S.) 31, 155 S. W. 1119; Thornton, Federal Employers' Liability Act, § 113; Tiffany, Death by Wrongful Act, § 182; Serensen v. Northern P. R. Co. 45 Fed. 407; Southern R. Co. v. Maxwell, 113 Tenn. 464, 82 S. W. 1137; Foster v. St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803.

The expression "next of kin," as used in the Federal employers' liability act, is to be construed in the light of the common law.

State v. Engle, 21 N. J. L. 360; Kitchen v. Tyson, 7 N. C. (3 Murph.) 314; Adams v Turrentine, 30 N. C. (8 Ired. L.) 147; McCool v. Smith, 1 Black, 459, 17 L. ed. 218; Rice v. Minnesota & N. W. R. Co. 1 Black, 374, 17 L. ed. 151; United States v. Sanges, 144 U. S. 311, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; United States v. Wong Kim Ark, 169 U. S. 654, 42 L. ed. 892, 18 Sup. Ct. Rep. 456; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Standard Oil Co. v. United States, 221 U. S. 1, 59, 55 L. ed. 619, 644, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 92, 103, 45 L. ed. 765, 771, 21 Sup. Ct. Rep. 561; Capital Traction Co. v. Hof, 174 U. S. 8, 43 L. ed. 875, 19 Sup. Ct. Rep. 580; Murray v. Chicago & N. W. R. Co. 62 Fed. 24; Truelove v. Truelove, 172 Ind. 444, 27 L.R.A.(N.S.) 220, 139 Am. St. Rep. 404, 86 N. E. 1018, 88 N. E. 516; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Garrett v. Louisville & N. R. Co. 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

Where a statute of another state or country is mainly adopted, though not entirely, and unchanged, the prior decisions of the foreign court interpreting the statute are entitled to great weight.

2 Lewis's Sutherland, Stat. Constr. § 404; 11 Enc. U. S. Sup. Ct. Rep. 153; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120; Robinson v. Belt, 187 U. S. 47, 47 L. ed. 68, 23 Sup. Ct. Rep. 16.

The Federal act has as the basis of its enactment Lord Campbell's act.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The English courts have held that a bastard is not a "child" within the provisions of Lord Campbell's act.

Dickinson v. North Eastern R. Co. 2 Hurlst. & C. 735, 33 L. J. Exch. N. S. 91, 9 L. T. N. S. 299, 12 Week. Rep. 52.

At common law the words "parent," "child," "next of kin," and words of similar import, were held to relate only to those who are legitimate.

McCool v. Smith, 1 Black, 459, 17 L. ed. 218; Jones v. Jones, 234 U. S. 615, 58 L. ed. 1500, 34 Sup. Ct. Rep. 937; Coor v. Starling, 54 N. C. (1 Jones, Eq.) 243.

Words of kindred, when used in a statute creating a right of action for death by wrongful act, refer solely to legitimates.

Lynch v. Knoop, 118 La. 611, 8 L.R.A.(N.S.) 480, 118 Am. St. Rep. 391, 43 So. 252, 10 Ann. Cas. 807; Dickinson v. North Eastern R. Co. supra; Gibson v. Midland R. Co. 2 Ont. Rep. 658; Clarke v. Carfin Coal Co. [1891] A. C. 412; McDonald v. Southern R. Co. 71 S. C. 352, 2 L.R.A.(N.S.) 640, 110 Am. St. Rep. 576, 51 S. E. 138; Robinson v. Georgia R. & Bkg. Co. 117 Ga. 168, 60 L.R.A. 555, 97 Am. St. Rep. 156, 43 S. E. 452; Illinois C. R. Co. v. Johnson, 77 Miss. 727, 51 L.R.A. 837, 28 So. 753; Runt v. Illinois C. R. Co. 88 Miss. 575, 41 So. 1; McDonald v. Pittsburgh, C. C. & St. L. R. Co. 144 Ind. 459, 32 L.R.A. 309, 55 Am. St. Rep. 185, 43 N. E. 447; Tiffany, Death by Wrongful Act, 2d ed. § 85.

In its sphere the Federal act is complete, and in matters of substance it is not to be added to or changed by state regulations.

Michigan C. R. Co. v. Vreeland, supra; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Doherty, Liability of Railroads to Interstate Employees, p. 241; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup.

Ct. Rep. 350, 6 N. C. C. A. 436; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, 8 N. C. C. A. 834, Ann. Cas. 1915B, 475; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67; Norton v. Erie R. Co. 163 App. Div. 468, 148 N. Y. Supp. 771.

Uniformity in the application of the Federal employers' liability act will be entirely destroyed if the expression "next of kin" is to be defined in accordance with the legislation and judicial decisions of the various states.

Butler v. Elyton Land Co. 84 Ala. 384, 4 So. 675; Bent v. St. Vrain, 30 Mo. 268; Woodward v. Duncan, 1 Coldw. 562; Bacon v. McBride, 32 Vt. 585; Woltemate's Appeal, 86 Pa. 219; Remington v. Lewis, 8 B. Mon. 606; McBryde v. Patterson, 78 N. C. 412; Croan v. Phelps, 23 L.R.A. 753, note; Smith v. Howard, 41 Am. St. Rep. 537, and note, 86 Me. 203, 29 Atl. 1008; Leake v. Gilchrist, 13 N. C. (2 Dev. L.) 75; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; Medley v. Dunlap, 90 N. C. 527; 14 Cyc. 24.

If Sills Hardy, Joe Hardy, and Nettie Hardy are the next of kin of the deceased employee, plaintiff has failed to show that they were dependent upon such employee.

Illinois C. R. Co. v. Doherty, 153 Ky. 363, 47 L.R.A.(N.S.) 31, 155 S. W. 1119; Jones v. Charleston & W. C. R. Co. 98 S. C. 197, 82 S. E. 415; Dooley v. Seaboard Air Line R. Co. 163 N. C. 454, L.R.A.1916E, —, 79 S. E. 970; Cincinnati, N. O. & T. P. R. Co. v. Wilson (Cincinnati, N. O. & T. P. R. Co. v. Stephens) 157 Ky. 460, 51 L.R.A.(N.S.) 308, 163 S. W. 493; Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 715, 3 N. C. C. A. 769, affirmed in 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Little v. Caldwell, 158 N. C. 351, 39 L.R.A.(N.S.) 450, 74 S. E. 10; Stimpson v. Wood, 57 L. J. Q. B. N. S. 486, 59 L. T. N. S. 218, 36 Week. Rep. 734, 52 J. P. 822; Standard Forgings Co. v. Holmstrom, 58 Ind. App. 306, 104 N. E. 872, 7 N. C. C. A. 713; 13 Cyc. 361; Sedgw. Damages, 9th ed. § 170.

Mr. Francis D. Winston argued the cause, and, with Mr. J. H. Matthews, filed a brief for defendant in error:

The question of relationship between the beneficiaries in this case and their illegitimate half brother by the same mother is to be determined by the laws of North Carolina, where they live.

Re Burrus, 136 U. S. 589, 34 L. ed. 501, 10 Sup. Ct. Rep. 850; Cope v. Cope, 137 U. S. 685, 34 L. ed. 833, 11 Sup. Ct. Rep. 222; Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504; United States v. Fox, 94 U. S. 315, 320, 24 L. ed. 192, 193; Cade v. Davis, 96 N. C. 147, 2 S. E. 225; Lamar v. Micou, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; Knights Templars & M. Mut. Aid Asso. v. Greene, 79 Fed. 461.

The next of kin were dependent upon deceased within the meaning of the act.

Dooley v. Seaboard Air Line R. Co. 163 N. C. 454, L.R.A.1916E, —, 79 S. E. 970; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806.

Mr. Chief Justice White delivered the opinion of the court:

The trial court on the verdict of a jury entered judgment against the plaintiff in error for the sum of $800 for the negligent killing of Capehart, who was one of its employees, and this writ of error is prosecuted to reverse the action of the court below, affirming such judgment. 167 N. C. 14, L.R.A.—, —, 82 S. E. 968. At the time of his death Capehart was a minor and was employed by the defendant company as a switchman. The accident occurred in North Carolina on an interstate freight train moving from a point in North Carolina to one in Virginia. The suit to recover was specifically based on the employers' liability act of April 22, 1908, 35 Stat. at L. 65, chap. 149, as amended April 5, 1910, 36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662, and as both parties concede that that act was applicable, that subject may be put out of view.

[492] The deceased was a natural or illegitimate child, born in North Carolina, and the next of kin for whose benefit the administrator sued, he having been qualified at the alleged domicil of the deceased in North Carolina, were three minor children of the deceased's mother, the issue of a marriage by her contracted after his birth, she, the mother, being dead at the time of the accident. There was no question in the court below as to nonliability because of an absence of negligence, since, as pointed out by the court, the sole contention pressed upon it for reversal was that the damages for the

death had been awarded to persons who were not entitled to the recovery as next of kin under the act of Congress, even although they were the next of kin by the law of the state. Thus the court said: "The sole contention of the defendant requiring our consideration is that the expression 'next of kin,' as used in § 1 of this act [the act of Congress], is to be construed by the common law, disregarding the state law defining those words." After then quoting from the state statute on the subject, the court further said: "It is very clear that in North Carolina the two half brothers and the sister of the intestate are his next of kin. It seems to us immaterial whether it were formerly otherwise in this state, either by statute or the common law before any statute. The question is, Who was the 'next of kin' at the time of such death in the state where the wrongful death occurred?" Proceeding to examine and decide this question, it was held that next of kin for the purpose of the recovery under the act of Congress were the next of kin as established by the law of the state where the right to recover obtained. And it is the correctness of this ruling which we are alone called upon to consider, since, despite the great number of assignments of error which are made, they all in last analysis depend upon that question. We need not stop to review the assignments to demonstrate this fact, since in argument they are all stated as embracing the solution of three [493] inquiries, which, as we shall see when we consider them, will be virtually disposed of by deciding the single question concerning the correctness of the ruling of the court below as to the next of kin under the statute. The three questions thus stated are in substance as follows: First, whether the minor children, who, under the law of North Carolina, were the next of kin of their natural or illegitimate brother, because of their common motherhood, were the the next of kin under the act of Congress? Second, if, in the absence of a parent, they were so, would the proof of the existence of an asserted father of the deceased make such person his parent within the act of Congress, excluding the right of the next of kin to recover the damages? Third, if the minor brothers and sister were next of kin under the act of Congress, had they such dependency on the deceased as gave them any right to recover under the act?

We consider the questions separately.

1. There can be now no question that the act of Congress in so far as it deals with the subjects to which it relates is paramount and exclusive. It is therefore not disputable that recovery under the act can be had alone in the mode and by and for the persons or class of persons in whose favor the law creates and bestows a right of action. Second Employers' Liability Cases (Mondou v. New York N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. But this is irrelevant, since the controversy concerns only the meaning of the act, which it is conceded, when rightly interpreted, is entitled to exclusive operation.

Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally under our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress [494] plainly indicates the purpose of Congress to leave the determination of that question to the state law. But, it is urged, as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common-law significance, and therefore as excluding all persons not included in the term under the common law; meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition, since, if it be well founded, it would apply equally to the other requirements of the statute,—to the provisions as to the surviving widow, the husband and children, and to parents, thus, for the purposes of the enforcement of the act, overthrowing the legislation of the states on subjects of the most intimate domestic character, and substituting for it the common law as stereotyped at the time

of the separation. The argument that such result must have been intended, since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the states, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others.

But we need go no further, since the want of merit in the [495] contention is fully demonstrated by authority. In Hutchinson Invest. Co. v. Caldwell, 152 U. S. 65, 38 L. ed. 356, 14 Sup. Ct. Rep. 504, the matter under consideration was § 2269, Revised Statutes, giving to the heirs of a deceased pre-emptor who had died before completing his entry the right to perfect the same, the statute providing: "But the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." The controversy was whether the word "heirs" under the statute should be taken in its common-law meaning, and therefore not to give a right to complete the entry to illegitimate children who had been recognized by their father, the pre-emptor, and who were his heirs under the "law of the state of Kansas, where the land was stipulated and where the deceased pre-emptor was domiciled. The court said: "We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words 'heirs of the deceased pre-emptor' as used in the section to persons who would be heirs at common law (children not born in lawful matrimony being, therefore, excluded), rather than those who might be such according to the *lex rei sitae*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word 'heirs' would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject. . . . But it is contended that the word 'heirs' was used in its common-law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common-law signification; but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word 'heirs' was used as meaning, as at common law, those capable of inheriting, but it does not follow that the question as [496] to who possessed that capability was thereby designed to be determined otherwise than *by the* law of the state which was both the situs of the land and the domicil of the owner." pp. 68, 69. And there is no ground for taking this case out of the rule thus announced upon the theory that the controversy involved the title to real estate, contracts concerning which are governed by the law of the situs, since we are dealing here with the subject of next of kin, which, so far as legislative power is concerned, under our constitutional system of government, is inherently local and to be determined by the rules of the local law. And this is well illustrated by Blagge v. Blach, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853, which involved a controversy as to the distribution of French spoliation claims awarded under an act of Congress providing "that in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy. . . . " [26 Stat. at L. 908, chap. 540.] Without going into detail concerning the controversy in that case it suffices to say that if the next of kin entitled to take under the act of Congress had been ascertained under the rule of the common law, there would have been one result, and if determined by the law of the state controlling distributions, another and different result followed. Coming to determine the significance of the words "next of kin" from the act itself and its context, the court said: "And we are of opinion that Congress, in order to reach the next of kin of the original sufferers, capable of taking at the time of distribution, on principles universally accepted as most just and equitable, intended next of kin according to the statutes of distribution of the respective states of the domicil of the original sufferers."

2 and 3. The suggestion rather than contention that if the state law be held applicable to determine next of kin, the right should have been recognized to seek to trace the paternity of the illegitimate child, so as to make the [497] asserted father the parent under the statute, might well be disposed of by saying that no such contention seems to have been urged in either of the courts below. But, aside from this, the entire want of merit of the proposition is at once demonstrable from a twofold point of view: (a) Because it was necessarily foreclosed by the ruling of the court below as to the state law concerning the next of kin and the right of the brothers and sister of the illegitimate child to inherit from him solely because of a common motherhood,—a ruling which excluded by necessary implication the right now contended for. (b) Because as no provision, either of the state law or of the common law, supporting the asserted right,

is referred to, the suggestion may be taken as simply a typical illustration of the confusion of thought involved in the main proposition relied upon which we have previously adversely disposed of.

In so far as it is suggested that there was no proof tending to show a dependent relation between the next of kin who were recognized and the deceased, so as to justify recovery under the statute, it suffices to say that it was expressly foreclosed by the finding of the jury, sanctioned by the trial court, and was not questioned in the court below, and at all events involves but a controversy as to the tendencies of all the proof, foreclosed by the action of both courts, which we would not reverse without a clear conviction of error, which, after an examination of the record on the subject, we do not entertain. Great Northern R. Co. v. Knapp, 240 U. S. 464, ante, 745, 36 Sup. Ct. Rep. 399.

Affirmed.

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[498] FARMERS' & MECHANICS' NATIONAL BANK OF PHILADELPHIA v. RIDGE AVENUE BANK et al.

(See S. C. Reporter's ed. 498–509.)

Bankruptcy — distribution — priorities — partnership and individual creditors.

The lack of any partnership assets and of any solvent partner does not disentitle a creditor of an individual partner in a bankrupt firm to be paid out of that partner's individual estate to the exclusion, if necessary, of the creditors of the partnership estate, upon the theory that such conditions create an exception to the general rule for the distribution of partnership and individual estates in bankruptcy, expressed in the bankrupt act of July 1, 1898 (30 Stat. at L. 548, chap. 541, Comp. Stat. 1913, § 9589), § 5, *viz.*, that partnership creditors shall, in the first instance, be satisfied from the net proceeds of the partnership estate, and creditors of an individual partner from the net proceeds of that partner's individual estate, since such an exception is not compatible with the other provisions of that section which empower courts of bankruptcy to adjudge a partnership a bankrupt, and to administer the partnership estate so far as possible as any other estate, and authorize them to permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and to marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

[For other cases, see Bankruptcy, X. c, 1, in Digest Sup. Ct. 1908.]

[No. 291.]

Argued March 15, 1916. Decided April 3, 1916.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit, presenting the question as to the right of a creditor of an individual partner in a bankrupt firm to be paid out of that partner's individual estate to the exclusion, if necessary, of the creditors of the partnership estate. Answered in the affirmative.

The facts are stated in the opinion.

Mr. J. Frank Staley argued the cause and filed a brief for the Farmers' & Mechanics' National Bank:

Clause "f" of § 5 of the bankruptcy act lays down a positive and direct rule of distribution, and requires the appropriation of the net proceeds of the individual estate of each partner to the payment of such individual debts, and partnership creditors are entitled to share therein only after such individual debts have been paid in full. The existence or nonexistence of firm assets for distribution cannot affect or vary the rule.

Re Janes, 67 C. C. A. 216, 133 Fed. 912; Euclid Nat. Bank v. Union Trust & D. Co. 79 C. C. A. 485, 149 Fed. 975; Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897; Re Wilcox, 94 Fed. 84; Re Daniels, 110 Fed. 745; Re Hull, 224 Fed. 796; Re Mills, 95 Fed. 269.

Historically, the rule of distribution provided by clause "f" is the re-enactment of the rule in equity governing the administration of the estates of insolvent partners, which has been in practice from the beginning of our judicial history.

Murrill v. Neill, 8 How. 414, 12 L. ed. 1135.

Mr. Frank R. Savidge argued the cause and filed a brief for the Ridge Avenue Bank et al.:

The equitable principle, commonly called an exception to the general rule, that firm creditors share equally with separate creditors of the partners in individual assets, where there are no firm assets and no living solvent partner, is supported by the best authority.

Lindley, Partn. 8th ed. p. 811, note, p. 855; Gilmore, Partn. pp. 438, 439; Parsons, Partn. 2d ed. p. 500; Collyer, Partn. 6th ed. p. 1459; Story, Partn. 7th ed. § 380. See

NOTE.—On adjudication of bankruptcy of member of firm as affecting rights of firm creditors against firm property—see note to American Steel & Wire Co. v. Coover, 30 L.R.A.(N.S.) 787.

also Loveland, Bankr. 1912, § 273; Bispham, Eq. 9th ed. § 517; Re Carpenter, 7 Morrell, 270; Ex parte Taitt, 16 Ves. Jr. 193.

Under the bankruptcy act of 1867 the weight of authority, following the English doctrine, supported this principle as a part of the long-established equitable method of distribution, and allowed firm creditors to participate in separate assets where there was no partnership fund for distribution; and this, regardless of whether the partnership was in bankruptcy or not. This method of distribution, the courts held, tended to produce the equality which it was the manifest purpose of the act to secure. Cases supporting it are:

Re Jewett, 1 Nat. Bankr. Reg. 491, Fed. Cas. No. 7,304; Re Knight, 2 Biss. 518, 8 Nat. Bankr. Reg. 436, Fed. Cas. No. 7,880; Re Downing, 1 Dill. 33, 3 Nat. Bankr. Reg. 748, Fed. Cas. No. 4,044; Re Rice, 9 Nat. Bankr. Reg. 373, Fed. Cas. No. 11,750; Re McEwen, 6 Biss. 294, 12 Nat. Bankr. Reg. 11, Fed. Cas. No. 8,783; Re Collier, 12 Nat. Bankr. Reg. 266, Fed. Cas. No. 3,002.

Under the bankruptcy act of 1898, although there is a conflict in the decisions among circuit courts of appeals and the lower Federal courts, it is submitted that the courts which have considered the matter, as should be done, in the light of its equitable foundation and development, and have kept in mind the intent and purpose of the bankruptcy act, have sustained the exception where the facts were substantially as in this case.

Re Green, 116 Fed. 118, 8 Am. Bankr. Rep. 553; Conrader v. Cohen, 58 C. C. A. 249, 121 Fed. 801, affirming 118 Fed. 676; Re Gray, 208 Fed. 959.

The courts which adopt the narrow view, as in the Wilcox Case and those following it, disregard not only the equitable principles underlying the bankruptcy act, but also the fact that a bankruptcy court is one of equity, administering the law, not merely according to the letter, or as read literally, but according to its spirit, and lose sight of the fact that the act is not antagonistic to, but is in support of, the equitable principle aforesaid.

Re Kane, 11 Am. Bankr. Rep. 533.

The great majority of the states of the Union sustain the exception in distributing insolvent partnership and individual estates in equity. Among the states allowing it are Alabama (Smith v. Mallory, 24 Ala. 628); New Jersey (Davis v. Howell, 33 N. J. Eq. 72); Missouri (Level v. Farris, 24 Mo. App. 445; Hundley v. Farris, 103 Mo. 78, 12 L.R.A. 254, 23 Am. St. Rep. 863, 15 S. W. 312); Rhode Island (Colwell v. Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913); Wisconsin (Thayer v. Humphrey, 91 Wis. 276, 30 L.R.A. 549, 51 Am. St. Rep. 887, 64 N. W. 1007); Maine (Harris v. Peabody, 73 Me. 262); Ohio (Rodgers v. Meranda, 7 Ohio St. 179).

The so-called exception is sustained by reason and equity.

Gilmore, Partn. p. 439; Re Knight, 8 Nat. Bankr. Reg. 436, Fed. Cas. No. 7,880; Re Green, 116 Fed. 118.

Mr. Chief Justice White delivered the opinion of the court:

The essential facts stated in the certificate of the court below are these: The firm of William Gray & Sons and its three partners, William J. Gray, Peter Gray, and Alexander J. Gray, were adjudged bankrupts. The same person was appointed trustee of the four estates. It resulted from charging separately against each estate the mere necessary and unquestioned expenses of administration that there was nothing whatever in the estate either of the partnership, of that of William J. Gray or of Peter Gray,—indeed in the latter there was nothing to defray the expenses of administration. As to the estate of Alexander J. Gray, after charging the expenses of administration there remained $1,597.26. Creditors of the firm proved their debts against it, the Ridge Avenue Bank of Philadelphia being among the number, while only one creditor, the Farmers' & Mechanics' National Bank of Philadelphia, proved a debt against the individual estate of Alexander J. Gray, that debt exceeding the total sum of the estate. No creditor proved against the individual estate of William J. Gray or that of Peter [502] Gray. Under these conditions the dispute which arose was whether the estate of Alexander J. Gray was to go wholly to the Farmers' & Mechanics' National Bank, the individual creditor, or was to be proportionately applied to the individual and firm creditors because of the absence of any firm estate for distribution. The district court directed the fund to be distributed between the Farmers' & Mechanics' National Bank, the creditor of the individual estate, and the creditors of the firm, and the question of law which the court below propounds to enable it to review this action of the district court, is as follows:

"When a partnership as such is insolvent, and when each individual member is also insolvent, and when the only fund for distribution is produced by the individual estate of one member, are the individual creditors of such member entitled to priority in the distribution of the fund?"

The solution of this question primarily depends upon an interpretation of subsection f of § 5 of the bankruptcy act of 1898,

and secondarily upon a consideration of all the pertinent subsections of the section; indeed, of all the relevant provisions of the context of the act. Subsection f is as follows:

"f" The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." [30 Stat. at L. 548, chap. 541, Comp. Stat. 1913, § 9589.]

[503] Let us first sift the respective contentions so as to reach the ultimate proposition required to be decided. In the first place, in favor of the right of the creditor of the individual partner to be paid, under the facts stated, out of the individual estate, to the entire exclusion, if necessary, of the creditors of the partnership estate, it is urged that such result is so unambiguously commanded by the rule of distribution established by the text of subsection f that there is no room for construction, but the simple duty arises to enforce the text, as to do otherwise would amount to judicial legislation. It is undoubted that this proposition is supported by largely the greater weight of opinion of the courts of the United States in enforcing subsection f. Re Wilcox, 94 Fed. 84 (1899); Re Mills, 95 Fed. 269 (1899); Re Daniels, 110 Fed. 745 (1901); Re Janes, 67 C. C. A. 216, 133 Fed. 912 (1904), reversing 128 Fed. 527; Re Henderson, 142 Fed. 588 (1906); Euclid Nat. Bank v. Union Trust & D. Co. 79 C. C. A. 485, 149 Fed. 975 (1906), affirming Re Henderson, supra; Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897 (1908); Re Hull, 224 Fed. 796 (1915).

On the other hand, to refute the proposition and to avoid the effect of the authorities sustaining it just referred to three contentions are relied upon. (a) It is said the absence of ambiguity in the general rule as stated in subsection f is conceded and the soundness of the authorities cited recognizing that fact is not disputed, but these concessions, it is declared, are negligible, since the fact that there were no partnership assets and no solvent partner causes this case to be an exception to the rule expressed in subsection f, hence not governed by it, and therefore makes it clear that the authorities cited are inapposite because they mistakenly applied the general rule to an exceptional case which that rule did not govern. (b) That this is demonstrated first by the fact that the general rule [504] was as unambiguously expressed in the previous bankruptcy acts (§ 14 of the act of 1841 [5 Stat. at L. 448, chap. 9] and § 36 of the act of 1867 [14 Stat. at L. 534, chap. 176]), and yet, under those acts, the exception stated, which unquestionably governed in bankruptcy in England, where the general rule was the same, was also held to be controlling by judicial decisions in this country. This being true, the argument insists the inference is that Congress, in adopting the act 1898 without any expression excluding the continued operation of the exception which prevailed under the previous acts, must be considered as having impliedly recognized the continued force of that exception; that is, must be held to have substantially made that exception a part of the rule established under the act of 1898. And this view, it is insisted, is expressly sustained by the following decided cases under the act of 1898: Re Green, 116 Fed. 118 (1902); Re Conrader, 118 Fed. 676 (1902); Conrader v. Cohen, 58 C. C. A. 249, 121 Fed. 801 (1903), affirming Re Conrader, supra; Re Janes, 128 Fed. 527 (1904), reversed in 67 C. C. A. 216, 133 Fed. 912; and by the present case, Re Gray, 208 Fed. 959 (1913), and is in reason supported by the adjudged cases which upheld the asserted exception under the prior acts.

(c) That even if this be held to be not the case, as there is nothing in the act of 1898 repudiating the application and existence of the exception which prevailed under the previous acts, therefore, as a question of original investigation, that exception should be held to be equally applicable and controlling under the act now in force as it was under the previous bankruptcy acts, since the general rule was as clearly stated in those acts as it is in this.

A twofold reply is made to these contentions: First, although admitting that the alleged exception prevailed in England, it is denied that it was authoritatively recognized in this country under the previous acts, and second, by insisting that even if it was, it is not applicable under [505] the act of 1898 because the terms of that act make manifest that it was drawn for the purpose of preventing the method of distribution provided in subsection f from being subject to the exception relied upon.

As we are of opinion that it is to be conceded that if, under the prior acts, it was

settled authoritatively and conclusively that the exception relied upon obtained and was fully recognized in practice, it would follow that the enactment of the same general rule without anything indicating a departure from the exception would justify the conclusion that it was the legislative intent to continue the exception, it results that, in order to answer the question propounded, the whole case comes to two inquiries: Was there such an authoritative exception to the general rule under the prior laws, and, if not, was the continued existence of such exception compatible with the rule of distribution established by subsection f of the present act as considered in the light of the context of § 5 of which it forms a part, and of the scope and operation of the act of 1898?

1. Undoubtedly in England, with the development of the general rule for the distribution of partnership and individual estates in bankruptcy as now formulated in subsection f of the present bankruptcy act, there also was evolved in practice the so-called exception here relied upon which was applicable in cases where there was no partnership estate to distribute and no solvent partner. We content ourselves with this statement, and do not refer to the adjudged cases in England establishing the rule, and those from which the alleged exception came to be evolved, since they were quite fully referred to in Murrill v. Neill, 8 How. 414, 12 L. ed. 1135, and will all be found stated in the fullest degree in the opinion of Lowell, Judge, in Re Wilcox, 94 Fed. 84. It is also true that this asserted exception came to be recognized and applied in adjudged cases in this country under the prior bankruptcy acts. [506] The cases on this subject again are not referred to because they will also be found stated in the opinion in the Wilcox Case. But, while this is true, we think there is no ground for saying that the asserted exception had become so authoritatively established prior to the adoption of the present law as to cause it to be in effect a part of the rule, since on the contrary, as will be seen by the references already made, its applicability was constantly disputed and its enforcement challenged. Nothing more is required to demonstrate this statement than a recurrence to Murrill v. Neill, supra, since in the opinion in that case, after considering the general rule of distribution as now stated in subsection f, and the alleged exception here under review, it was said: "It may be proper in this place to mention the two departures permitted by the court of chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion." After then stating the first exception, the one now in question was referred to as follows: "The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country." p. 427.

2. Although the alleged exception was therefore clearly not so authoritatively established as to cause it to become a part of the rule by the enactment of the bankruptcy act of 1898, it yet remains to consider whether its existence is compatible with that act; that is, whether to permit it would be in accord with the rights which the act gave and the duty which it imposed to enforce them. In the first [507] place it is to be observed that the act of 1898 in the opening subsections of § 5 confers the power on courts of bankruptcy to adjudge a partnership a bankrupt and to administer the partnership estate so far as possible as any other estate,—an authority not conferred by the previous bankruptcy acts. In the second place, subsection f, establishing the rule of distribution, is immediately followed by subsection g, which provides as follows:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The legislative mind must therefore have been immediately and directly concerned with the enforcement of the rule of distribution expressed in subsection f, since that subject was thus immediately considered and provided for. And the significance of this provision and its effect upon the continued existence of the supposed authority to depart from the rule expressly provided for by permitting the alleged exception now relied upon will become quite clear by the briefest possible outline of some of the principal considerations involved in the origin and development of that assumed exception.

As pointed out in the opinion in Murrill v. Neill, supra, and as fully shown by the review of the English cases so carefully stated in Re Wilcox, supra, to which we again refer, that origin and development

was this: It came to pass in England at an ancient date that with the establishment of the rule of distribution substantially as formulated in subsection f, it was recognized that a creditor of the joint or partnership estate would be permitted, if no objection was made, to prove his claim in a bankruptcy proceeding against an individual partner. This resulted from the fact that the power of the court over the [508] separate or individual estate extended not only to the individual assets, but to the share of the individual bankrupt in the partnership assets, the court having power upon application, by ordering separate accounts to be kept, to protect the rights of all and secure a distribution conformably to the settled rule. While there is obscurity and consequent contrariety of opinion as to the reason upon which it was placed, it no doubt came to pass in a further state of evolution that both joint and separate creditors were allowed to prove their claims in bankruptcy against the separate estate, the practice of protecting the rights of each by an order requiring separate accounts disappearing and the creditors being relegated for the accomplishment of that result to a bill in equity to enforce and secure the distribution as provided in the rule. It is further certain that as in every case where an order was made allowing the joint creditor to prove against the separate estate of a partner such right would be frustrated by chancery proceedings, it came to pass that joint creditors were only allowed to prove against the separate estate upon condition that distribution would be made conformably with the general rule in every case where that course could be compelled by chancery proceedings. As it came further, however, to be appreciated that chancery could not afford relief in a case where there was no joint estate and no solvent partner, it resulted that in such a case the limitation as to distribution was treated as not applicable, and therefore the alleged exception to the general rule arose,—an exception which, as pointd out by this court in Murrill v. Neill, supra, was but a failure to give effect to the rule, not because of the absence of right of the creditors to enjoy its benefit, but alone because the judicial power had at its command no remedy which it could apply to give effect to the legal right which undoubtedly existed.

When the origin and source of the so-called exception is thus appreciated and the comprehensive delegation of [509] authority for the first time conferred by subsection g is considered, it would seem to be fairly inferable that at the very moment of the re-expression of the ancient rule in subsection f in terms free from ambiguity, the means of preventing its frustration in the guise of an exception or otherwise because of an assumed absence of judicial remedy to enforce the rule was provided for. And this being true, it of course results that no possible reason can be found for refusing to give effect to the law by permitting the successful operation of the so-called exception now relied upon. In fact, irrespective of the considerations derived from the origin of such assumed exception, to which we have referred, when the positive commands of the statute are considered and the new power conferred by the act as to partnership estates is borne in mind, we see no escape from the conclusion that the powers conferred by subsection g are coincident with the duties which the act imposes, and amply efficient to secure and give effect to their performance. This, indeed, was the view hitherto indicated in Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176, where, after quoting subsection f of the act, it was said:

"To enforce these provisions the act compels (subdiv. d) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (subdiv. e) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and permits (subdiv. g) the proof of the claim of the partnership estate against the individual estate, and *vice versa*, and directs the marshaling of the assets of the partnership estate and the individual estates 'so as to prevent preferences and secure the equitable distribution of the property of the several estates.'" p. 504.

It follows that the question propounded will be answered, Yes.

And it is so ordered.

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[510] ARMOUR & COMPANY, Plff. in Err.,
v.
STATE OF NORTH DAKOTA.

(See S. C. Reporter's ed. 510-517.)

Constitutional law — due process of law — regulating net weight of retail packages.

1. Prohibiting the sale of lard otherwise than in bulk unless put up in 1, 3, or

NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation,

5-pound packages, net weight, or some multiple of these numbers, as is done by N. D. Laws 1911, p. 355, does not render the statute repugnant to U. S. Const., 14th Amend., as denying due process of law.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — regulating net weight of packages of lard.

2. Singling out lard from other food products, as is done by the prohibition of N. D. Laws 1911, p. 355, against the sale of lard otherwise than in bulk unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers, does not make the statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Commerce — state regulation — retail sales.

3. As applied to retail sales not in the package of importation, the commerce clause of the Federal Constitution is not violated by the prohibition of N. D. Laws 1911, p. 355, against the sale of lard otherwise than in bulk unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers.

[For other cases, see Commerce, IV. b, in Digest Sup. Ct. 1908.]

Commerce — conflicting state and Federal regulations — net weight of retail packages.

4. There is no repugnancy between the pure food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), which is directed against the adulteration and misbranding of articles of food transported in interstate commerce, and the prohibition of N. D. Laws 1911, p. 355, against retail sales of lard otherwise than in bulk, unless put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers.

[No. 258.]

Argued March 3 and 6, 1916. Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of North Dakota to review a judgment which affirmed a conviction in the District Court of Cass County, in that state, for selling lard not put up in 1, 3, or 5-pound packages, net weight, or some multiple of these numbers. Affirmed.

See came case below, 27 N. D. 177, L.R.A. —, —, 145 N. W. 1033.

The facts are stated in the opinion.

Mr. N. C. Young argued the cause, and, with Messrs. J. S. Watson, Abram S. Stratton, and Alfred R. Urion, filed a brief for plaintiff in error:

This statute arbitrarily and without reasonable ground therefor singles out lard from all food products, and is therefore void.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 558–561, 46 L. ed. 679, 689, 690, 22 Sup. Ct. Rep. 431.

This statute is arbitrary and has no reasonable relation to a purpose which it is competent for the government to effect.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 563, 55 L. ed. 337, 31 Sup. Ct. Rep. 259.

As applied to the sale of the lard in question, this statute conflicts with the labeling provision of the Federal food and drug act and the commerce clause of the Federal Constitution.

Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Corn Products Ref. Co. v. Weigle, 221 Fed. 988.

Mr. Andrew Miller argued the cause, and, with Mr. Henry J. Linde, Attorney General of North Dakota, and Messrs. Francis J. Murphy, H. R. Bitzing, Alfred Zuger, and B. F. Tillotson, filed a brief for defendant in error:

One who invites the confidence of the public may be compelled to submit to such regulations as will guard the public as far as possible against misapprehension and possible imposition and fraud.

Freund, Pol. Power. §§ 274, 275; Tiedeman, Pol. Power, § 89; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

Where the legislative action is arbitrary and has no reasonable relation to a purpose

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generally,—see notes to State v. Goodwill, 6 L.R.A. 621; and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107, and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power to prescribe the manner or method of determining quantity or amount of commodity—see note to Ex parte Steube, L.R.A.1916E, —.

On validity of regulations as to weight of loaf of bread—see note to Chicago v. Schmidinger, 44 L.R.A.(N.S.) 632.

As to what constitutes an original or unbroken package—see note to State v. Maire, 39 L.R.A.(N.S.) 1051.

As to state regulations of interstate commerce as affected by Federal pure food laws—see note to McDermott v. State, 47 L.R.A.(N.S.) 984.

which it is competent for the government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative inquiry is not subject to judicial review.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259. See also McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501.

For the purpose of preventing fraud and imposition upon consumers, made possible by ignorance or thoughtlessness, it is within the police power to standardize the package in which a commodity is sold, when it is not sold in bulk, and the price agreed upon according to actual weight or measure.

State v. Co-operative Store Co. 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912C, 248; State v. Aslesen, 50 Minn. 5, 36 Am. St. Rep. 620, 52 N. W. 220; Turner v. Maryland, 107 U. S. 38, 39, 43, 27 L. ed. 370–372, 2 Sup. Ct. Rep. 44; Wheeler, v. Russell, 17 Mass. 258; Eaton v. Kegan, 114 Mass. 433; State v. Pittsburg & S. Coal Co. 41 La. Ann. 465, 6 So. 220, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; Levy v. Gowdy, 2 Allen, 320; James v. Josselyn, 65 Me. 138; Richmond v. Foss, 77 Me. 590, 1 Atl. 830; Williams v. Tappan, 23 N. H. 385; McLean v. State, 81 Ark. 304, 126 Am. St. Rep. 1037, 98 S. W. 729, 11 Ann. Cas. 72, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Com. v. McArthur, 152 Mass. 522, 25 N. E. 836; Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; Chicago v. Schmidinger, 243 Ill. 167, 44 L.R.A.(N.S.) 632, 90 N. E. 369, 17 Ann. Cas. 614, 245 Ill. 317, 92 N. E. 244, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1914B, 284; State v. McCool, 83 Kan. 428, 111 Pac. 477; People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; State v. Campbell, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; People v. Luhrs, 195 N. Y. 377, 25 L.R.A.(N.S.) 473, 89 N. E. 171; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; State v. Fourcade, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 So. 187; Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; State, Waterbury, Prosecutor, v. Newton, 50 N. J. L. 534, 2 Inters. Com. Rep. 63, 14 Atl. 604; Freund, Pol. Power, §§ 272, 275; Tiedeman, Limitation of Pol. Power, § 89, p. 207.

So far as the actual handling, sale, and distribution of Armour & Company's goods, including lard, in this state, is concerned, it is the same as if the packing plant were located and the products put up in North Dakota. As to the particular pail involved in this case, for the sale of which the plaintiff in error was convicted, the evidence is undisputed that it was found in its warehouse at Fargo in a crate, and that the crate was broken by the agent of plaintiff in error, and the pail sold. Hence, the plaintiff in error cannot successfully contend that it was convicted without due process of law, and in the absence of a statute authorizing the conviction.

Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Guckenheimer v. Sellers, 81 Fed. 997; Re Harmon, 43 Fed. 372; Cook v. Marshall County, 196 U. S. 261, 49 L. ed. 471, 25 Sup. Ct. Rep. 233.

The legislature of the state of North Dakota, being familiar with the lard trade for many years, and acquainted with local conditions, was best able to judge of the necessity for the statute in question. The fact that the courts may not agree with the legislature in its views as to the necessity or propriety of this legislation constitutes no ground for judicial interference, unless the act is clearly in violation of constitutional guaranties of equal protection; and this statute is not so clearly and unmistakably in excess of the power of the legislature that it should be held for naught.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Sinking Fund Cases, 99 U. S. 718, 727, 25 L. ed. 501, 504; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 563, 55 L. ed. 337, 31 Sup. Ct. Rep. 259.

[511] Mr. Justice McKenna delivered the opinion of the court:

A statute of the state requires (§ 1) that "every article of food or beverage as defined in the statutes of this state shall be sold by weight, measure or numerical count and as now generally recognized by trade custom, and shall be labeled in accordance with the provisions of the food and beverage laws of this state. . . .

"Section 2 (Weight of Lard). Every lot of lard compound or of lard substitute, unless sold in bulk, shall be put up in pails or other containers holding one (1), three (3), or five (5), pounds net weight, or

some whole multiple of these numbers, and not any fractions thereof. If the container be found deficient in weight additional lard, compound, or substitute, shall be furnished to the purchaser to make up the legal weight. The face label shall show the true name and grade of the product, the true net weight together with the true name and address of the producer or jobber. If other than leaf lard is used then the label shall show the kind, as 'Back Lard,' or 'Intestinal Lard.' Every lard substitute or lard compound shall also show, in a manner to be prescribed by the food commissioner, the ingredients of which it is composed, and each and every article shall be in conformity with, and further labeled in accordance with the requirements under the food laws of this state." [Laws 1911, p. 355.]

Violations of the act are made misdemeanors with a minimum and a maximum fine increased for subsequent offenses.

In pursuance of the statute the state's attorney for the county of Cass filed an information against plaintiff in error for unlawfully offering for sale and selling to one E. F. Ladd a quantity of lard not in bulk, which was put up by the company and sold and delivered to Ladd in a pail which held more than 2 pounds and less than 3 [512] pounds net weight of lard, to wit, 2 pounds and 6 ounces, which pail or container did not have or display on the face label thereof the true net weight of the lard in even pounds or whole multiples thereof, but expressed the weight of the lard in pounds and ounces.

A demurrer to the information was overruled and the Armour Company pleaded not guilty. A stipulation was entered into waiving a jury trial and that the issues be tried by the court.

The company was found guilty and adjudged to pay a fine of $100. The judgment was affirmed by the supreme court of the state and this writ of error was then allowed by its chief justice.

The assignments of error attack the validity of the statute, specifying as grounds of the attack that the statute offends the due process and equal protection clauses of the 14th Amendment of the Constitution of the United States and also the commerce clause of the Constitution.

Armour & Company is a New Jersey corporation. It is a packer of certain pork products and has packing plants where it produces lard as an incident to its business in Illinois, Missouri, Iowa, and Nebraska. It has no plant in North Dakota, but has a branch office establishment in the city of Fargo, in that state, to which its goods are shipped in carload lots to be distributed therefrom. The branch at Fargo is under the charge of a local manager.

In October, 1911, the state food commissioner went to the company's establishment at Fargo and asked to purchase 3 pounds of lard. He was sold a pail containing 2 pounds and 6 ounces. It was upon this sale as a violation of the statute that the information was filed, and for which the Armour Company was convicted and sentenced.

The supreme court considered the statute as but a development of other laws passed in the exercise of the [513] police power of the state to secure to its inhabitants pure food and honest weights, questions which the court thought were "inseparably allied and any argument advanced upon one applies equally to the other." And the court said the law was drafted by the Pure Food Commission, it might be reasonably assumed, "after twelve years of observation and study," and, further, that "the expert who drafted the law, the legislature who passed it, and the governor who approved it, all thought necessity existed for such a measure. If we did not agree with all those, we might well hesitate to say that there was absolutely no doubt upon the question, but in fact a majority of this court believes the law not only reasonable, but necessary, and this belief is founded upon the evidence in this case and upon facts of which this court can take judicial cognizance."[1]

The court, by these remarks, expressed the test of a judicial review of legislation enacted in the exercise of the police power, and in view of very recent decisions it is hardly necessary to enlarge upon it. We said but a few days ago that if a belief of evils is not arbitrary, we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. Rast v. Van Deman & L. Co. 240 U. S. 342, ante, 679, 36 Sup. Ct. Rep. 370; Tanner v. Little, 240 U. S. 369, ante, 691, 36 Sup. Ct. Rep. 379. It only remains to ap-

[1] [This quotation is taken from the original opinion of the state court in this case. Following the denial of a petition for rehearing a substituted opinion was filed, this latter opinion being the one reported in 27 N. D. 177, L.R.A.—, —, 145 N. W. 1033. —Ed.]

ply to the present case the principles so announced.

Lard is a very useful product and its many purposes are set forth in the testimony. It was originally sold in the state only in tierces and tubs; that is, in bulk. A demand arose for smaller and more convenient packages and the [514] Armour Company and other packers responded to that demand and put their lard in 3, 5, and 10-pound pails, gross weight, the net weight of lard at first having no indication, but subsequently, in obedience to the state laws, being indicated by labels, and in the present case by a small label at 2 pounds and 6 ounces. The practice of selling by gross weight is a continuation of the practice of selling by bulk.

The Armour Company asserts an inviolable right in the practice as convenient and useful and free from deception. But experience does not justify such unqualified praise. The practice has its advantages, no doubt, but it is the observation of the officers of the state that it conceals from buyers their exact purchases,—there is confusion as to what the price paid compensates, whether lard or tin container.

The Armour Company contests this conclusion and contends that the label upon the package, put on in observance of a law of the state passed in 1907,[1] shows the net weight of the lard, and protects the consumer from imposition while it preserves to the company a useful method of packing and a necessary freedom of business with the public. To this we reply the law of 1907 was deemed necessary to protect the purchaser against the concealment in the method of the packers, the amount of lard not being indicated. Supposedly the requirement was not adequate, and the law of 1911 was passed. However, with a comparison of the laws we have nothing to [515] do, nor need we even consider, as the supreme court considered, with some reluctance, that the label used by the company was a scant compliance with the law of 1907, if not an evasion of it. We need only deal with the law under review and the justification for its adoption. Evils attended the method of the company which the Food Commission of the state thought should be redressed, and which the legislature reasonably believed were definite, and not fanciful, and in this belief passed the law. And the belief being of that character removes the law, as we have already said, from judicial condemnation; and besides, there is nothing in the testimony inconsistent with it.

The testimony of the company was directed at great length to show the advantages of selling in containers over selling in bulk, and the expense to the company of the former, and the additional expense which the law would require. And meeting the objection that the company fixed the price of the lard by the gross weight of the package,—in other words, as though there were 3 pounds instead of 2 pounds, 6 ounces, it was replied that by so doing there was no profit to the company and only a reimbursement of the cost of the tin container and extra cost of putting up the lard in that style of package.

But this does not justify the practice of the company nor establish the invalidity of the law of the state. The advantages are in a sense made a snare, and the testimony means no more than that the packer has built up a trade on a system of gross weight which enables it to practice a kind of deception on the purchaser that he is getting 3 pounds of lard when he is only getting 2 pounds, 6 ounces, and enables the packer to pay for the container. The evil of the transaction is not in the latter, but in the former,—that is, in the deception. The correction of the statute is that the lard and the container shall be unequivocally distinguished, and the purchaser have the [516] direct assurance of the quantity of lard he is receiving, knowledge of its price and the cost of the container to him,—a means of estimating his purchase free from disguises or the necessity of an arithmetical estimate of what he is getting or paying for upon the market fluctuations of lard and tin. This may involve a change of packing by the company and the cost of that change, but this is a sacrifice the law can require to protect from the deception of the old method. The law is allied in principle, as the supreme court of the state observed, to regulations in the interest of honest weights and measures. It involves no giving up of what the company has a right to retain, and the cost of the container as well after change as now can be cast upon the purchaser, he, however, being able to determine if it is worth the price he has to pay for it.

There are advantages undoubtedly in packing lard in pails,—advantages to the

[1] The law of 1907, p. 316, reproducing the provision of a law passed in 1905, provided as follows:

"Ninth. If every package, bottle or container does not bear the true net weight, the name of the real manufacturer or jobbers, and the true grade or class of the product, the same to be expressed on the face of the principal label in clear and distinct English words in black type on a white background, said type to be in size uniform with that used to name the brand or producer. . . ."

packer and the consumer; but the advantages are not on account of selling by gross instead of by net weight. In other words, all of the advantages will be retained by a compliance with the provisions of the law; that is, by putting up the lard in 1, 3, or 5-pound packages, net weight, or some multiple of those numbers. It is in the testimony that the packing company furnishes lard in net-weight pails to Park & Tilford, of New York city; that is, in weights of 3, 5, and 10 pounds, and has been doing so for a few years.

The equal protection clause of the 14th Amendment is invoked by the Armour Company and the specification is that the law under review "arbitrarily and without reasonable ground therefor singles out lard from all food products" which are sold in packages, such as "prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included, and no natural and reasonable [517] ground for excluding them and in singling out lard has been suggested."

The range of discretion that a state possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil, or exercised in cases where detriment is specially experienced. Carroll v. Greenwich Ins. Co. 199 U. S. 401, 411, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; Central Lumber Co. v. South Dakota, 226 U. S. 157, 161, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66. The law of North Dakota does not exceed this power.

It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importation. And it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the state.

Nor do we think that the law is repugnant to the pure food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717). That act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the Federal law (Rast v. Van Deman & L. Co. 240 U. S. 342, ante, 679, 36 Sup. Ct. Rep. 370), and the operation of that law is in no way displaced or interfered with.

Judgment affirmed.

[518] ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Plff. in Err.,

v.

STATE OF ARKANSAS.

(See S. C. Reporter's ed. 518–521.)

Constitutional law — due process of law — full switching crew.

1. Railway companies with yards or terminals in cities of the state may, consistently with due process of law, be forbidden by a state statute to conduct switching operations across public crossings in cities of the first and second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers.

[For other cases, see Constitutional Law, IV. b, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — full switching crew.

2. The exemption in favor of railways less than 100 miles in length, made by a state statute forbidding railway companies with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers, does not render the statute repugnant to U. S. Const., 14th Amend., as denying the equal protection of the laws to a railway company coming within its provisions, although certain terminal companies which do switching for connecting trunk lines, being less than 100 miles in length, are not covered by the statute, and one of such companies may do switching over some of the same crossings that the railway company in question does.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

Commerce — state regulation — full switching crew.

3. Interstate commerce is not unconstitutionally interfered with by a state statute which forbids railway companies with

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Note.—As to constitutionality of full-crew acts—see note to Pennsylvania R. Co. v. Ewing, 49 L.R.A.(N.S.) 978.

On excessive penalty as denial of due process of law—see note to State v. Crawford, 46 L.R.A.(N.S.) 1039.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers.

[For other cases, see Commerce, III., in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — excessive penalties.

4. A state statute forbidding railway companies with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers, under penalty of $50 fine for each separate offense, is not repugnant to U. S. Const., 14th Amend., on the theory that it prevents a contest of its validity by the excess of its penalties.

[For other cases, see Constitutional Law, IV. a, 3, b, in Digest Sup. Ct. 1908.]

[No. 302.]

Argued March 17, 1916. Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a conviction in the Circuit Court of Garland County, in that state, of a violation of the full switching crew act. Affirmed.

See same case below, 114 Ark. 486, 170 S. W. 580.

The facts are stated in the opinion.

Mr. Robert E. Wiley argued the cause, and, with Messrs. E. B. Kinsworthy and Edward J. White, filed a brief for plaintiff in error:

The statute in question is discriminatory, and denies to plaintiff in error the equal protection of the laws.

Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Yick Wo v. Hopkins, 118 U. S. 356–359, 30 L. ed. 220–222, 6 Sup. Ct. Rep. 1064; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; 1 Sutherland, Stat. Constr. 2d ed. p. 366; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

It is also arbitrary and unreasonable and repugnant to the due process clause of the 14th Amendment of the Constitution of the United States.

Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Louisiana & A. R. Co. v. State, 85 Ark. 12, 106 S. W. 960.

The act is void because judicial review to test its constitutionality can be had only at the risk of excessive penalties.

Rider v. Leatherman, 85 Ark. 230, 107 S. W. 996; De Queen v. Fenton, 98 Ark. 524, 136 S. W. 945; State v. Lindsay, 34 Ark. 372; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

The requirements of the act operate as a regulation of and an interference with interstate commerce.

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A.1915F, 792, P.U.R. 1915A, 231, 35 Sup. Ct. Rep. 158.

Mr. Henry M. Armistead argued the cause, and, with Messrs, Ashley Cockrill, Hamilton Moses, W. D. Jackson, Gus K. Jones, and Mr. Wallace Davis, Attorney General of Arkansas, filed a brief for defendant in error:

The act is not unconstitutional as interfering with interstate commerce.

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Pittsburgh, C. C. & St. L. R. Co. v. Indiana, 223 U. S. 713, 56 L. ed. 626, 32 Sup. Ct. Rep. 520; Savage v. Jones, 225 U. S. 523, 56 L. ed. 1190, 32 Sup. Ct. Rep. 715; Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829.

The classification of railways affected is not so arbitrary as to make the act unconstitutional.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 104, 43 L. ed. 912, 19 Sup. Ct. Rep. 609; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625; Stevenson Iron Min. Co. v. Kibbe, 205 U. S. 537,

51 L. ed. 920, 27 Sup. Ct. Rep. 790; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 59 L. ed. 839, 35 Sup. Ct. Rep. 504; Booth v. Indiana, 237 U. S. 391, 59 L. ed. 1011, 35 Sup. Ct. Rep. 617; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Dow v. Beidleman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Hendrick v. Maryland, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; Northwestern Laundry v. Des Moines, 239 U. S. 486, ante, 396, 36 Sup. Ct. Rep. 206.

The act is not unreasonable as a measure of safety.

McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Williams v. Arkansas, 217 U. S. 79, 54 L. ed. 673, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 54 L. ed. 930, 30 Sup. Ct. Rep. 663; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 642, 58 L. ed. 1135, 34 Sup. Ct. Rep. 678; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

If there was really a fear of the penalties in the case at bar, injunctive protection would have been sought.

Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

The objection made seems to be that no maximum limit is fixed for the penalty. This is not required either in this country or England.

12 Cyc. 966, and cases cited; 1914 Cyc. Ann. 1518.

But the question is not really before the court. The penalty assessed is not unreasonable. The provision for penalties is separable, and not involved.

Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912A, 1312; Ohio Tax Cases, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct. Rep. 372.

Mr. Justice McKenna delivered the opinion of the court:

An act of the state of Arkansas, entitled, "An Act for the Better Protection and Safety of the Public," provides as follows:

"Section 1. That no railroad company or corporation owning or operating any yards or terminals in the cities within this state, where switching, pushing or transferring of cars are made across public crossings within the city limits of the cities, shall operate their switch crew or crews with less than one engineer, a fireman, a foreman and three helpers.

"Section 2. It being the purpose of this act to require all railroad companies or corporations who operate any yards or terminals within this state who do switching, pushing or transferring of cars across public crossings within the city limits of the cities to operate said switch crew or crews with not less than one engineer, a fireman, a foreman and three helpers, but nothing in this act shall be so construed as to prevent any railroad company or corporation [520] from adding to or increasing their switch crew or crews beyond the number set out in this act.

"Section 3. The provisions of this act shall only apply to cities of the first and second class, and shall not apply to railroad companies or corporations operating railroads less than 100 miles in length.

"Section 4. Any railroad company or corporation violating the provisions of this act shall be fined for each separate offense not less than $50 and each crew so illegally operated shall constitute a separate offense." [Acts 1913, pp. 211, 212.]

The railroad company violated the terms of the statute for a day in the city of Hot Springs, and, being convicted thereof, was sentenced to pay the minimum fine imposed

by the statute. The judgment which was entered upon the sentence was affirmed by the supreme court of the state. This writ of error was then granted.

The railroad company contends that the statute violates (1) the due process and equality clauses of the 14th Amendment of the Constitution of the United States, (2) that it operates as an interference with interstate commerce, and (3) prevents a contest of its validity by the excess of its penalties. Of the last ground it may be immediately said that it is without merit.

The other grounds are in effect disposed of by prior decisions.

In the case of Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275, a statute of Arkansas was considered which required freight trains to be equipped with crews consisting of an engineer, a foreman, a conductor, and three brakemen, "regardless of any modern equipment or automatic couplings and air brakes. . . ." The statute did not apply to railroads whose line or lines did not exceed 50 miles in length, nor to any railroad, regardless of length of its line, where the freight train should consist of less than twenty-five cars. The statute was sustained on the authority of prior cases against charges of conflict [521] with the 14th Amendment and the commerce clause of the Constitution. We need not cite the cases relied on or repeat the argument of the court. In that case, as in this, there was controversy in the testimony and the contentions of the parties as to the necessity of the statute. It was held, however, that the controversy did not establish that the statute was an arbitrary exercise of power. Armour & Co. v. North Dakota, this day decided [240 U. S. 510, ante, 771, 36 Sup. Ct. Rep. 440].

A distinction is asserted between that case and this, and it is urged that the operation of freight trains of more than twenty-five cars on the trunk lines may require different provision than the movement of switching operations within terminals. But the basis of both is safety to the public, though the urgency in one may not be as great as the urgency in the other.

A more serious objection is that certain terminal companies, one at the city of Helena and one at Fort Smith, do switching for certain connecting trunk lines, and yet, by reason of their length being less than 100 miles, are not covered by the act. Indeed, it is said that one of them, that at Fort Smith, does switching over some of the same crossings that plaintiff in error does. The distinction seems arbitrary if we regard only its letter, but there may have been considerations which determined it, and the record does not show the contrary. We have recognized the impossibility of legislation being all-comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant. Armour & Co. v. North Dakota, supra; Miller v. Wilson, 236 U. S. 373, 382, 383, 59 L. ed. 628, 631, 632, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342.

Judgment affirmed.

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[522] INDIAN TERRITORY ILLUMINATING OIL COMPANY, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(See S. C. Reporter's ed. 522-531.)

Taxes — Federal agency — oil and gas lease of Indian lands.

A state may not, when assessing for purposes of taxation the corporate assignee of an oil and gas lease of Osage lands, made under the authority of the act of February 28, 1891 (26 Stat. at L. 794, chap. 383, Comp. Stat. 1913, § 4195), and extended by the act of March 3, 1905 (33 Stat. at L. 1049, chap. 1479, Comp. Stat. 1913, § 3986), which recognized the assignment, include in such assessment the lease and rights thereunder, either as separate objects of taxation, or as represented or valued by the stock of the corporation.

[For other cases, see Taxes, I. c, 2, in Digest Sup. Ct. 1908.]

[No. 283.]

Argued and submitted March 14, 1916. Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment that the property of a corporation be assessed as recommended by a referee. Reversed and remanded for further proceedings.

See same case below on rehearing, 43 Okla. 307, 142 Pac. 997.

The facts are stated in the opinion.

Mr. Preston C. West argued the cause, and, with Mr. John H. Brennan, filed a brief for plaintiff in error:

The plenary power of Congress over all the lands and property of the Osage Indian Tribe will be admitted. Congress has unquestionably the power to administer the property of Indians, and Congress possesses a paramount power over their property by reason of the exercise of guardianship over their interests. Such authority may

be implied, even though opposed to the strict letter of a treaty with the Indians.

Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306. 7 Sup. Ct. Rep. 75; Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; United States v. Aaron, 183 Fed. 347; United States v. Allen, 103 C. C. A. 1, 179 Fed. 13; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; Anicker v. Gunsburg, 141 C. C. A. 174, 226 Fed. 176; United States v. Osage County, 193 Fed. 485; Gleason v. Wood, 28 Okla. 502, 114 Pac. 703; Jefferson v. Winkler, 26 Okla. 653, 110 Pac. 755.

In any event, the right, license, or privilege possessed by the Indian Territory Illuminating Oil Company and its sublessees to enter upon tribal property and drill for oil cannot be taxed. If any part of the property of said lessees is taxable, it would only be its physical properties, its pipe lines, casing, derricks, etc., employed in the oil and gas business. The company, being a Federal agent under the lease, and transacting business between the government and the Osage Tribe of Indians, is charged with the burden of a high Federal policy or business. Such business, license, privilege, or franchise is not the subject of state taxation.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Farmers' & M. Sav. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Missouri, K. & T. R. Co. v. Meyer, 204 Fed. 140; McAlester-Edwards Coal Co. v. Trapp, 43 Okla. 510, 141 Pac. 794; Thomas v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.

If the court intended to assess the stock of the company at its full value of $500,000, such valuation would comprise all the leases and privileges belonging to it, as well as the good will and business, thus bringing the case squarely within the condemnation of this court.

California v. Central P. R. Co. 127 U. S. 1, 2 Inters. Com. Rep. 153, 32 L. ed. 150, 8 Sup. Ct. Rep. 1073.

Mr. John B. Harrison submitted the cause for defendant in error. Mr. S. P. Freeling, Attorney General of Oklahoma, and Mr. J. H. Miley were on the brief.

Mr. Justice McKenna delivered the opinion of the court:

The question in the case is whether a certain assignment of a lease and rights thereunder, made by the Osage Tribe [523] of Indians, which lease conferred the privilege of prospecting, drilling wells and mining and producing petroleum and natural gas upon lands in Oklahoma territory, are subject to a tax assessed under the laws of Oklahoma as the property of plaintiff in error in its capacity of a public service corporation.[1]

Plaintiff in error, herein designated as the oil company, is assignee of the lease, and asserts the negative of the question, contending that under the lease and the assignment of the lease it became "a Federal agent, acting under a Federal appointment and authorization, in the development of lands belonging to the Osage Tribe of Indians in the Osage Reservation, and that its business, license, or permit as such cannot be taxed by the state government, although its physical properties are always subject to taxation." It rests its contention upon an act of Congress of February 28, 1891 (26 Stat. at L. 794, 795, chap. 383, Comp. Stat. 1913, § 4195), and an act of Congress of March 3, 1905 (33 Stat. at L. 1049, 1061, chap. 1479, Comp. Stat. 1913, § 3986), which extended the lease to the extent of such portion of the lands as had been subleased, namely, 680,000 acres.

By the act of 1891 it was provided: "That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of [524] the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior." Comp. Stat. 1913, § 4218.

The act of 1905 recognized the oil com-

[1] It is provided by § 7338, Revised Laws of 1910, that "every public service corporation organized, existing or doing business in this state shall on or before the last day of February of each year return sworn lists or schedules of its taxable property as hereinafter provided, or as may be required by the State Board of Equalization, and such property shall be listed with reference to amount, kind and value on the first day of February of the year in which it is listed; and said property shall be subject to taxation for state, county, municipal, public school and other purposes, to the same extent as the real and personal property of private persons."

pany as the owner by assignment of the lease, which assignment was approved by the Secretary of the Interior, and extended the lease for a period of ten years from March 16, 1906, with all the conditions of the original lease except that from and after that date the royalty to be paid on gas should be $100 per annum on each gas well instead of $50, as provided in the lease, and except that the President of the United States should determine the amount of royalty to be paid to all.

The state opposes the contentions of the oil company and asserts that the lease was "not a grant of any authority, franchise, or privilege to any particular person or corporation, and is merely a permit to the Osage Tribe, authorizing such tribe to lease to any person or any number of persons upon the approval of such lease contract by the Secretary of the Interior." It further asserts that the oil company merely occupied "the position of an independent contractor, acting for itself and in its own behalf, in a contract with the Osage Indian Tribe," and that therefore the relation of principal and agent between it and the government did not exist.

A statement of the case is as follows: The oil company made a sworn return of what it considered the fair cash value of that part of its property engaged in the public service at $53,835.10. The State Board of Equalization, after a hearing, increased the valuation to $538,350, the basis of the order of the Board being that the oil company was not protected from taxation by the lease from the Indians. Under the procedure of the state, the [525] oil company appealed from that order to the supreme court of the state.

In the latter court a referee was appointed to take testimony and report his findings of fact and conclusions of law. He duly reported the facts and from them also reported as a conclusion of law that the oil company was "liable to taxation by the state of Oklahoma for the full value of its property, tangible and intangible,—that is, for the sum of $500,000;" and that it was "not exempt from taxation upon the theory that it is a Federal agent, or that it holds a franchise from the Federal government." And he recommended that judgment be entered fixing the assessment of the oil company's property for taxation for the year 1911 at $447,169.98, this being the difference between the total value of all the property and the amount ($52,830.02) locally assessed.

The report was confirmed, the court adjudging that the property of the oil company be assessed as recommended by the referee.

The question in the case seems to be a simple one. It is given some complexity by the opinions of the court on the hearing and rehearing, which require some reconciliation. It appears from the findings of the referee that on March 16, 1896, the Osage Nation of Indians in Oklahoma territory entered into a contract with one Edwin B. Foster, by the terms of which Foster had a blanket lease upon the Osage Indian Reservation for the sole purpose of prospecting and drilling wells and mining and producing petroleum and natural gas only. The lease was for a term of ten years, and was approved by the Secretary of the Interior. By an act passed March 3, 1905, Congress extended the lease as to 680,000 acres for ten years. The lease has therefore expired. Prior to its extension in 1905, the lease was assigned to the oil company.

The oil company has sublet to more than one hundred persons and corporations and the operations upon most [526] of the lands covered by the lease have been and are conducted by sublessees. A small portion, the amount not appearing, is operated by the company.

By the terms of the lease as extended, the sublessees are required to pay a royalty of $\frac{1}{8}$ of the oil produced upon the property, of which $\frac{1}{16}$ goes to the company and $\frac{1}{16}$ to the Indians, the payments on behalf of the latter being made to the Indian Agency under and by virtue of the rules and regulations of the Department of the Interior.

The oil company has laid pipe lines upon the leased lands for conveying natural gas, and it has been its practice to furnish gas to the sublessee for use as fuel for their drilling and pumping operations at a flat rate, the amount of which is not disclosed. The company also furnished gas during 1911 for domestic consumption to the residents of Bigheart and Avant, two small towns in which it had no franchise, in the Osage Nation, adjacent to the pipe lines of the company. It also furnished gas to a local corporation in the city of Bartlesville, which company held a franchise for and was engaged in the business of selling gas to the residents of that city, and also to a local distributing company at the town of Ochelata for use in the business of the latter company in selling gas to the inhabitants of that town.

By the terms of the contract with the Osage Indians the company was required to furnish gas free to the Osage citizens for use in the public institutions of the Osages under certain conditions named.

The oil company is primarily engaged in the business of oil production, and its operations in the gas business are conducted as an incident to the development of the oil

territory and the production of oil, and, to some extent, as a matter of accommodation to the citizens of Bigheart and Avant, and other persons residing along the company's pipe lines.

[527] In 1911 the company made a sworn return of $53,835.10 as the actual cash value of that part of its property engaged in the public service by reason of the gas business transacted by the company. This valuation was raised by the Board of Equalization to $538,350. Certain of the company's property was returned to local assessors and assessed at $52,830.02. All of its property is situated in Osage and Washington counties, Oklahoma, and the total value of its stock, including all its property, tangible and intangible, on February 1, 1911, was $500,000.

The property returned to the Board of Equalization and to the local assessors did not include the lease, subleases, contracts, and franchises of the company, but only its physical property, it being contended by the company that such lease, subleases, contracts, and franchises were not subject to taxation.

The total value of the company's property of every kind located in Oklahoma over and above the amount locally assessed was $447,169.98 on February 1, 1911.

The gas business of the company has not been profitable, but has been and is valuable as an adjunct to its oil operations.

Against the confirmation of the report of the referee the court said that the oil company made four contentions: (1) That it was not a public service corporation and that the Board of Equalization was without authority to assess its property. (2) That its oil and gas leases were not property used in any public service rendered by it. (3) That the leases were not subject to taxation in the hands of the lessee or his assigns. (4) That in exercising rights under the laws and by the act of Congress extending the lease the oil company was a Federal agency, or exercised a privilege or franchise granted by the Federal government, and that the lease, therefore, was not subject to taxation.

The court held: (1) that the company was a public service corporation; (2) that the Board of Equalization [528] had the power to assess to the company other property than that used in connection with public service; (3) that the oil and gas lease was property and must be assessed in the name of the owner of the lease, and not in the name of the lessor; and (4) that by reason of the act of Congress of 1905 the gas, oil, and other minerals under the lands remained the property of the Osage Tribe, and that the power of Congress over the property could not be questioned. And, distinguishing between the property of a Federal agent and the operations of such agent, it was held "that the tax sought to be levied was not invalid because sought to be levied upon a Federal agency or upon a franchise granted by the Federal government; or because it interferes with the power of Congress to regulate commerce between the Indian Tribes."

On rehearing the court modified or changed its view. The changes and the reasons for them are not easy to represent. In the first opinion the report of the referee was confirmed and it was adjudged "that the property of appellant [oil company] be assessed as recommended by the referee in his report." In the second opinion the report of the referee is again confirmed and the estimate of the property of the company at $500,000 held to be sustained by the testimony taken by the referee; but the reasoning of the opinions is quite different. For a statement of the difference we may adopt for convenience that of the Attorney General of the state. He says: " . . . the essential difference between the original opinion and the opinion on rehearing being that in the original opinion it was held that oil and gas leases, as such, constitute property as defined by the Constitution and statutes of the state of Oklahoma, and as such was subject to taxation by said state, while the opinion on rehearing held that oil and gas leases, as such, were not defined as personal property subject to taxation under the statutes of Oklahoma, nor by the Constitution of said state, and, therefore, could not [529] be taxed as personal property; but that under the statutes the market value of the capital stock of said corporation could be taken into consideration by the State Board of Equalization in assessing the properties of said company, and could be properly considered as an element of value in assessing said properties, and that the evidence taken before the referee as to the amount of the capital stock of said company and the market value thereof, together with its tangible assets, was sufficient to sustain the assessment made by the State Board of Equalization."

It is clear that the Board of Equalization and the referee sustaining its action proceeded upon the consideration that the leases constituted taxable property, and the first opinion of the court, confirming the report of the referee, had its basis in the same consideration. That consideration was regarded as untenable in the second opinion, but the court adhered to its former conclusion; that is, that the report of the referee should be confirmed. The Board of Equalization, the referee, and the court

in its first opinion, regarded the leases as taxable entities. In the second opinion it was held that they could not be so regarded under the Constitution of the state, but the court gave them effective representation in the capital stock of the company, and the latter then was taken as evidence that the value of the property of the oil company was $500,000. Whether the Constitution of the state permits this accommodation we are not called upon to say. We are clear it cannot be permitted to relieve from the restraints upon the power of the state to tax property under the protection of the Federal government. That the leases have the immunity of such protection we have decided.

In Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27, the railroad company was the lessee of certain coal mines, obligating itself to take out annually specified amounts of coal and to pay a stipulated royalty. It proceeded actively [530] to develop the mines, either directly or through its agent, and took therefrom large quantities of coal and fully complied with the obligations assumed. The state of Oklahoma attempted to tax the company under the law of the state requiring every person engaged in the mining or production of coal to make a report of the kind and amount produced and the actual cash value thereof, and at the same time pay to the state treasurer a gross revenue tax in addition to the taxes levied upon an ad valorem basis upon such mining property, equal to 2 per cent of the gross receipts from the total production. The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duty to the Indians.

The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did. The assessment by the Board was of the leases as objects of taxation, having no immunity under Federal law. This was repeated by the referee, and he made it clear that the assessment was so constituted. There was, he reports, a local assessment by the assessors of Osage and Washington counties of $52,830.02, and that the total value of the oil company's "property of every kind located in Oklahoma, over and above the amount locally assessed, was $447,169.98, on February 1, 1911," and he recommended a judgment for the latter amount. And, we repeat, there is no doubt of what elements it was composed. The gas business, he reports, was not "of itself profitable," but was "valuable as an adjunct to the company's oil operations." He was explicit as to what [531] the stock of the company represented, saying that "the total value of said company's stock, including all its property, tangible and intangible, on the first day of February, 1911, was $500,000." It is manifest, therefore, when the court took the stock as evidence of the value of the property of the company the court took it as evidence of the value of the leases, and thereby justified their assessment and taxation. This, for the reasons we have stated, was error.

It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

CARL U. ACKERLIND, Administrator of Erik G. Lind, Deceased, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 531–537.)

Reformation of instruments — mistake — contract with government.

1. A contract with the United States, formally prepared by the Bureau of Supplies and Accounts, conformably to U. S Rev. Stat. § 3744, Comp. Stat. 1913, § 6895, upon a requisition by the Bureau of Equipment, should be reformed by the court of claims by striking out a clause which the Bureau of Equipment, in settling the terms of the contract, had agreed should be omitted from the specifications, but which, through a clerical inadvertence, was left in the requisition and embodied in the contract as formally drawn and signed,— although the contractor may have signed without careful reading.

[For other cases, see Reformation of Instruments, II. c., in Digest Sup. Ct. 1908.]

Appeal — from court of claims — remanding for further proceedings.

2. The failure of the court of claims to find in terms certain facts which it has assumed to be true in the decision that it delivered does not necessitate sending the case back for further proceedings, where such facts, if material, are not controverted.

[For other cases, see Appeal and Error, IX. 1, in Digest Sup. Ct. 1908.]

Appeal — from court of claims — necessity of finding of fact.

3. A fact which the court of claims states that it does not find stands unproved in the Federal Supreme Court on appeal.

[For other cases, see Appeal and Error, V. o, in Digest Sup. Ct. 1908.]

Commerce — tonnage dues — exemption.

4. Vessels used by a contractor in the performance of his contract with the United States for the transportation of coal to Manila bay are not "employed in the service of the government" within the meaning of the provision of the Philippine Islands tariff act of March 3, 1905 (33 Stat. at L. 976, chap. 1408), § 15, exempting vessels so employed from the payment of tonnage dues.

[For other cases, see Commerce, VII. a, in Digest Sup. Ct. 1908.]

[No 293.]

Argued March 15, 1916. Decided April 3, 1916.

APPEAL from the Court of Claims to review a judgment granting a portion of the relief demanded under a contract with the United States for the transportation of coal to Manila bay. Reversed.

See same case below, 49 Ct. Cl. 635.

The facts are stated in the opinion.

Mr. George A. King argued the cause, and, with Mr. William B. King, filed a brief for appellant:

U. S. Rev. Stat. § 3744, Comp. Stat. 1913, § 6895, requiring written contracts, does not prevent the reformation of a contract where a clear mistake has been made.

Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Harvey v. United States, 105 U. S. 671, 26 L. ed. 1206; Ætna Constr. Co. v. United States, 46 Ct. Cl. 113; McManus v. Philadelphia, 211 Pa. 394, 60 Atl. 1001.

Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 490, 491, 22 L. ed. 395, 396, 397; Snell v. Atlantic F. & M. Ins. Co. 98 U. S. 85, 25 L. ed. 52; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Walden v. Skinner, 101 U. S. 577, 25 L. ed. 963; Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019.

Relief is not barred in such a case, either by failure to read the contract (Equitable Safety Ins. Co. v. Hearne, 20 Wall. 494, 496, 22 L. ed. 398, 399; West v. Suda, 69 Conn. 62, 36 Atl. 1015, 1 Am. Neg. Rep. 578), or by reading it with misunderstanding of its purport (Penfield v. New Rochelle, 18 App. Div. 86, 45 N. Y. Supp. 460, affirmed in 160 N. Y. 697, 55 N. E. 1098). It is sufficient that the contract as written departed from the mutual intention of the parties.

The vessel was employed in the service of the government of the United States.

United States v. Morris, 14 Pet. 464, 10 L. ed. 543; The Alexander, 3 Mason, 175, Fed. Cas. No. 165.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

The contract should not be reformed, as the alleged oral agreement was merged in the written instrument.

Dermott v. Jones, 2 Wall. 1, 7, 17 L. ed. 762, 764; New Orleans-Belize, Royal Mail & C. A. S. S. Co. v. United States, 239 U. S. 202, ante, 227, 36 Sup. Ct. Rep. 76.

The reformation desired would make a different contract from the one executed, and hence is contrary to U. S. Rev. Stat. § 3744, Comp. Stat. 1913, § 6895.

United States v. New York & P. R. S. S. Co. 239 U. S. 88, ante, 161, 36 Sup. Ct. Rep. 41; Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

The vessels employed, being in the service of appellant, were not exempt from tonnage dues.

New Orleans-Belize Royal Mail & C. A. S. S. Co. v. United States, 239 U. S. 202, 206, ante, 227, 229, 36 Sup. Ct. Rep. 76.

Mr. Justice Holmes delivered the opinion of the court:

The main point at issue in this case is a claim for the reformation of a contract for the transportation of coal from certain ports in the United States to Manila bay. It is demanded by the claimant upon the following facts: The terms of such contracts are settled by the Bureau of Equipment. A requisition embodying the transaction is then sent to the Bureau of Supplies and Accounts, which prepares a formal contract in writing in accordance with Rev. Stat. § 3744, Comp. Stat. 1913, § 6895. This section makes it the duty of the Secretaries of War, of the Navy, and of the Interior "to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties." In the present case the printed specifications upon which proposals were asked contained the clause: "And further that in the event of a cargo arriving before the preceding cargo is dis-

charged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving." The contractor [534] objected to this clause upon satisfactory grounds, and it was agreed that it should be omitted. Through a clerical inadvertence, however, the clause was left in the requisition sent to the Bureau of Supplies and Accounts, and the contract was drawn embodying it, and signed by the contractor on March 2, 1905, without careful reading, the precise form having been settled, as we have said. This mistake was discovered upon the arrival of several vessels at Cavite, on June 17, 1905, the attention of the Bureau of Equipment was called to it, and the Bureau of Supplies and Accounts was requested to make the necessary change, on June 23. That Bureau notified the contractor that the contract was amended by the omission of the clause. The government refuses to recognize the amendment, the court of claims dismissed the claim for reformation (49 Ct. Cl. 635), and the claimant appealed to this court.

It hardly is denied and cannot be denied successfully that in a proper case reformation of a contract may be required against the United States notwithstanding the statute that we have quoted, as it may be required notwithstanding the provisions of the statute of frauds. William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 239 U. S. 221, 230, ante, 238, 242, 36 Sup. Ct. Rep. 70. It is the contract that has been made through the agent authorized to make it that is to be reduced to writing, and if a clerk or some other agent makes a mistake we perceive no reason why the writing should not be made to conform to the fact. The contract is not unlawful in the preliminary stage, or even void in a strict sense, but simply not to be enforced against the United States. United States v. New York & P. R. S. S. Co. 239 U. S. 88, ante, 161, 36 Sup. Ct. Rep. 41. The contract is made with the principal and the several steps are to be regarded as if they all had been taken by him. Here the United States made the contract by the Bureau of Equipment, and by its mouth requested the Bureau of Supplies and Accounts to put it on paper and sign it. [535] What the Bureau of Supplies and Accounts understood is immaterial; it simply followed the requisition of the Bureau of Equipment. There was a mistake made by a clerk in not striking out a printed clause from that requisition. It is as if a principal, after making the agreement, had taken a printed form and forgotten to draw his pen through the words. The failure of the contractor to read before signing an instrument the terms of which he had seen in print is not enough to debar him from seeking relief. Equitable Safety Ins. Co. v. Hearne, 20 Wall. 494, 22 L. ed. 398.

The only ground for hesitation is the purely technical one that the court of claims, acting before the decision of William Cramp & Sons Ship & Engine Bldg. Co. v. United States, 239 U. S. 221, 232, ante, 238, 242, 36 Sup. Ct. Rep. 70, and probably uncertain whether to send up facts or evidence, has not found in terms certain of the facts that we have stated. It has found that the acting chief of the Bureau of Equipment wrote an official letter stating them, and it has assumed them to be true in the decision that it delivered. We understand that they are not controverted if material, and therefore think it unnecessary to send the case back for further findings. The decree of the court of claims upon this part of the case will be reversed.

The next question that arises concerns the amount of demurrage to be allowed under the contract as reformed. Undisputed terms of the instrument were: "6. The government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point. 7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel for any detention caused by the government (through fault of [536] its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given the commandant before lay days commence." (Then followed the clause stricken out by reformation.) "13. While an average daily discharge of four hundred (400) tons in the stream and six hundred (600) tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime." It is found that one vessel went to the wharf drawing 22 feet and 6 inches, and it is argued that if one could, another could, and that, under paragraph 13, just quoted, the other vessels should have been docked at that draft, and thus have been enabled to deliver 200 tons more a day,—that being the difference between wharf and stream. If the argument is correct, it would give the claimant $2,217.44 demurrage under the

contract as reformed. But as to this, it is enough to say that the court of claims stated that it did not find the fact of generally available depth of over 20 feet, and therefore it stands unproved in this court.

The only other point argued is that the vessels concerned should not have been required to pay tonnage dues because the Philippine Tariff act of March 3, 1905, chap. 1408, § 15, 33 Stat. at L. 928, 976, exempts from them "a vessel belonging to or employed in the service of the government of the United States." But it is a sufficient answer that the words do not mean every vessel that carries a ton or a cargo of coal for the government, but only one that is under the control of the United States, as explained in New Orleans-Belize Royal Mail & C. A. S. S. Co. v. United States, 239 U. S. 202, 206, ante, 227, 229, 36 Sup. Ct. Rep. 76. The ground of the exemption is to prevent interference with government agencies. But an independent carrier, such as the contractor was in this case, is not such an agency, and is not employed in the service of the [537] government within the meaning of the law. See Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 382, 49 L. ed. 242, 244, 25 Sup. Ct. Rep. 50. Upon the last two points the judgment of the Court of Claims is affirmed.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

FRANK G. FARNHAM, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 537–540.)

Claims — implied contract — use of patented invention.

No undertaking on the part of the United States to pay the patentee of an improvement in stamp books or holders for the alleged use of his invention can be implied so as to be within the cognizance of the court of claims, where the government expressly rejected the patentee's suggestion that it adopt his device, and instead began the manufacture and sale of a stamp book designed by a postal official, claiming that such book was not covered by any previous patent.

[For other cases, see Claims, 122–127; United States, VI. c, in Digest Sup. Ct. 1908.]

[No. 107.]

Argued March 2, 1916. Decided April 3, 1916.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a patentee to recover upon the basis of an implied contract for the alleged use by the government of his patented invention. Modified by directing that the judgment be without prejudice, and, as so modified, affirmed.

See same case below, 49 Ct. Cl. 19.

The facts are stated in the opinion.

Messrs. George W. Ramsey and Hosea B. Moulton argued the cause and filed a brief for appellant:

There was an implied contract on the part of the government to pay for the use of appellant's invention.

Boyden v. Burke, 14 How. 575, 14 L. ed. 548; United States v. Russell, 13 Wall. 623, 20 L. ed. 474; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; Cammeyer v. Newton, 94 U. S. 225, 24 L. ed. 72; Seymour v. Osborne, 11 Wall. 516, 20 L. ed. 33; United States v. Burns, 12 Wall. 246, 20 L. ed. 388; James v. Campbell, 104 U. S. 356, 26 L. ed. 786; Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; United States v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104; McKeever v. United States, 14 Ct. Cl. 396; United States v. Berdan Firearms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420; United States v. Société Anonyme des Anciens Etablissements Cail, 224 U. S. 309, 56 L. ed. 778, 32 Sup. Ct. Rep. 479.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

There was no implied contract.

Russell v. United States, 182 U. S. 516–530, 45 L. ed. 1210–1215, 21 Sup. Ct. Rep. 899; Schillinger v. United States, 155 U. S. 169, 39 L. ed. 110, 15 Sup. Ct. Rep. 85.

Mr. Justice Hughes delivered the opinion of the court:

The claimant, in the year 1906, brought his petition to recover upon the basis of an implied contract for the alleged use by the government of his patented invention, consisting of a stamp holder. The claim was for profits alleged to have been made between April 16, 1900, and June 30, 1905. Another petition was filed, in 1911, upon the same basis, to recover profits for the period between June 30, 1905, and June 30, 1910. Motion to consolidate the two suits, as involving the same issues, was granted. Upon hearing, the court made findings of fact, and held that the plaintiff was not entitled to recover. 49 Ct. Cl. 19.

The court found that, under date of January 4, 1898, Letters Patent No. 596,656 had been issued to the claimant for improvement in stamp holders. Models of the proposed stamp book and an explanatory pamphlet were submitted to the Third Assistant Postmaster-General with the suggestion that the Postoffice Department should adopt this method of handling and selling stamps. That officer, on June 17, 1898, returned the books to the claimant, saying: "The Department does not deem it expedient to sell stamps in this way." The claimant, on July 14, 1898, replied, stating that the descriptive pamphlet and the model stamp books formerly transmitted did not fully show the invention, and that he requested a personal interview. Two days later the government responded as follows: "Your plan for booking and selling stamps is well understood; your explanation of it could not be clearer; but, as stated in a former letter to you, the [539] Department does not wish to adopt it." In June, 1899, the adoption of the claimant's device was again suggested to the Postoffice Department, and the Department replied that it adhered to its former decision. On July 1, 1899, Edwin C. Madden was appointed Third Assistant Postmaster-General, and he held office until March, 1907. Soon after his appointment he took under consideration the manufacture and sale of postage stamp books. He designed, without actual knowledge of the existence of the claimant's patent or of the correspondence with the Department relating to it, the stamp book now in departmental use. This stamp book was transmitted by Mr. Madden to the Bureau of Printing and Engraving with an inquiry as to the possibility of its manufacture, the details of manufacture being left to that Bureau. It prepared plans accordingly. After the public announcement that the Department would begin the public sale of two-cent stamps in book form, Mr. Madden learned for the first time that it was claimed that there were letters patent covering the proposed stamp book, and before issuing the same to the public he requested the Assistant Attorney General for the Department to examine all such claims and letters patent, and to advise him whether his book would constitute an infringement. The Assistant Attorney General advised him to proceed with the public sale as contemplated; that the stamp book to be issued was not covered by any previous patents. Both he and Mr. Madden examined the patents of the claimant, and Mr. Madden also examined the correspondence on file. From the beginning the latter insisted that the invention of the stamp book issued by the Department was his own, being independent of the claimant's patent. In March, 1909, the Third Assistant Postmaster-General addressed a letter to the claimant's attorney, expressly asserting that the Department's stamp book was not an infringement. It was in these circumstances that the government [540] commenced the manufacture of its stamp books on March 26, 1900.

It is apparent that these facts furnished no basis for a finding of implied contract on the part of the government to pay for the use of the invention,—the only ground upon which the petitions were cognizable in the court of claims. Schillinger v. United States, 155 U. S. 163, 170, 39 L. ed. 108, 111, 15 Sup. Ct. Rep. 85; United States v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 556, 39 L. ed. 530, 531, 15 Sup. Ct. Rep. 420; Russell v. United States, 182 U. S. 516, 530, 45 L. ed. 1210, 1215, 21 Sup. Ct. Rep. 899; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 303, 304, 56 L. ed. 771, 775, 776, 32 Sup. Ct. Rep. 488; United States v. Société Anonyme des Anciens Etablissements Cail, 224 U. S. 309, 311, 56 L. ed. 778, 780, 32 Sup. Ct. Rep. 479. In this view, the consolidated petition was properly dismissed and it is unnecessary to consider the questions which have been argued with respect to actual use and the validity of the claimant's patent. The second petition related to a period extending to June 30, 1910, thus embracing five days after the approval of the act of June 25, 1910, chap. 423, 36 Stat. at L. 851, Comp. Stat. 1913, § 9465, permitting the recovery from the government of reasonable compensation in cases of infringement. Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 303, 304, 56 L. ed. 771, 775, 776, 32 Sup. Ct. Rep. 488. This petition, however, like the first, did not purport to present a case within this act, but was rested solely upon implied contract. The judgment, however, should be without prejudice to the presentation of any claim the petitioner may have under the statute; and with this modification the judgment is affirmed.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

[541] JONES NATIONAL BANK, Plff. in Err.,
v.
CHARLES E. YATES, D. E. Thompson, and Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, Deceased. (No. 163.)

BANK OF STAPLEHURST, Plff. in Err.,
v.
CHARLES E. YATES, D. E. Thompson, and Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, Deceased. (No. 164.)

UTICA BANK, Plff. in Err.,
v.
CHARLES E. YATES and Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, Deceased. (No. 165.)

THOMAS BAILEY, Plff. in Err.,
v.
CHARLES E. YATES and Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, Deceased. (No. 166.)

(See S. C. Reporter's ed. 541–563.)

Error to state court — decision in favor of Federal right.

1. The theory that plaintiffs in the state court sought to enforce defendants' alleged liability on non-Federal grounds, and that the Federal question was raised exclusively by the defendants, cannot successfully be urged to defeat the appellate jurisdiction of the Federal Supreme Court over a judgment of the highest state court, which, upon the ground that a case was not made out, under U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, as construed by the Federal Supreme Court, reversed a judgment holding the directors in a national bank civilly liable to depositors suffering damage because of false representations as to the bank's financial condition, contained in the published official reports to the Comptroller of the Currency, even though plaintiffs' petition did not refer in terms to the Federal statute, and defendants alleged in their answer that, if any liability attached to them as directors, it was determined by the Federal statute, since, if the plaintiffs' cause of action required the application of the Federal statute in defining the liability of the directors with respect to the acts alleged and proved, plaintiffs were entitled to its correct application.

[For other cases, see Appeal and Error, 1431–1460, in Digest Sup. Ct. 1908.]

Error to state court — review of facts.

2. The Federal Supreme Court, when reviewing on writ of error a judgment of the highest court of a state, which, upon the ground that a case had not been made out, under U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, reversed a judgment holding directors in a national bank civilly liable to depositors suffering damage because of false representations as to the bank's financial condition, contained in the published official reports to the Comptroller of the Currency, will determine whether the facts found by the trial court justified a recovery under the Federal law, and, if so, whether there was substantial evidence to support these findings.

[For other cases, see Appeal and Error, 2175–2208, in Digest Sup. Ct. 1908.]

National banks — liability of directors — false official reports — knowing participation or assent.

3. Directors in a national bank, who, with knowledge of the falsity of the representations as to the bank's financial condition, contained in official reports to the Comptroller of the Currency, made and published conformably to U. S. Rev. Stat. § 5211, Comp. Stat. 1913, § 9774, either formally attested such reports, or knowingly permitted, assented to, and allowed the same to be made and published, must be deemed knowingly to have participated in or assented to a violation of the national banking laws, within the meaning of U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, which provides that, in case of such violation, or permitted violation, every director participating in, or assenting thereto, shall be civilly liable to any person suffering damage in consequence thereof.

[For other cases, see Banks, IV. e, 3, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — knowledge of national bank directors — falsity of official reports.

4. A finding that the directors in a national bank, who participated in or assented to the official reports of the bank's financial condition to the Comptroller of the Currency, made and published conformably to U. S. Rev. Stat. § 5211, Comp. Stat. 1913, § 9774, did so with knowledge of the gross and easily discoverable falsity of the representations therein that the capital

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On review of questions of fact on writ of error to a state court—see note to Smiley v. Kansas, 49 L. ed. U. S. 546.

stock was intact, and that there were undivided profits and a surplus, is sustained by evidence of the deliberate assertions of the directors themselves, made prior to such reports, in response to official complaint, that they were examining the condition of the bank, were considering the losses sustained and the expenses incurred, and the basis of the last declared dividend.

[For other cases, see Evidence XII. f, in Digest Sup. Ct. 1908.]

[Nos. 163, 164, 165, and 166.]

Argued April 5 and 6, 1915. Restored to docket for reargument June 21, 1915. Reargued January 12 and 13, 1916. Decided April 3, 1916.

FOUR WRITS OF ERROR to the Supreme Court of the State of Nebraska to review judgments which reversed judgments of the District Court of Seward County, in that state, holding the directors of a national bank civilly liable to depositors suffering damage because of false representations as to the bank's financial condition, contained in the published official reports to the Comptroller of the Currency. Reversed and remanded, with instructions to reinstate the judgments entered in the District Court.

See same case below, first appeal, 74 Neb. 734, 105 N. W. 287; second appeal, 93 Neb. 121, 139 N. W. 844, 1135.

The facts are stated in the opinion.

Mr. John Jacob Thomas argued the cause, and, with Mr. Lionel C. Burr, filed a brief for plaintiffs in error:

Plaintiffs' petitions state a cause of action, whether tested by U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, or the common law.

Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; Davis v. Central Land Co. (Davis v. Trent) 162 Iowa, 269, 49 L.R.A.(N.S.) 1219, 143 S. W. 1073.

The provisions of U. S. Rev. Stat. § 5239, requiring a knowing violation in order to subject a director to the liability therein imposed, do not demand proof of an intentional violation, but a violation in effect intentional. And there is in effect an intentional violation of the statute when a director deliberately fails or refuses to examine that which it is his duty to examine.

Thomas v. Taylor, supra.

While bank directors may delegate the performance of ministerial duties to subordinate officers, agents, or servants under their supervision and direction, they may not abdicate their trust as directors by committing the management of the affairs of the association to others, and thus avoid responsibility and liability. It is their duty to actually, actively, and diligently manage its affairs, and from this obligation they cannot absolve themselves; and they will be held to such knowledge as the performance of that duty would give; or, conversely, they will not be absolved from liability on account of ignorance which could only result from gross negligence, wilful recklessness, or deliberate refusal to perform their duty.

First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Hall v. Henderson, 126 Ala. 495, 61 L.R.A. 621, 85 Am. St. Rep. 53, 28 So. 544; United Soc. v. Underwood, 9 Bush, 609, 15 Am. Rep. 731; Rankin v. Cooper, 149 Fed. 1010; Warren v. Robison, 19 Utah, 289, 75 Am. St. Rep. 734, 57 Pac. 287; Auten v. United States Nat. Bank, 174 U. S. 147, 43 L. ed. 928, 19 Sup. Ct. Rep. 637; McClure v. People, 27 Colo. 371, 61 Pac. 617; Henry v. Dennis, 85 Am. St. 388, note; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Marshall v. Farmers' & M. Sav. Bank, 85 Va. 676, 2 L.R.A. 534, 8 S. E. 586, 17 Am. St. Rep. 84, note, p. 100; Fletcher v. Eagle, 74 Ark. 585, 109 Am. St. Rep. 100, 86 S. W. 810; Martin v. Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. Rep. 428; Savings Bank v. Caperton, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; Williams v. McKay, 40 N. J. Eq. 190, 53 Am. Rep. 775; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676; Seale v. Baker, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742; Hun v. Cary, 82 N. Y. 71, 37 Am. Rep. 546; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.

By the act of attesting as correct an official report of the financial condition of a national bank, directors thereby affirm and represent that they have actual knowledge of the bank's condition and of the truthfulness of the report, as distinguished from mere opinion or belief. If they make or attest untrue statements without knowledge of whether they are true or false, they are guilty of false representation in effect knowingly made. If they make or attest such statement recklessly, without knowledge of its truth or falsity, or are conscious that they have no actual knowledge of its truthfulness, they are guilty of a false representation knowingly made. Where directors who, through gross neglect of duty or reckless inattention, have not participated in the management of the bank's affairs, and are ignorant of its financial

condition, make a representation of such condition, and they do not know whether it be true or false, and it is actually untrue, they are guilty of a false representation, knowingly made.

Boyd v. Schneider, 65 C. C. A. 209, 131 Fed. 223; Vincent v. Corbett, 94 Miss. 46, 21 L.R.A.(N.S.) 85, 47 So. 641; 20 Cyc. 24–29; Cooper v. Schlesinger, 111 U. S. 148, 28 L. ed. 382, 4 Sup. Ct. Rep. 360; Lehigh Zinc & I. Co. v. Bamford, 150 U. S. 665, 37 L. ed. 1215, 14 Sup. Ct. Rep. 219; Hindman v. First Nat. Bank, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 934; Taylor v. Commercial Bank, 68 App. Div. 460, 73 N. Y. Supp. 924; Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923; Rothschild v. Mack, 115 N. Y. 7, 21 N. E. 726; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168, 16 Mor. Min. Rep. 103; John Gund Brewing Co. v. Peterson, 130 Iowa, 301, 106 N. W. 741; Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; Joines v. Combs, 38 Okla. 380, 132 Pac. 1115; Arrowsmith v. Nelson, 73 Wash. 658, 132 Pac. 743; Grant v. Ledwidge, 109 Ark. 297, 160 S. W. 200; Pate v. Blades, 163 N. C. 267, 79 S. E. 608; Davis v. Central Land Co. (Davis v. Trent) 162 Iowa, 269, 49 L.R.A.(N.S.) 1219, 143 N. W. 1073; Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384; Morse, Banks & Bkg. §§ 132, 133.

After receiving the letters from the Comptroller of the Currency, shown by the record, it was directors' duty to enter upon the exercise of their functions and acquaint themselves with the affairs of the association, and their failure to do so was gross negligence and recklessness, or a deliberate refusal to perform their duty, and constituted an intentional violation, actionable under U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831. And if, thereafter, directors make or attest statements of the association's financial condition, or permit its officers, agents, or servants to do so, and such statements are in fact false and untrue, they are liable in their personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not the directors had actual personal knowledge of the falsity. Upon receipt of the letters aforesaid it was the duty of the directors to acquaint themselves with the affairs of the association, and they are presumed to have such knowledge of its condition as a performance of their duty would have given them.

Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403; Chesbrough v. *Woodworth, 116* C. C. A. 465, 195 Fed. 875; Chicago, St. L. & P. R. Co. v. Nash, 1 Ind. App. 298, 27 N. E. 564.

It follows that the state court erred in deciding that, to entail liability under § 5239, for the publication of false official reports of the bank's condition, it must be shown that the directors had actual knowledge of its falsity,—that knowledge must be brought home to the directors that they are deceiving the individual wronged, and may thereby occasion a loss to him,—or that they personally participated in the act complained of.

The state court, in testing the sufficiency of the evidence to sustain recovery, having weighed it under an erroneous interpretation of § 5239, and a misconception of the decision of this court in these cases, it follows that its conclusions in that regard are erroneous. Measured by the correct rule of responsibility, the evidence establishes undoubted liability, and the finding and judgment of the trial court should be affirmed.

Jones Nat. Bank v. Yates, 93 Neb. 137, 139 N. W. 844, 1135; Black v. Epstein, 221 Mo. 286, 120 S. W. 754; Stuart v. Hayden, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274; Farmers' & M. Nat. Bank v. Mosher, 68 Neb. 724, 94 N. W. 1003, 100 N. W. 133.

Messrs. John Jacob Thomas, Lionel C. Burr, and Arthur B. Hayes also filed a brief for plaintiffs in error:

The findings of the state supreme court are subject to review.

Carlson v. Washington, 234 U. S. 103, 58 L. ed. 1237, 34 Sup. Ct. Rep. 717; Southern P. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Rector v. City Deposit Bank Co. 200 U. S. 405, 412, 50 L. ed. 527, 529, 26 Sup. Ct. Rep. 289; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

Mr. John Jacob Thomas filed a supplemental brief for plaintiffs in error:

The state supreme court reviewed the cases for errors of law, and did not assume to try them *de novo*.

Roode v. Dunbar, 9 Neb. 95, 2 N. W. 345; State ex rel. Miller v. Lancaster Co. 13 Neb. 223, 13 N. W. 212; Prentice Brownstone Co. v. King, 39 Neb. 816, 58 N. W. 277; State ex rel. McMullen v. Affholder, 44 Neb. 497, 62 N. W. 871; Campbell v. Farmers' & M.

Bank, 49 Neb. 143, 68 N. W. 344; Nebraska Wesleyan University v. Craig, 54 Neb. 173, 74 N. W. 605; Lowe v. Riley, 57 Neb. 252, 77 N. W. 758; Cary v. Kearney Nat. Bank, 59 Neb. 169, 80 N. W. 484; Van Doren v. Empkie-Shugart Co. 2 Neb. (Unof.) 818, 90 N. W. 220.

The scope of review, as well as the procedure, is inconsistent with any other theory.

Union P. R. Co. v. Rasmussen, 25 Neb. 810, 13 Am. St. Rep. 527, 41 N. W. 778; Jones v. Edwards, 1 Neb. 170; Blackburn v. Ostrander, 5 Neb. 219; Conner v. Draper, 34 Neb. 870, 52 N. W. 720; Storz v. Riley, 41 Neb. 822, 60 N. W. 96; Douglas v. Smith, 75 Neb. 169, 106 N. W. 173; Ogden v. Sovereign Camp, W. W. 78 Neb. 804, 111 N. W. 797, 113 N. W. 524; H. F. Cady Lumber Co. v. Wilson Steam Boiler Co. 80 Neb. 607, 114 N. W. 774; High v. Merchants' Bank, 6 Neb. 155; Angle v. Bilby, 25 Neb. 595, 41 N. W. 397; Carmack v. Erdenberger, 77 Neb. 592, 110 N. W. 315; Waxham v. Fink, 86 Neb. 180, 28 L.R.A.(N.S.) 367, 125 N. W. 145, 21 Ann. Cas. 301; State ex rel. McDonald v. Farrington, 86 Neb. 653, 126 N. W. 91; Tait v. Reed, 91 Neb. 235, 136 N. W. 39; Lowe v. Keens, 90 Neb. 565, 133 N. W. 1127; Ann. Cas. 1913B, 430; Hammond v. Edwards, 56 Neb. 631, 77 N. W. 75; Ogden v. Garrison, 82 Neb. 302, 17 L.R.A. (N.S.) 1135, 117 N. W. 714; Lion Bonding & Surety Co. v. Capital F. Ins. Co. 96 Neb. 51, 146 N. W. 1051; Shoff v. Ash, 95 Neb. 255, 145 N. W. 271; Lau v. Lindsey, 3 Neb. (Unof.) 681, 92 N. W. 642; First Nat. Bank v. Crawford, 78 Neb. 665, 111 N. W. 587; Western Cornice & Mfg. Works v. Leavenworth, 52 Neb. 418, 72 N. W. 592; Bishop v. Huff, 81 Neb. 729, 116 N. W. 665; Haight v. Omaha & C. B. Street R. Co. 97 Neb. 293, 149 N. W. 778; Kohl v. Munson, 97 Neb. 170, 149 N. W. 314; De Noon v. Lincoln Traction Co. 97 Neb. 4, 149 N. W. 48; Calbreath v. Bamford, 97 Neb. 832, 151 N. W. 957; Davis v. Manning, 97 Neb. 663, 150 N. W. 1019; Wenquist v. Omaha & C. B. Street R. Co. 97 Neb. 560, 150 N. W. 637; Langdon v. Withnell, 97 Neb. 335, 149 N. W. 781; Omaha F. Ins. Co. v. Thompson, 50 Neb. 584, 70 N. W. 30; Risse v. Gasch, 43 Neb. 288, 61 N. W. 616; Flanigan v. Guggenheim Smelting Co. 63 N. J. L. 647, 44 Atl. 762, 7 Am. Neg. Rep. 113; Hopkins v. Washington County, 56 Neb. 596, 77 N. W. 53; Rand v. King, 134 Pa. 641, 19 Atl. 806; Porter v. Sherman County, 40 Neb. 274, 58 N. W. 721; American Surety Co. v. Musselman, 90 Neb. 62, 132 N. W. 729; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, 528, 530, Ann. Cas. 1914D, 1029.

A jury having been waived, the findings of fact of the trial court have the same force and effect in law as the verdict of a jury.

Madison Nat. Bank v. Gross, 98 Neb. 684, 154 N. W. 207; Powers v. Bohuslav, 84 Neb. 179, 120 N. W. 942; Dorsey v. Wellman, 85 Neb. 262, 122 N. W. 989; Darr & Spencer v. Kansas City Hay Co. 85 Neb. 665, 124 N. W. 103; Tyng v. Grinnell, 92 U. S. 467, 23 L. ed. 733.

Granting, for the sake of argument, that the state supreme court decided that the findings of fact were insufficient to sustain the judgments, this court will go no further than to examine those findings to determine that question. It will not weigh the evidence to ascertain if it supports the findings of ultimate fact.

Tyng v. Grinnell, supra.

And if we were to go further still, and assume that Judge Letton decided that the evidence did not sustain the findings, this would not be a finding of fact, but a conclusion of law as to the legal effect of the evidence, and this court would not weigh the evidence to determine its preponderance, but would look to the record to see only if the evidence, with all the inferences that could justifiably be drawn from it, was sufficient to support the findings. In other words, it would re-examine the matter according to the rules of the common law.

2 Enc. Pl. & Pr. 404.

A refusal to find a fact which is supported by undisputed evidence, or a finding of fact unsupported by any evidence tending to establish it, is also reviewable as a question of law.

2 Enc. Pl. & Pr. 407; The City of New York (Alexandre v. Machan) 147 U. S. 72, 37 L. ed. 84, 13 Sup. Ct. Rep. 211; Bedlow v. New York Floating Dry Dock Co. 112 N. Y. 263, 2 L.R.A. 629, 19 N. E. 800; Phenix Ins. Co. v. Kerr, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, 529, Ann. Cas. 1914D, 1029.

This court will accept the findings of fact of the trial court and review the cases solely for errors of law.

Supreme Justices v. Murray (Supreme Justices v. United States) 9 Wall. 274, 19 L. ed. 658; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903; Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Parsons v. Bedford, 3 Pet. 441, 448, 7 L. ed. 735, 737; Merced Min. Co. v. Boggs, 3 Wall. 304, 18 L. ed. 245; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup.

Ct. Rep. 581; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488–498; Standard Oil Co. v. Brown, 218 U. S. 78, 54 L. ed. 939, 30 Sup. Ct. Rep. 669; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

Mr. Frank E. Bishop argued the cause, and, with Mr. Frank M. Hall, filed a brief for defendants in error Charles E. Yates and Louisa Hamer:

The findings of the state court are not subject to review in this court.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309.

The printed bill of exceptions does not contain all of the evidence, and cannot be re-examined to change the findings of fact.

Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 56 L. ed. 556, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 57 L. ed. 662, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; Carlson v. Washington, 234 U. S. 103, 58 L. ed. 1237, 34 Sup. Ct. Rep. 717; United States v. Copper Queen Consol. Min. Co. 185 U. S. 495, 46 L. ed. 1008, 22 Sup. Ct. Rep. 761; United States ex rel. Kinney v. United States Fidelity & G. Co. 222 U. S. 283, 56 L. ed. 200, 32 Sup. Ct. Rep. 101; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 649.

The judgment of the state supreme court upon the vote of the four judges does not deny the plaintiffs any Federal right, and the motion for rehearing with only three judges in its favor must fail for lack of a majority of the court, and is not reviewable in this court.

Shumway v. State, 82 Neb. 152, 117 N. W. 407, 119 N. W. 517; Consolidated Turnp. Co. v. Norfolk & O. Valley R. Co. 228 U. S. 326, 57 L. ed. 857, 33 Sup. Ct. Rep. 510; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Carmichael v. Eberle, 177 U. S. 63, 44 L. ed. 672, 20 Sup. Ct. Rep. 571.

The petitions do not state a cause of action against the defendants.

Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638.

U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, requires a knowing violation of its provision in order to establish liability.

McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Mason v. Moore, 73 Ohio St. 275, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Spurr v. United States, 174 U. S. 728, 43 L. ed. 1150, 19 Sup. Ct. Rep. 812; Rosen v. United States, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; Southern Development Co. v. Silva, 125 U. S. 247, 31 L. ed. 678, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Thomas v. Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. Rep. 403.

The directors of a national bank are not obliged to manage, but to administer, its affairs, and are not responsible for the acts of its officers and agents which they did not knowingly participate in or assent to.

Briggs v. Spaulding, 141 U. S. 162, 35 L. ed. 674, 11 Sup. Ct. Rep. 924.

The director does not attest the official report at his risk of its being false. He is not responsible without knowledge of its falsity.

Yates v. Jones Nat. Bank, 206 U. S. 179, 51 L. ed. 1014, 27 Sup. Ct. Rep. 638; Briggs v. Spaulding, 141 U. S. 147, 35 L. ed. 668, 11 Sup. Ct. Rep. 924.

The Nebraska supreme court correctly understood the rule of liability of directors, derived from the national bank act, and correctly applied it to the evidence.

Jones Nat. Bank v. Yates, 93 Neb. 121, 139 N. W. 844, 1135.

Mr. Halleck F. Rose argued the cause, and, with Messrs. John F. Stout and Arthur R. Wells, filed a brief for defendant in error David E. Thompson:

A single creditor cannot maintain an action against the directors of a corporation for recovery of damages for neglect or mismanagement whereby the corporation sustains losses and becomes insolvent. Such cause of action is for a wrong done to the corporation and the whole body of the corporate creditors, and can only be maintained by the corporation or its receiver.

Hornor v. Henning, 93 U. S. 228, 23 L. ed. 879; Bailey v. Mosher, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 491; Yates v. Bailey, 206 U. S. 181–185, 51 L. ed. 1015–1017, 27 Sup. Ct. Rep. 646; Yates v. Jones Nat. Bank, 74 Neb. 739, 105 N. W. 287; United States Fidelity & G. Co. v. Corning State Sav. Bank, 154 Iowa, 588, 45 L.R.A.(N.S.) 421, 134 N. W. 857; Conway v. Halsey, 44 N. J. L. 463; Kennedy v. Gibson, 8 Wall. 506, 19 L. ed. 479; Cockrill v. Cooper, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 13;

Davis v. Elmira Sav. Bank, 161 U. S. 284, 40 L. ed. 701, 16 Sup. Ct. Rep. 502; First Nat. Bank v. Colby, 21 Wall. 609, 613, 22 L. ed. 687, 688.

The decision of the state supreme court rests, exclusively, on a finding of fact that the evidence in the record is not sufficient to show that defendants knowingly made or knowingly permitted the making and publishing of false official reports. Upon that issue plaintiffs had the burden of proof; and upon a finding of pure fact depends the applicability of U. S. Rev. Stat. § 5239, Comp. Stat. 1913, § 9831, and the Federal right now asserted thereunder.

Jones Nat. Bank v. Yates, 93 Neb. 127, 139 N. W. 844, 1135.

On error to a state court of last resort, this court regards the findings of fact of the state court as binding upon it. This court, therefore, refuses to review issues of fact determined by the state court; and whatever was a question of fact in the state court is a question of fact on a writ of error from this court to the state court.

Dower v. Richards, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97, 98, 53 L. ed. 417, 424, 425, 29 Sup. Ct. Rep. 220; Rankin v. Emigh, 218 U. S. 27, 32, 54 L. ed. 915, 920, 30 Sup. Ct. Rep. 672; Kerfoot v. Farmers' & M. Bank, 218 U. S. 281, 288, 54 L. ed. 1042, 1044, 31 Sup. Ct. Rep. 14; Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309; Eastern Bldg. & L. Asso. v. Ebaugh, 185 U. S. 114, 121, 46 L. ed. 830, 833, 22 Sup. Ct. Rep. 566; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 623, 30 L. ed. 519, 522, 523, 7 Sup. Ct. Rep. 398.

It is, of course, conceded that cases in which the finding is not strictly one of fact, but is, in itself, a legal conclusion on the Federal right claimed,—cases where there is a complete failure of evidence to support a conclusion announced upon a Federal question, and cases where the facts on which the application of the Federal right depends have not been determined,—do not come within the purview of the rule just stated. In cases of these excepted classes it is the conceded duty of this court to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted Federal rights.

Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717; Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309.

The finding of the state court on an issue that determines whether the Federal right asserted is applicable will not in any case be disturbed if there is sufficient evidence in the record to sustain it.

German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 128, 129, 48 L. ed. 373, 376, 377, 24 Sup. Ct. Rep. 221.

Proof of a *scienter* is indispensable to maintenance of the present suits.

Yates v. Jones Nat. Bank, 206 U. S. 158, 179, 180, 51 L. ed. 1002, 1014, 1015, 27 Sup. Ct. Rep. 638; McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743; Potter v. United States, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Felton v. United States, 96 U. S. 699, 702, 24 L. ed. 875, 876; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Mason v. Moore, 73 Ohio St. 275, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Briggs v. Spaulding, 141 U. S. 132–174, 35 L. ed. 662–678, 11 Sup. Ct. Rep. 924; Crofton v. State, 25 Ohio St. 249, 2 Am. Crim. Rep. 378; State v. Stafford, 67 Me. 125; Gregory v. United States, 17 Blatchf. 325, Fed. Cas. No. 5,803; Rosen v. United States, 161 U. S. 33, 40 L. ed. 607, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251; Price v. United States, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366; McGuire v. State, 7 Humph. 55; Pier v. Hanmore, 86 N. Y. 102.

A director is not liable for the tort of a fellow director.

Briggs v. Spaulding, 141 U. S. 132–174, 35 L. ed. 662–678, 11 Sup. Ct. Rep. 924; Gerner v. Mosher, 58 Neb. 144, 46 L.R.A. 244, 78 N. W. 384.

The issue of whether, upon the whole case, the evidence justified or required a finding in favor of the defendants, is not presented to this court by the printed record. A large part of the evidence is not printed, and since this court only examines the printed record, it must presume, in favor of the finding of the state supreme court, that the evidence before the state court, which is omitted from the printed record, justified and required a finding upon the whole case in favor of defendants.

Grand Trunk R. Co. v. Cummings, 106 U. S. 701, 27 L. ed. 267, 1 Sup. Ct. Rep. 493; United States v. Copper Queen Consol. Min. Co. 185 U. S. 497, 46 L. ed. 1009, 22 Sup. Ct. Rep. 761.

The mere fact of attestation does not foreclose the issue of knowledge against the attesting director.

Yates v. Jones Nat. Bank, 206 U. S. 171, 172, 51 L. ed. 1011, 1012, 27 Sup. Ct. Rep. 638; Gerner v. Mosher, 58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384.

Where the question of good faith is in issue, as it necessarily is in issue under the statute requiring proof of a *scienter*, the

onus of proving knowledge and bad faith is upon the plaintiff.

Ripley v. United States, 220 U. S. 491, 55 L. ed. 557, 31 Sup. Ct. Rep. 478.

To maintain a writ of error under § 237 of the Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214), the Federal right must have been claimed by the plaintiff in error in the state court in the manner therein prescribed.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581.

It must appear from the face of the record that the plaintiff in error asserted his Federal right.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506.

It is not sufficient that a Federal claim was made in argument.

Yesler v. Washington Harbor Line, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190.

The Federal question must be raised before the entry of the final judgment in the highest state court.

Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; Bobb v. Jamison, 155 U. S. 416, 39 L. ed. 206, 15 Sup. Ct. Rep. 357; Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 540, 40 L. ed. 252, 16 Sup. Ct. Rep. 88; California Nat. Bank v. Thomas, 171 U. S. 441, 43 L. ed. 231, 19 Sup. Ct. Rep. 4; Scudder v. The Comptroller (Scudder v. Coler) 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26.

A number of the cases last cited hold that the Federal question cannot be introduced into the record by petition for rehearing, filed in the highest court of the state after the rendition by that court of final judgment. Obviously the suitor's only means of throwing upon the court the burden of deciding a Federal claim is to present his Federal right before the entry of final judgment. The denial of a motion or petition for rehearing may well be based on the ground that the party presenting the motion or petition for rehearing has no standing to litigate issues not presented to the court for decision before his case had passed to final judgment. The settled rule of this court is that the mere denial of a motion or petition for rehearing, in which the plaintiff in error for the first time asserts a Federal claim, does not constitute an adverse decision entitling the moving party in that proceeding to review the Federal question in this court.

McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; Waters-Pierce Oil Co. v. Texas, 212 U. S. 118, 53 L. ed. 434, 29 Sup. Ct. Rep. 227; Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 129, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21; Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 426, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

Mr. Justice Hughes delivered the opinion of the court:

The Capital National Bank of Lincoln, Nebraska, suspended payment on January 21, 1893. The plaintiffs in error were unpaid depositors and brought these actions against directors of the bank to recover damages attributed to false representations of the bank's condition. With their denials of breach of duty, the defendants averred that their liability, if any, was to be determined [544] by the provisions of the national bank act. Judgment in favor of the plaintiffs, upon the verdict of a jury, was affirmed by the supreme court of the state. Yates v. Jones Nat. Bank, 74 Neb. 734, 105 N. W. 287. It was held that the actions were for deceit, at common law, and the judgments were sustained upon that ground. Upon writ of error the judgments were reversed. 206 U. S. 158, 181, 51 L. ed. 1002, 1015, 27 Sup. Ct. Rep. 638. It was the view of the court, even if it were conceded "that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the Comptroller of the Currency, and published in conformity to the national bank act, that such latter statements were counted upon in the amended petition and were, if not exclusively, certainly principally, the grounds of the alleged false representations covered by the proof." Id. p. 171. It was therefore concluded that the recovery had been based upon conduct of the defendants in the discharge of duties imposed by the Federal statute; that, with respect to such conduct, the statute (Rev. Stat. § 5239, Comp. Stat. 1913, § 9831) furnished an exclusive test of liability; and that this test had not been applied. It was held that responsibility, by the terms of the statute, arose from its violation "knowingly," and hence that "something more than negligence is required; that is, that the violation must in effect be intentional." Id. pp. 179, 180.

Upon remand, the petitions were amend-

ed, but there was no material change in the nature of the causes of action. By agreement, the several cases were tried together, and trial was had by the court without a jury. Official reports, as published, of the condition of the bank, were introduced in evidence. Two of these (of December 28, 1886, and December 9, 1892) had been annexed to the petition, and the allegations were broad enough to embrace others. It appeared that the official reports of December 28, 1886, December 12, 1888, September 30, 1889, [545] July 9, 1891, December 2, 1891, and December 9, 1892, had been attested by the defendant Yates; those of September 25, 1891, and September 30, 1892, by Ellis P. Hamer, the intestate of the defendant, Louisa Hamer; and those of December 28, 1886, August 1, 1887, October 2, 1890, December 19, 1890, and July 9, 1891, by the defendant, David E. Thompson. Each of these statements showed the capital stock intact and also surplus and undivided profits.

On behalf of the defendants Yates and Hamer, the following special findings among others were requested:

"III. That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents, or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said bank operated.

"IV. That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents, or servants of said Capital National Bank."

"IX. That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not, with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities.

"X. That neither the defendant Charles E. Yates nor the deceased Ellis P. Hamer, with actual knowledge or intentionally, made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said bank, as required by the national banking act, which reports are shown in the testimony in this case."

[546] The trial court found "against each of the defendants and in favor of the plaintiff" respecting the third and fourth requests. On the ninth request, the court answered "in the negative" as to the report of December 28, 1886, and "in the affirmative" as to the report of December 9, 1892; and on the tenth request, the court found "in the affirmative." These rulings "in the affirmative" were taken to be findings against these defendants, each of whom at once (on a motion to set aside the findings and for a new trial) filed exceptions,—the defendant Yates stating that the court "erred in finding against defendant on the ninth request as to report Dec. 9, 1892," and each of the defendants Yates and Hamer stating that the court "erred in finding against defendant on the tenth request."

Among the requests for findings submitted by the defendant Thompson were the following:

"4. Whether this defendant at any time prior to its failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency, and referred to in the petition or the evidence, were in any material respect false and untrue.

"5. Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency other than the five several reports dated respectively, December 28, 1886, August 1, 1887, October 2, 1890, and December 19, 1890, and July 9, 1891.

"6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith.

"7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently and with actual personal [547] knowledge that such reports or any one of them were in any material respect false and untrue."

As to the fourth request, the trial court found "in the affirmative," and the defendant Thompson filed his objection that the finding was "not sustained by sufficient evidence" and was "not consistent with the findings made in response to the sixth and seventh requests." As to the fifth request, the trial court found "that the defendant attested only five reports mentioned in said request." As to the sixth and seventh requests, it was found:

"Respecting the sixth and seventh requests of the defendant, the court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, but in attesting such reports the court finds

that the defendant relied upon the statements made to him by the president and cashier of the bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports, and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and in this respect the court finds that the same were not made in good faith."

The trial court, upon its own motion, found in each case, as to all the defendants, as follows:

"The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to $300,000, had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus, and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time its liabilities exceeded its assets by more than a million dollars.

[548] "The court finds that from and after September, 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them, had knowledge and knew that the statements, advertisements, and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary, shown by the evidence, were being published in the newspapers and sent to the plaintiff, by the officers of the bank, as alleged in the amended petition, and that they contained the names of all the directors, including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority, in their names, and with their sanction and consent.

"The court further finds that the said Ellis P. Hamer and the defendants Yates and Thompson, and each of them, from and after September, 1891, had knowledge and knew said statements, representations, and advertisements aforesaid contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in plaintiff's amended petition alleged, and with knowledge of all of the matters and facts aforesaid they and each of them knowingly permitted, assented to, and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid, as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the bank to be in a sound, solvent, and prosperous financial condition when in fact it was at all times wholly insolvent and unable to pay its liabilities."

It was further found "that the allegations of plaintiff's amended petition are true." The trial court, as to each of the defendants, also set forth its conclusion that the plaintiffs were entitled to recover "in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act," and fixed the damages sustained. Motion for a new trial was denied.

[549] Upon appeal, the judgments in the several cases were reversed by the supreme court of the state, and the actions were dismissed. 93 Neb. 121, 139 N. W. 844, 1135. The appeals were heard by six judges, two of whom dissented from the conclusion reached. Three judges concurred in one opinion (delivered by Hamer, J.), taking the view that the amended petitions contained "no material additional statement of facts," that they "still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery," and that the plaintiffs "having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain," were not entitled to recover under the decision of this court as to the rule of liability established by the Federal act. Id. pp. 123, 130. The remaining judge (Letton, J.), whose concurrence was essential to the reversal, stated his views in a separate opinion. After pointing out that the issues were the same as when the case was presented to this court on the former writ of error, and that this court had held that a Federal question was involved, he said:

"I agree with the former judgment of this court and that of the several inferior Federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect. I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that, under the holding of the Supreme Court of the United States as to the measure [550] of duty and of liability of directors under the banking laws of the United States, I think

a case has not been made. For that reason alone, I concur in the conclusion." Id. p. 131.

The appellees moved for a rehearing, contending, in part, that the court had erred in denying to them "the right to recover under the national bank laws." On this motion the court was equally divided and the motion was denied. And these writs of error to review the judgments of reversal and dismissal have been prosecuted.

1. It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the Federal statute, is not controlling. Thomas v. Taylor, 224 U. S. 73, 78, 79, 56 L. ed. 673, 676, 677, 32 Sup. Ct. Rep. 403; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 48, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168. It was alleged that statements published by the defendants, acting as directors and officers of the bank, with respect to its financial condition, were false, and were known to be false, and were made with intent to deceive plaintiffs and others. Two of these statements—official reports formally attested—were, as we have said, annexed to the petitions. The proof of representations chiefly concerned these reports and others of a similar sort. In contemplation of law, the question upon the case made by the plaintiffs was essentially one as to the liability of these directors for conduct governed by the Federal act. The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions. Recognizing that these must be deemed to rest upon transactions falling within the purview of that statute, and that the plaintiffs' rights must be measured accordingly, the supreme court of the state reversed the judgments [551] and dismissed the actions. Although the defendants alleged in their answers that, if any liability attached to them as directors, it was determined by the Federal act, the construction of which was necessarily involved, this was not, properly speaking, a matter of affirmative defense. What is called the defendants' assertion of Federal right was simply their contention as to the essential elements of the plaintiffs' cause of action. In Thomas v. Taylor, supra, the case was framed in deceit under the common law, but the appellate courts of the state decided "that it was the facts pleaded, and not the technical designation of the action, which constituted grounds of recovery." We accepted that decision, saying: "There is nothing in the national banking laws which precludes such view. Those laws are not concerned with the form of pleadings. They only require that the rule of responsibility declared by them shall be satisfied." If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application. Their case, as made by their pleadings and proofs, is not to be treated as of one character for the purpose of dismissing it in the state court, and as of another sort for the purpose of denying their right to complain of the dismissal. We conclude that this court has jurisdiction.

2. It is apparent that there were no findings of fact by the supreme court of the state. The actions being at law and trial by jury being waived, the findings of fact made by the trial court— as we understand the local practice—had "the same force and effect" as the verdict of a jury. Citizens Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N. W. 160; Dorsey v. Wellman, 85 Neb. 262, 122 N. W. 989; Darr v. Kansas City Hay Co. 85 Neb. 665, 124 N. W. 103; Madison Nat. Bank v. Gross, 98 Neb. 684, 154 N. W. 207. It was not a case of a trial *de novo* upon appeal, as in an equity suit. First Nat. Bank v. Crawford, 78 [552] Neb. 665, 111 N. W. 587. But, apart from these considerations, findings of fact by the supreme court would necessarily require the action of a majority of that court, and it is plain that the opinion of the three judges, unaided by the concurrence of the fourth, could not be regarded as embodying such findings. Justice Letton, whose concurrence in the result made the reversal possible, stated specifically the sole ground of his action, and his statement did not purport to be the resolving questions of fact. After saying that he was inclined to the view that the evidence would support a judgment upon a cause of action at common law for deceit, and that "the findings of the district court" were "to that effect," he added that he was not satisfied that these findings were "unsustained by the evidence." He considered the presumption to be that they were "so sustained," but he had "not examined the evidence so critically as would be necessary to determine this," for the reason that, in view of the holding of this court "as to the measure of duty and of liability of directors" under the Federal act, he thought that "a case had not been made." "For that reason alone" he concurred in the conclusion.

It is manifest that this was simply the

expression of an opinion with respect to the legal sufficiency of the plaintiffs' case. That is, the decisive ruling—upon which the reversal rested—was that, as matter of law, applying the Federal statute, the plaintiffs were not entitled to their recovery. And the judgment as entered upon appeal simply set forth that the court, finding "error apparent in the record of the proceedings and judgment," reversed and dismissed.

In this state of the record, for the purpose of determining whether, in thus reversing the judgments and depriving the plaintiffs of their recovery, the Federal question was wrongly decided, there are two questions to be considered: (a) whether the facts found by the trial court [553] justified a recovery under the Federal law, and, if so, (b) whether there was substantial evidence to support these findings, as the duty to decide the Federal question in its very nature involves this further inquiry. Dower v. Richards, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Stanley v. Schwalby, 162 U. S. 255, 277, 278, 40 L. ed. 960, 967, 968, 16 Sup. Ct. Rep. 754; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 573, 591, 592, 56 L. ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; Creswill v. Grand Lodge, K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L.R.A.(N.S.) 901, 33 Sup. Ct. Rep. 277; North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159; Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717.

3. In addition to the general finding in each case that the allegations of plaintiffs' amended petition were true, we have noted that the court found specially that the bank had sustained losses greatly in excess of its purported capital stock; that it never "had any capital stock, undivided profits or surplus;" that it "was at all times insolvent and so continued up to the time it ceased to do business on January 21, 1893," when "its liabilities exceeded its assets by more than a million dollars;" and that the published statements shown by the evidence, embracing the official reports to which reference has been made, represented the bank to be "in a sound, solvent, and prosperous financial condition" when in fact it was "wholly insolvent and unable to pay its liabilities." The official reports covered by the findings were those made to the Comptroller of the Currency and published at the times we have mentioned, in pursuance of *§ 5211 of the Revised Statutes* (Comp. Stat. 1913, § 9774).[1] [554] While, as pointed out on the former writ of error, the act did not expressly require that these reports "should contain a 'true' statement of the condition of the association," yet "by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited." 206 U. S. p. 177. And as it is plain that the making of these official reports, found to be false, was a violation of the statute, the question is whether the findings made a case within § 5239 of the Revised Statutes (Comp. Stat. 1913, § 9831), which provides that where the statute is "knowingly" violated or is "knowingly" permitted to be violated, as stated, "every director who participated in or assented to" such violation shall be liable individually for all damages thereby sustained by "the association, its shareholders, or any other person,"—a civil liability which may be enforced in the state court. Id. pp. 180, 181.

As to the directors Yates and Hamer (the former having attested an official report to the Comptroller of the Currency as late as December 9, 1892, and the latter having attested an official report of September 30, 1892), the trial court not only found "against each of the defendants and in favor of the plaintiff" upon the special requests for findings that these directors did not knowingly participate in the violation of the act, but the trial court also found explicitly that each of these direct-

[1] "Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the [associations] [association] at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

ors "from [555] and after September, 1891," knew that the official statements as to the bank's financial condition, which were shown by the evidence to have been published, "contained material false representations of the financial condition of said bank, and were in fact false and untrue," and that these directors, with knowledge "of all the matters and facts aforesaid," had "knowingly permitted, assented to, and allowed the same" to be made and published. The findings as to each of these directors abundantly supported the plaintiffs' recovery within the established rule of liability.

With respect to the defendant Thompson (the latest official report attested by him being the one of July 9, 1891), we have seen that the court found that he had "no actual personal knowledge of the truth or falsity" of the reports which he attested, but that in attesting them he "relied upon the statements made to him by the president and cashier" of the bank "without any investigation," and that "at the time of attesting such statements" he "knew that he had no personal knowledge" of their truth or falsity, and that they "were attested recklessly and without performing his duties as a director" to ascertain their truth or falsity before attestation, and in this respect that these reports "were not made in good faith." If this finding, fairly construed, did not import more than mere neglect or inattention, it would not be sufficient to sustain a recovery; for Congress did not make negligence the test of liability, but the fact that the act was violated knowingly, although there may be a violation "in effect intentional," and therefore within the statute, "when one deliberately refuses to examine that which it is his duty to examine." Thomas v. Taylor, 224 U. S. 73, 78, 79, 56 L. ed. 673, 676, 677, 32 Sup. Ct. Rep. 403. In that case the directors, having been warned by the bank examiner and Comptroller of the doubtful character of certain assets, still represented them to be good; and their reckless report, in disregard of the official direction, was found to have the [556] quality of an intentional breach of the defined duty. But in the present case, we are not called upon to determine what should be deemed to be involved in the finding that the attestation of the earlier reports, which were attested by this defendant, was made "without any investigation" and "recklessly." For there were later reports made on behalf of the bank, and the defendant is not excused simply by the fact that he did not attest them. His liability was not merely with respect to attestation, but for knowingly "participating in" or "assenting to" the violation of the act. 206 U. S. pp. 177–179. If the defendant Thompson participated in or assented to the making and publication of the official reports to the Comptroller of the Currency, which were made in the year 1892, knowing that they were false reports, he was liable to the plaintiffs deceived and damaged thereby under the express terms of the statute; and he could not escape this liability simply because, while he thus participated or assented, other directors gave the formal attestation. And the trial court found, not only with respect to Yates and Hamer, but as to the defendant Thompson, that each of them after September, 1891, knew that the official statements as to the condition of the bank, shown by the evidence, were in fact false, and that with knowledge of the facts stated in the findings with respect to the condition of the bank, the defendant Thompson, as well as the others, "knowingly permitted, assented to, and allowed" the same to be made and published. This was a sufficient finding of the ultimate fact of participation or assent, and constituted an adequate basis for recovery.

We conclude that the findings of the trial court, in the light of the Federal statute, supported the judgments it entered.

4. The plaintiffs in error, however, are not entitled to complain of the reversal as a denial of Federal right, even though the judgments were supported by the findings of [557] fact made by the trial court, if these findings themselves were not supported by substantial evidence.

As to the financial condition of the bank, there is no room for controversy. It would be difficult to conceive of a case of more scandalous maladministration than that which the testimony portrays. There was evidence of manipulation of accounts, of fictitious and falsified entries, of fraudulent concealments. It cannot be said that there was serious effort to meet this evidence. There was no attempt to palliate the offenses which it appeared had been committed by the executive officers in the conduct of the bank's affairs. But these directors were not accountants; presumably they relied upon the books as containing accurate items, and there is no basis for the conclusion that they had knowledge of fictitious or falsified entries in the books, or of the fraudulent transactions which such entries were intended to conceal, and which were revealed after the bank failed. With respect to such concealed transactions, we find nothing to show that the directors knowingly participated in, or assented to, a violation of the statute.

We pass, therefore, to matters of a different sort which lay easily within the ken of the directors. The bank had been incorporated as the Marsh National Bank, in

the year 1883, with a capital stock of $100,000. The assets and liabilities of a preceding concern, Marsh Brothers, Mosher, & Company, were transferred to the bank and became its assets and liabilities. In 1884, the name was changed to the Capital National Bank of Lincoln; the capital stock was then increased to $200,000, and in 1886 there was a further increase, making the total capital stock $300,000. Yates, Hamer, and Thompson became directors in 1884, and continued as such until the failure of the bank in January, 1893. There were seven directors in all, including C. W. Mosher, the president. It appears that, at the time of the failure, the bank's assets at their face [558] value, as shown by the books, were about $1,031,000. The liabilities, as shown by the books, including capital stock, amounted to about $1,017,000; these seem to have been in fact (including liabilities on rediscounts) about $1,760,000. Included in the assets above stated, the amount of $850,059.86 (in face value) was in bills receivable of which $155,560.84 were classed by the receiver as doubtful and $397,073.63 as worthless. The actual showing on liquidation appears to have been even worse; the total amount realized from the bills receivable (aggregating $850,059.86) was $229,520.82, and the total amount realized from all the assets of the bank (including rediscounted items placed in the hands of the receiver for collection, and excluding stock assessments) seems to have been less than $400,000.

The evidence was that at the time of the failure there were on hand worthless notes of C. W. Mosher, the president, amounting to $85,281.67; of the cashier, R. C. Outcalt, $54,166.96 (less an offset of $570.99); and of the Western Manufacturing Company (signed by E. Hurlburt, Jr., manager), $235,000. This concern was apparently but another name for C. W. Mosher; the testimony is that it had no assets and ceased to do an active business in 1889. There were also notes in the name of E. W. Mosher aggregating $107,085.45, which it was testified were worthless, save for a collection on collateral of less than $10,000. According to the schedules in evidence these worthless notes had been taken since June 1, 1892, that is, within a period of seven months before the failure. And while the totals of these accounts, respectively, were much larger than they had been formerly, the same accounts embracing loans to a considerable amount had long been carried and were included in the published reports. There was evidence that there had been about $200,000 of worthless notes in these accounts in January, 1892. While it is not necessary for the present purpose to [559] go further back, the testimony supports the finding of the trial court that the bank in fact not only had no surplus or undivided profits, but that its actual condition was one of insolvency.

In the fourteen months before the failure the evidence shows three of the official reports made to the Comptroller of the Currency and published in the newspapers in Lincoln; those of December 2, 1891, September 30, 1892, and December 9, 1892. The total resources in these reports are stated, respectively, as $1,143,946.88, $1,033,561.11, and $1,074,867.37. Each of these reports shows the capital stock unimpaired. As of December 2, 1891, the surplus is stated to be $32,000, and the undivided profits, $23,276.89; as of September 30, 1892, these items are $6,000 and $11,978, respectively; and as of December 9, 1892, $6,000 and $21,180.75. In January, 1892, the directors declared a dividend of 5 per cent, and in July, 1892, a further dividend of 4 per cent. There was evidence of serious discrepancies between the items in the published official reports and corresponding items as shown by the books. Without attempting to state the details disclosed by the voluminous record, it is sufficient to say that it was clearly shown by evidence substantially undisputed that these reports constituted grossly false representations of the bank's financial condition upon which the plaintiffs were invited to rely and did rely.

There was also substantial basis for the finding that the directors assented to the making and publication of these reports; for, as we have said, whether this or that director attested a particular report is not controlling upon the question of assent. The official reports required by law are the reports of the bank, and not simply of those signing and attesting. As the reports of the bank, they are made under its authority and presumably with the assent of the board of directors. Taking the proved circumstances into consideration, and particularly in the light of the [560] activity of these directors, to which we shall presently refer, it is hardly conceivable that they did not know of the last-mentioned official reports which were made on behalf of the bank and published in Lincoln. Certainly, the fact of such knowledge on the part of each of them could properly be found. There is no suggestion that they made the slightest objection to the making or publication of these reports, and the evidence was unquestionably sufficient to show their assent to this action on behalf of the bank.

The remaining question is with respect to the evidence of the knowledge of these directors of the falsity of these official reports, or of such reckless disregard of the

truth or falsity of their contents as would show that the participation in, or assent to, the violation of the statute, was "in effect intentional." Under date of September 8, 1891, the Comptroller of the Currency addressed a letter to President Mosher, referring to a report of an examination of the bank, and criticizing various matters. It was evidently in view of this communication that the trial court took September, 1891, as the time after which the directors had knowledge of facts showing the falsity of the reports. Without reciting the letter in full, it is sufficient to note that the Comptroller called attention to two loans (one being that of E. W. Mosher) exceeding the statutory limit; to the fact that at the time of the last report of the bank the overdrafts shown by the books largely exceeded those stated in the report; to overdue paper, with the statement that such of it as was good should be collected or made active by renewal with satisfactory security; to the excess of current expenses over undivided profits; and to the fact that the bank had a large liability on account of rediscounted paper, said to be caused by the falling off in deposits. It was suggested that some of the loans should be called in as soon as practicable, and the letter closed with the statement that, [561] according to the examiner's report, the board of directors had held only two meetings during the past year, and that there was "no record of their having examined or approved of the loans and discounts." It was pointed out "that the conduct of affairs of a national bank is by law devolved upon the board of directors, and that regular and frequent meetings are therefore very desirable." The defendants insist that they were not apprised of this letter until after the failure. There was evidence tending to show that it was considered at a meeting of the board in September, 1891, but, in addition to explicit denials, there was testimony to impeach the credit of the witness so testifying. There was, however, another letter from the Comptroller of the Currency under date of February 16, 1892, which admittedly was brought to the attention of the directors. This letter, in substance, repeated several of the criticisms which had been made in the earlier letter; it referred to the desirability of collecting as soon as practicable loans that had been carried for a number of years, and to the agreement of Mosher and Outcalt to reduce their liabilities and to close "the bulk of their outside interests," owing to which the business of the bank had suffered; it again emphasized the duty of the directors with respect to the conduct of the bank's affairs; and it concluded with a request for a reply over the directors' "individual signatures." The directors, including those whose liability is now in question, accordingly signed a reply, under date of February 19, 1892, which purported to furnish explanations and promised improvement. It was stated that the bank had always had a discount committee, and that a vacancy caused by the death of a former member had been filled by the appointment of E. P. Hamer. The last-mentioned director also wrote to the Comptroller on February 23, 1892, to the effect that the manner of conducting the bank had not been satisfactory to him, and, promising better management, [562] he added: "Your letter is a move in the right direction, it indicates that we the directors should take a more positive position in the management which I for one shall do."

Apparently the Comptroller of the Currency was not satisfied. For it appears that he wrote another letter under date of August 31, 1892, which, having been lost, was not introduced in evidence. But the letter in reply, which the directors, including Yates, Hamer, and Thompson signed individually (under date of September 19, 1892, as stated by defendants' counsel), is in evidence and its significance cannot be overlooked. Among other things, it stated:

"The dividend of July 1st was all right; the expenses since then have exceeded income by reason of having paid taxes & interest on certificates of deposits to an unexpected amount during July. The item of $8,000 losses referred to was an estimate of contingent losses & not any particular loss already incurred, but referred to some matters or process of liquidation, all items mentioned by you shall receive prompt attention."

There was thus sufficient evidence from these directors themselves that they were scrutinizing the affairs of the bank; that prior to the published official report of September 30, 1892, which was followed by the published official report of December 9, 1892, these directors were examining the condition of the bank, that they were considering the losses sustained, the expenses incurred, and the basis of the dividend declared in July. These were not casual statements, but deliberate assertions of activity of supervision in response to official complaint. It was plainly permissible, despite their disclaimers and denials, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they professed [563] to be actively exercising. Assuming that they were ignorant of the frauds that had

been committed and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive. The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial court. Citizens Ins. Co. v. Herpolsheimer, 77 Neb. 232, 109 N. W. 160; Madison Nat. Bank v. Gross, 98 Neb. 684, 154 N. W. 207. It is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial court, at least with respect to the last-mentioned reports, had substantial support; and, in this view, we must conclude that the reversal of the judgments, as entered in the trial court, upon the ground of the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error.

The judgments of the Supreme Court of the State are reversed and the cases are remanded with instructions to reinstate the judgments entered in the District Court, which are affirmed. Stanley v. Schwalby, 162 U. S. 255, 279–283, 40 L. ed. 960, 968–970, 16 Sup. Ct. Rep. 754.

It is so ordered.

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[564] DETROIT & MACKINAC RAILWAY COMPANY, Plff. in Err.,
v.
MICHIGAN RAILROAD COMMISSION and Fletcher Paper Company.

(See S. C. Reporter's ed. 564–572.)

Error to state court — final judgment — mandamus.

1. A judgment of the highest court of a state, awarding a writ of mandamus to enforce obedience by a railway company to an order of a State Railway Commission directing it to relay ½ mile of rails removed by it from a 5-mile logging spur, and to resume service thereon on condition that a suitable bond be given to indemnify the railway company should the Commission's order ultimately be vacated in a pending suit in equity, is "final" in the sense of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to state courts.

[For other cases, see Appeal and Error, I, d, 13, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — mandamus.

2. Requiring obedience by mandamus to an order of a State Railway Commission directing a railway company to relay ½ mile of rails removed by it from a 5-mile logging spur, and to resume service thereon pending the determination of a suit in equity to vacate such order on the ground that such logging spur was only a private convenience, not a part of the railway system, and that the Commission had denied the railway company an adequate opportunity to be heard on that question,—does not deprive the railway company of the due process of law guaranteed by U. S. Const., 14th Amend., where the grant of the mandamus writ was conditioned upon the giving of a suitable bond to indemnify the railway company should the Commission's order ultimately be vacated in the equity suit.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 68.]

Argued and submitted November 10, 1915.
Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment awarding a writ of mandamus to enforce obedience by a railway company to an order of the Railway Commission, directing it to relay rails removed by it from a logging spur, and to resume service thereon. Affirmed.

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

As to what constitutes due process of law, generaly—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

What judgments of state courts are final for the purpose of a review in the Supreme Court of the United States.

This question is discussed in a note to Schlosser v. Hemphill, 49 L. ed. U. S. 1001, and only the cases decided since the publication of that note are here considered.

The finality of the judgment of the highest court of a state is to be tested by the form of the judgment, and the Federal Supreme Court cannot, for the purpose of determining whether its reviewing power exists, resort to the state law for the purpose of converting a judgment not on its face final into one final in character. Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78.

Any judgment which determines the particular cause is final. Hence a judgment of the highest court of a state, finally dispos-

See same case below, 178 Mich. 230, 144 N. W. 676.

The facts are stated in the opinion.

Messrs. Fred A. Baker and James McNamara submitted the cause for plaintiff in error:

It was not competent for the supreme court of Michigan, while the case in the Wayne circuit was pending and undetermined, to order the railroad company to restore the Tubbs branch and to resume service thereon.

McKechnie, Magna Charta, p. 434; De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214.

The failure of the Michigan Railroad Commission to carry out its agreement to

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ing of a writ of prohibition sued out under Ala. Code 1907, §§ 4864–4867, 4872, to prevent an inferior court from taking jurisdiction of an action, is a final judgment, within the meaning of the Judicial Code, § 237, 36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214, governing writs of error to state courts, although such judgment does not determine the merits of the principal suit. Mt. Vernon Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, ante, 507, 36 Sup. Ct. Rep. 234.

And a judgment of a state court ordering the delivery to the state by a canal company of the waterway in its entirety, and all appurtenant property and its improvements, including the roadways upon the sides, which comprise practically all the property sued for, such judgment involving and disposing of the Federal right asserted by the canal company, possesses the requisite finality to sustain a writ of error from the Federal Supreme Court, although there is reserved for further adjudication a small piece of ground as to which there was a dispute as to whether it was appurtenant to the canal, and although an accounting of certain receipts and disbursements is ordered. Carondelet Canal & Nav. Co. v. Louisiana, 233 U. S. 362, 58 L. ed. 1001, 34 Sup. Ct. Rep. 627.

A judgment of the highest court of a state, which reversed a judgment below dismissing a petition because it stated no cause of action, and remanded the cause for further proceedings, is not final for the purpose of a writ of error from the Federal Supreme Court. Louisiana Nav. Co. v. Oyster Commission, supra.

A judgment of the highest court of a state, affirming, without directing a dismissal, the judgment of the court below, which had sustained a demurrer to the petition in a civil suit upon the ground that it did not state facts sufficient to constitute a cause of action, but had not dismissed the suit, lacks the finality requisite to sustain a writ of error from the Federal Supreme Court. Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46.

But where the cause will be determined by the judgment which the highest state court directs the court below to enter, there is a final judgment. Hence a judgment of the highest state court, which reversed a judgment below in favor of defendants in a suit by a railway company to quiet title to a strip of land claimed and used by it as a right of way under the act of March 3, 1875, and to which defendants asserted title under a patent to a placer mining claim, and remanded the cause with a direction to "enter a judgment awarding to the plaintiff title to a right of way over the lands in question 100 feet wide on each side of the center of the track," is a final judgment within the meaning of the Judicial Code, § 237, governing writs of error from the Federal Supreme Court to state courts. Rio Grande Western R. Co. v. Stringham, 239 U. S. 44, ante, 136, 36 Sup. Ct. Rep. 5.

Until the judgment rendered by the state trial court pursuant to the mandate from the state court of last resort, which, on reversing a prior judgment, remanded the cause for further proceedings, had been affirmed by the latter court upon a second writ of error, there was no final judgment in that court such as might be brought up to the Federal Supreme Court under the Judicial Code, § 237, for review. Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625.

The judgment of the highest court of a state affirming, on a third appeal, a judgment of the trial court entered on a verdict in favor of plaintiff, is the first final judgment in the action which is the subject of review in the Federal Supreme Court, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a Federal circuit court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, although the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the Federal question. Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

The rule which excludes the right to review questions arising in a cause depending in a state court until a final judgment is rendered by such court involves as a necessary correlative the power and the duty in the Federal Supreme Court, when a final judgment in form in rendered and the cause is brought there for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the state law such questions were concluded during the litigation, and before a final judgment susceptible of review was rendered. Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78.

give a further hearing and an opportunity to introduce evidence, and the refusal of the supreme court of Michigan to give any such opportunity, was a deprivation of property without due process of law, and a denial of the equal protection of the laws.

Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Roller v. Holly, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 88, 91, 57 L. ed. 431, 433, 33 Sup. Ct. Rep. 185; Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625.

If the proposed use is public, the question of necessity, in the absence of anything in the state Constitution to the contrary, may be determined by the legislature, or by executive or administrative officers, or a court by authority of the legislature, and without any notice or hearing.

People ex rel. Herrick v. Smith, 21 N. Y. 598; Ford v. Chicago & N. W. R. Co. 14 Wis. 610, 80 Am. Dec. 791; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Waterworks Co. v. Burkhart, 41 Ind. 364; Cooley, Const. Lim. 7th ed. 777, 778.

But it must appear that the purpose is public, and not private, for taking property for a private purpose is a deprivation of property without due process of law.

Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; Re Tuthill, 163 N. Y. 138, 49 L.R.A. 781, 79 Am. St. Rep. 574, 57 N. E. 303; Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 61 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 103 Am. St. Rep. 438, 94 N. W. 379.

The indemnity bond of $10,000 filed by the Fletcher Paper Company by direction of the supreme court of Michigan, as a condition precedent to the issuing of the writ of mandamus, does not cure the error of that court in awarding the mandamus.

Foule v. Mann, 53 Iowa, 42, 3 N. W. 814.

On the answers of the railroad company the Tubbs branch has always been, and, as proposed to be restored, will certainly be, private, and not public.

Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 58 L. ed. 1459, 34 Sup. Ct. Rep. 956.

It is settled law in Michigan that requiring railroad companies to construct at their own expense, highway crossings, farm crossings, or drainage culverts, is a taking without compensation, and forbidden by the due process of law clause.

Chicago & G. T. R. Co. v. Chappell, 124 Mich. 72, 82 N. W. 800; People v. Detroit, G. H. & M. R. Co. 79 Mich. 471, 7 L.R.A. 717, 44 N. W. 934; Chicago & G. T. R. Co. v. Hough, 61 Mich. 507, 28 N. W. 532; People v. Lake Shore & M. S. R. Co. 52 Mich. 277, 17 N. W. 841.

And this court has held that a serious interruption to the common and necessary use of property is a taking of it.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 168, 20 L. ed. 557.

Mr. David H. Crowley argued the cause, and, with Mr. Grant Fellows, Attorney General of Michigan, filed a brief for defendant in error, the Michigan Railroad Commission:

The order of the Michigan Railroad Commission could not, even if viewed from the standpoint of plaintiff in error, be considered void.

Cooley, Const. Lim. 7th ed. pp. 587, 588; White v. Crow, 110 U. S. 183, 28 L. ed. 113, 4 Sup. Ct. Rep. 71; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825.

The necessary rules of procedure, viz., notice, hearing, etc., and the distinction between those errors that render a judgment void and those resulting simply in irregular procedure have been pointed out many times by this court in reviewing judgments of state courts. The rules of procedure should be construed even more liberally when applied to the Michigan Railroad Commission, whose proceedings are administrative or ministerial, and not judicial (Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549). And, again, the findings of such Commission are not, under the Michigan statutes, conclusive, but are only prima facie until modified by the Commission or set aside by the court.

Michigan R. Commission v. Michigan C. R. Co. 159 Mich. 580, 124 N. W. 564; Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 346, 137 N. W. 329.

As a general rule, mandamus will not lie where another suit involving the same subject-matter is pending, but this rule does not apply where the pending litigation will be ineffective, or where irreparable loss or damage will result from delay.

Petaluma Sav. Bank v. Superior Ct. 111 Cal. 488, 44 Pac. 177; Southern P. Co. v. Siemens, — Or. —, 150 Pac. 290; State ex rel. Oshkosh, A. & B. W. R. Co. v. Burnell, 104 Wis. 246, 80 N. W. 460; Michigan R. Commission v. Michigan C. R. Co. 159 Mich. 580, 124 N. W. 564.

Mr. Grant Fellows, Attorney General of Michigan, and Mr. I. S. Canfield also filed a separate brief for defendants in error:

No final judgment or decree has been

rendered by the supreme court of Michigan.

Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; St. Clair County v. Lovingston, 18 Wall. 628, 21 L. ed. 813; Missouri & K. I. R. Co. v. Olathe, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; Miners' Bank v. United States, 5 How. 213, 12 L. ed. 121; McComb v. Knox County, 91 U. S. 1, 23 L. ed. 185; Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410.

The order here involved, and which the court enforced by the writ of mandamus, is administrative in its nature.

2 Elliott, Railroads, 2d ed. ¶ 675; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; Michigan C. R. Co. v. Michigan R. Commission, 160 Mich. 355, 125 N. W. 549; Michigan R. Commission v. Michigan C. R. Co. 159 Mich. 580, 124 N. W. 564; Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 346, 137 N. W. 329.

A writ of error will not issue to the order of a state court which is administrative or ministerial in its nature.

Barton v. Forsyth, 5 Wall. 190, 18 L. ed. 545; Dredge v. Forsyth, 2 Black, 563, 17 L. ed. 253; Smith v. Trabue, 9 Pet. 4, 9 L. ed. 30; New York Secur. & T. Co. v. Illinois Transfer R. Co. 44 C. C. A. 161, 104 Fed. 710; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Hand v. Hagood, 131 U. S. CLXXXI, Appx. and 26 L. ed. 301.

No Federal question has been passed upon by the supreme court of Michigan.

Rogers v. Clark Iron Co. 217 U. S. 589, 54 L. ed. 895, 30 Sup. Ct. Rep. 693; Santa Cruz County v. Santa Cruz R. Co. 111 U. S. 361, 28 L. ed. 456, 4 Sup. Ct. Rep. 474; Southern R. Co. v. Carson, 194 U. S. 136, 48 L. ed. 907, 24 Sup. Ct. Rep. 609; Christ Church v. Philadelphia County, 20 How. 26, 15 L. ed. 802; Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; Smith v. Hunter, 7 How. 738–743, 12 L. ed. 894–896; Crowell v. Randell, 10 Pet. 392, 9 L. ed. 467; M'Kinney v. Carroll, 12 Pet. 66, 9 L. ed. 1002; Coons v. Gallagher, 15 Pet. 18, 10 L. ed. 645; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918.

Mandamus lies to put into effect the orders of the Commission, pending proceedings in equity to set them aside.

Michigan R. Commission v. Michigan C. R. Co. 159 Mich. 580, 124 N. W. 564; Michigan R. Commission v. Detroit & M. R. Co. 178 Mich. 230, 144 N. W. 696; Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup. Ct. Rep. 148; 26 Cyc. 372; Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; Seaboard Air Line R. Co. v. Florida, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109.

The relator in the court below made out such a clear legal right that it was entitled to have its order enforced by mandamus for the benefit of the complainant before the Commission, defendant in error here, the Fletcher Paper Company.

State ex rel. Wisconsin Teleph. Co. v. Janesville R. Co. 87 Wis. 72, 22 L.R.A. 759, 41 Am. St. Rep. 23, 57 N. W. 970; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; People ex rel. Hunt v. Chicago & A. R. Co. 130 Ill. 175, 22 N. E. 857; 2 Elliott, Railroads, § 698.

Mr. Justice Van Devanter delivered the opinion of the court:

This was a petition to the supreme court of Michigan by the Railroad Commission of that state, for a writ of mandamus to enforce obedience to an order of the Commission, directing the Detroit & Mackinac Railway Company to re-lay ½ mile of rails removed by it from a 5-mile logging spur, called Tubbs branch, and to resume service thereon. The railroad company answered, and, after a hearing, the court granted the writ, subject to a condition presently to be stated. 178 Mich. 230, 144 N. W. 696.

The Commission's action was invoked by a complaint presented by the Fletcher Paper Company, of which the railway company had due notice. Before the Commission the railway company insisted that the logging spur was not a part of its railroad system, and that its use had been only that of a private convenience; but the Commission concluded from the pleadings and evidence that the fact was otherwise, and made the order with the purpose of correcting what it deemed an unreasonable and unjust discrimination and an inadequate service within the meaning of the local statute (3 Howell's Anno. Stat. 2d ed. §§ 6526, 6537, 6545). Thereupon the railway company filed a bill in equity in the circuit court of Wayne county, praying that the order be vacated, and asking that its enforcement be temporarily and permanently enjoined. In the bill the railway company repeated its

insistence [567] that the logging spur was not a part of its railroad system, but only a private convenience, and charged that an adequate hearing was denied by the Commission in that the issues were determined upon the evidence presented by the paper company, and in contravention of an understanding, assented to by the Commission, that if an objection of the railway company in the nature of a plea of res judicata should be overruled, as it afterwards was, the company would be afforded a further opportunity to present evidence in opposition to that of the paper company. The bill invoked the due process of law clause of the 14th Amendment. Apparently the prayer for a temporary injunction was not insisted upon.

It was during the pendency of that suit that the mandamus proceeding was begun and carried to judgment in the supreme court. In this proceeding the railway company again asserted that the logging spur was only a private convenience, and not a part of the railroad system used by it as a common carrier, and that the Commission had denied it an adequate opportunity to be heard upon that question, and further insisted that to require it to give effect to the Commission's order in advance of a hearing and decision upon that question in the suit in equity would deprive it of the due process of law guaranteed by the 14th Amendment.

In the course of its opinion the supreme court said, pp. 243-246:

"We are not called upon to consider and determine the merits of the controversy between the Fletcher Paper Company and respondent railway company upon the order of August 3, 1911. Such questions are involved in the case now pending before the circuit court for the county of Wayne, in chancery, wherein the respondent railway company seeks to review, annul, and set aside said order. The sole question before this court in this proceeding is whether the order of the Railroad Commission shall [568] take effect and become operative pending the hearing and determination of that chancery cause. . . .

"Relative to an order made by this Commission, this court has said: '. . . Its orders stand until modified or set aside by it or by the courts. . . . Presumptively, the findings and orders of the Commission are right. If attacked, the complainant has the burden of showing "by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be."' Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 346, 137 N. W. 329.

. . . . . .

"The petitioner in the instant case before the Railroad Commission offered, and upon this hearing before this court keeps such offer good, to indemnify respondent for all costs and expenses incurred in re-laying the track taken up by it, with interest; and to pay all rates that may be fixed or charged by the railway company and approved by the Commission, in case this order is vacated and set aside by the Wayne circuit court in chancery, or by this court, if an appeal is taken. This indemnity would save respondent harmless from any possible loss in complying with the order, and save petitioner from claimed irreparable damage to 21,000,000 feet of forest products during the probable term of years occupied in this litigation.

"It has been held by this court that an order of the Railroad Commission is enforceable by mandamus, although a proceeding in equity to review it is pending. Michigan R. Commission v. Michigan C. R. Co. 159 Mich. 580, 124 N. W. 564.

"This order is prima facie not unreasonable. There is no question but that the legislative intent, clearly expressed in this statute, was that the orders of the Commission should be and continue in force during all subsequent proceedings until modified or set aside by the Commission or by the courts.

"The statute provides a remedy by mandamus to enforce [569] the orders of the Commission, and this court has granted such writs. Upon the facts presented, the writ should be granted in this case.

"Upon furnishing bond by the petitioner before the Railroad Commission, the Fletcher Paper Company, in the penal sum of $10,000 to indemnify respondent in manner and form as herein stated, with two sureties, to be agreed upon between the parties, or approved by the clerk of this court, a writ of mandamus will issue as prayed."

And in the course of a separate opinion one of the justices said, p. 248:

"So long as the respondent was operating the spur, accepting thereon and transporting over it freight for those who offered it, and so long as it published tariffs affecting such service, it was undoubtedly, as to such operations, within the scope of the act in question, and this we held in Detroit & M. R. Co. v. Michigan R. Commission, 171 Mich. 335, 137 N. W. 329. But whether the Michigan Railroad Commission has power under the statute to require respondent to continue to operate such a spur, or branch, against its will, and in face of its efforts to abandon it, is quite a different question. It is a question which we assume is presented in the pending chancery proceeding to set aside the order which in

this proceeding is sought to be enforced. It need not be answered now."

The local statute, 3 Howell's Anno. Stat. 2d ed., provides: (§ 6545) Orders of the Commission shall take effect and become operative twenty days after service; (§ 6547) the Commission may, upon application, rescind or alter any order; (§ 6548) all regulations, practices, and services prescribed by the Commission shall be in force and be prima facie lawful and reasonable until finally held otherwise in a suit brought for the purpose under § 6549, or until rescinded or altered by the Commission under § 6547; (§ 6549) a carrier may, within thirty days after notice of an order, commence a suit in equity to vacate [570] it, the burden being upon the carrier to show that the order is unlawful or unreasonable. In such a suit original evidence may be introduced in addition to the transcript of that presented before the Commission; and if evidence be introduced by the carrier which is different from or in addition to that presented before the Commission, the court, unless the parties stipulate to the contrary, shall transmit a copy thereof to the Commission and stay further proceedings for the time being. The Commission shall consider the evidence transmitted, and may alter or rescind its order, and shall report its action to the court. If the Commission rescind its order, the suit shall be dismissed; if it alter the order, the same in its changed form shall take the place of the original, and judgment shall be rendered thereon as though the last action of the Commission had been taken at first; (§ 6570) in addition to all other remedies, the Commission, and likewise any party in interest, may compel compliance with an order of the Commission by a proceeding in mandamus, injunction, or other appropriate civil remedy.

It will be perceived that the supreme court, applying the statute, held that the "sole question" for decision was whether the Commission's order should be given effect pending the determination of the equity suit; and then, coming to dispose of that question, held that due regard for the provisions of the statute, especially §§ 6545, 6548, and 6549, and for the relative consequences of enforcing or refusing to enforce the order, required that it be enforced by mandamus, if a suitable bond was given to indemnify the railway company for any resulting loss in the event the order ultimately should be vacated in the equity suit.

Our jurisdiction is called in question upon the ground that the judgment is not final in the sense of § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], upon which our power to review depends, because the judgment does not determine the merits and end the [571] litigation. But, as this court has said, "all judgments and decrees which determine the particular cause" are final in the sense of the statute. Weston v. Charleston, 2 Pet. 449, 463–465, 7 L. ed. 481, 486, 487; Central Transp. Co. v. Pullman's Car Co. 139 U. S. 24, 40, 35 L. ed. 55, 61, 11 Sup. Ct. Rep. 478; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, ante, 507, 36 Sup. Ct. Rep. 234. This view has prevailed through a century of practice in reviewing judgments and decrees dismissing causes for want of jurisdiction or for other reasons not decisive of the merits. And it is settled that a proceeding in mandamus is an independent adversary suit, and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute. Davies v. Corbin, 112 U. S. 36, 40, 28 L. ed. 627, 629, 5 Sup. Ct. Rep. 4; McPherson v. Blacker, 146 U. S. 1, 24, 36 L. ed. 869, 873, 13 Sup. Ct. Rep. 3; American Exp. Co. v. Michigan (American Exp. Co. v. Maynard) 177 U. S. 404, 406, 44 L. ed. 823, 824, 20 Sup. Ct. Rep. 695.

Under the local statutes, as interpreted by the supreme court of the state, whether the logging spur was merely a private convenience or was so used and operated by the railway company that the latter was not free to discontinue service thereon, in the circumstances existing when the rails were removed, was primarily a question for the Commission and secondarily for the Wayne circuit court, wherein the Commission's order was sought to be vacated. By the order the Commission resolved this question against the railway company. The order was valid upon its face and recited that it was made after a hearing and due consideration of the proofs and briefs of the parties. Whether the hearing was adequate and whether the facts relating to the logging spur were such as to sustain the order were matters which were in issue in the suit in the Wayne circuit court, where the railway company was at liberty to produce any evidence legitimately bearing upon the propriety of the order. It was in this situation that the supreme court, having regard to the statutory requirement that the order be given effect and treated as prima facie lawful and reasonable until adjudged otherwise in [572] the suit brought to vacate it, and also having regard to the comparative consequences of enforcing or refusing to enforce it while that suit was undetermined, held that it ought to be enforced by mandamus, if a suitable bond

was given to indemnify the railway company should the order ultimately be vacated. In this we perceive no deprivation of due process. The granting of an order or writ to maintain or restore the status quo pending the outcome of existing litigation, which really is what was done here, has been practised by the courts of the country since before the Constitution was adopted; and the claim that relief of this nature cannot be granted, even upon condition that ample security be given to make good any loss that may be sustained thereby, without encroaching upon the due process of law secured by the Constitution, is manifestly without merit.

Judgment affirmed.

Mr. Justice McReynolds is of opinion that the judgment is not final within the meaning of § 237, Judicial Code [36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214], and therefore that the writ of error should be dismissed.

JENNIE A. WILLINK, Executrix, etc., Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 572–581.)

Eminent domain — what is a taking — location of harbor line.

1. Something more than the location of a harbor line across the land of a riparian owner on a navigable and tidal stream is essential in order to amount to a taking of his property and its appropriation to a public use.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

Eminent domain — what is a taking — preventing renewal of wharf and piling.

2. The property of a riparian owner on a navigable and tidal stream was not taken so as to entitle him to compensation therefor because he was prevented by the engineer officer in charge of harbor improvements there, and by the United States attorney for the district, acting under the authority of the river and harbor act of September 19, 1890 (26 Stat. at L. 455, chap. 907, Comp. Stat. 1913, § 9923), §§ 11, 12, from renewing the sheet piling which protected his marine railway, or rebuilding his wharf, where both piling and wharf were not only below the mean high-water line, but were within the harbor area as defined conformably to the act of August 11, 1888 (25 Stat. at L. 425, chap. 860), § 12, by the Secretary of War.

[For other cases, see Eminent Domain, V., in Digest Sup. Ct. 1908.]

[No. 180.]

Argued January 21, 1916. Decided April 3, 1916.

APPEAL from the Court of Claims to review a judgment which, on a second trial, denied a recovery from the United States by a riparian owner for an alleged taking of his property in the improvement of a harbor. Affirmed.

See same case below, first trial, 38 Ct. Cl. 693; second trial, 49 Ct. Cl. 701.

The facts are stated in the opinion.

Mr. George A. King, argued the cause, and, with Mr. William B. King, filed a brief for appellant:

There could hardly be a clearer case of the taking of private property for public use.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; United States v. Alexander, 148 U. S. 186, 37 L. ed. 415, 13 Sup. Ct. Rep. 529; United States v. Lynah, 188 U. S. 445, 465, 466, 47 L. ed. 539, 546, 547, 23 Sup. Ct. Rep. 349; United States v. Welch, 217 U. S. 333, 338, 339, 54 L. ed. 787, 789, 790, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 184, 185, 55 L. ed. 165, 166, 167 31 L.R.A.(N.S.) 1135 31 Sup. Ct. Rep. 162; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654; Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251, 59 L. ed. 939, 35 Sup. Ct. Rep. 551.

There is no foundation for the view that the acts of the officers of the United States stopped short of a taking of the claimant's property. Everything was done under full sanction of the Secretary of War. He in turn acted under the authority of an act of Congress. Surely, the claimant was not obliged to submit to the indignity of arrest and prosecution, in order to test his rights. On the contrary, he acted as a good citizen, in conforming to the desires of the officers of the government, who were carrying out the directions of the Secretary of War, and in suffering the damage inflicted upon him, relying upon the courts for redress in awarding him the "just compensation" as-

Note.—As to what constitutes a taking of property by eminent domain—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co. 18 L.R.A. 166, and Sweet v. Rechel, 40 L. ed. U. S. 188.

On distinction between taking or damaging property and consequential injuries—see note to Gordon v. Ellenville & K. R. Co. 47 L.R.A.(N.S.) 462.

sured by the Constitution for the taking of his property.

Pearsall v. Eaton County, 74 Mich. 558, 4 L.R.A. 193, 42 N. W. 77; Janesville v. Carpenter, 77 Wis. 301, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; St. Louis v. Hill, 116 Mo. 527, 534, 21 L.R.A. 226, 22 S. W. 861.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

Congress acted within its constitutional powers in authorizing the Secretary of War to establish the harbor lines in the Savannah river.

Greenleaf-Johnson Lumber Co. v. Garrison, 237 U. S. 251–258, 59 L. ed. 939–943, 35 Sup. Ct. Rep. 551; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Scranton v. Wheeler, 179 U. S. 141, 162, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; United States v. Chandler Dunbar Water Co. 229 U. S. 64, 57 L. ed. 1076, 33 Sup. Ct. Rep. 667; Monongahela Bridge Co. v. United States, 216 U. S. 177, 194, 54 L. ed. 435, 442, 30 Sup. Ct. Rep. 356; Philadelphia Co. v. Stimson, 223 U. S. 605, 638, 56 L. ed. 570, 584, 32 Sup. Ct. Rep. 340.

The premises directly affected were within high water and harbor lines of a navigable stream, and therefore the 5th Amendment cannot be invoked.

Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 64, 57 L. ed. 1076, 33 Sup. Ct. Rep. 667.

The damages complained of were not the result of direct invasion by the government, but the incidental consequence of a lawful exercise of governmental power.

Prosser v. Northern P. R. Co. 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528.

Appellant's contention being predicated upon tortious acts of government officials, the court of claims was without jurisdiction.

Langford v. United States, 101 U. S. 341–346, 25 L. ed. 1010–1012; Bigby v. United States, 188 U. S. 400, 410, 47 L. ed. 519, 525, 23 Sup. Ct. Rep. 468; Hill v. United States, 149 U. S. 593, 599, 37 L. ed. 862, 864, 13 Sup. Ct. Rep. 1011.

Mr. Justice Van Devanter delivered the opinion of the court:

Henry F. Willink sued to recover as upon an implied contract for an alleged taking of his property in the improvement of the harbor in the Savannah river at Savannah, Georgia. A recovery was denied (38 Ct. Cl. 693; 49 Ct. Cl. 701), and the claimant's executrix prosecutes this appeal.

The material facts disclosed by the findings are these: At Savannah the river is navigable and within the ebb and flow of the tide. Opposite the city is Hutchinson's island, a strip of which on the side towards the city was owned by the claimant. He there conducted a plant for repairing vessels. Among his facilities used in the business were a marine railway and a wharf. The former extended into the river and was protected by sheet piling "where in the water." A substantial portion of it lay below the mean high-water line, and the wharf seems also to have been below that line, although its location is not precisely stated. In the conduct of the claimant's business the vessels subjected to repair were drawn out of the river and lowered into it by means of the railway, and to prevent its lower end, "which was under water at high tide," from becoming seriously obstructed by deposits of mud the piling was driven on both sides. The piling was effectual for the purpose, but decayed in time and had to be replaced.

Prior to 1887 many improvements had been made in the harbor, and in that year a plan for further and extensive improvements was submitted to Congress, but was not approved. Among other changes this plan contemplated [578] a widening of the river by cutting away a portion of Hutchinson's island, including that whereon the claimant's facilities were situate. On May 4, 1889, the harbor line, which theretofore had not reached the island or the claimant's facilities, was re-established by the Secretary of War, under § 12 of the act of August 11, 1888, chap. 860, 25 Stat. at L. 400, 425, in such manner that a part of the claimant's land and all of his facilities were brought within the harbor area. In 1890 another extended project, retaining the earlier proposal to widen the river by cutting away a portion of the island, was submitted to Congress and was approved. The estimated cost of this project was $3,500,000, which included $45,000 for "possible land damages" to the island. A part of the larger sum was appropriated each year until the appropriations equaled the full estimate, which was in 1895. The appropriation of July 13, 1892, chap. 158, 27 Stat. at L. 88, 92, was accompanied by a provision that "contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete the present project of improvement, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate" so much of the estimate as remained unappropriated. A

contract was then made for cutting away a portion of the island, including that whereon the claimant's facilities were situate, but this work never was done or undertaken, and the appropriations were otherwise exhausted and the project treated as completed.

In the summer of 1892 the condition of the claimant's wharf and piling became such that it was necessary to rebuild the one and to renew the other. While he was so engaged the engineer officer in charge of the harbor improvements requested him to desist and to remove all of his facilities that were within the harbor area as defined by the Secretary of War in 1889. The request was followed by a letter from the United States attorney for [579] that district, notifying the claimant that in driving the piling he was obstructing navigation contrary to the act of September 19, 1890, chap. 907, 26 Stat. at L. 426, 454, 455, and that unless he desisted and "all piling outside of the bulkhead line" was removed, he would be prosecuted. Because of this request and notice he ceased work upon the piling and wharf, but did not remove any of his facilities or surrender them or his land to the United States or any of its officers. On the contrary, he continued to operate his plant and use his marine railway and other facilities as best he could. Theretofore he was able to haul up on the railway and repair vessels of considerable draft, and the chief profit in his business came from that work; but thereafter, the renewal of the piling being prevented, deposits of mud filled up the entrance to the railway to such an extent that he was obliged to confine his work to smaller vessels. Even then it was necessary to be almost constantly dredging the entrance. This condition continued until December, 1897, when the Secretary of War re-established the harbor line as it was prior to May 4, 1889. The expense incurred by the claimant in dredging was $7,697, and the loss consequent upon his inability to handle the larger vessels was $12,500.

Upon these facts, as before indicated, the court held that he was not entitled to recover.

We reach the same conclusion, and for the following reasons:

There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use. Yesler v. Washington Harbor Line, 146 U. S. 646, 656, 36 L. ed. 1119, 1122, 13 Sup. Ct. Rep. 190; Prosser v. Northern P. R. Co. 152 U. S. 59, 65, 38 L. ed. 352, 356, 14 Sup. Ct. Rep. 528; Philadelphia Co. v. Stimson, 223 U. S. 605, 623, 56 L. ed. 570, 578, 32 Sup. Ct. Rep. 340. [580] No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance. Thus, at best, the asserted taking rested upon the acts of the engineer officer and the district attorney in preventing the claimant from renewing his piling and rebuilding his wharf. But in this no right of his was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed. Gibson v. United States, 166 U. S. 269, 271, 41 L. ed. 996, 998, 17 Sup. Ct. Rep. 578; Scranton v. Wheeler, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; Philadelphia Co. v. Stimson, 223 U. S. 605, 634, 638, 56 L. ed. 570, 582, 584, 32 Sup. Ct. Rep. 340; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 53, 62, 57 L. ed. 1063, 1075, 33 Sup. Ct. Rep. 667; Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 88, 57 L. ed. 1083, 1085, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232; Greenleaf Johnson Lumber Co. v. Garrison, 237 U. S. 251, 263, 59 L. ed. 939, 945, 35 Sup. Ct. Rep. 551. The piling and wharf were below the mean high-water line, and so, if navigation was likely to be injuriously affected by their presence, Congress could prevent their renewal without entitling him to compensation therefor. See cases supra. By the legislation in force at the time, Congress not only authorized the Secretary of War to establish the harbor lines, but made it unlawful to extend any wharf or other works, or to make any deposits, within the harbor area as so defined, except under such regulations as the Secretary might prescribe, and laid upon the district attorney and the officer in charge of the harbor improvements the duty of giving attention to the enforcement of its prohibitive and punitive provisions (chap. 860, § 12, 25 Stat. at L. 400, 425; chap. 907, §§ 11, 12, 26 Stat. at L. 426, 455, Comp. Stat. 1913, § 9923). When the claimant attempted to renew the piling and rebuild the wharf, they were not only below the mean high-water line, but [581] within the harbor area as defined under this legislation. Consistently with its prohibitions he could not proceed with the work, except under a permissible

regulation of the Secretary of War. It is not contended that the work was thus made permissible, and so the conclusion is unavoidable that the claimant was proceeding in violation of the statute, and that the engineer officer and the district attorney rightly requested him to desist. Such inconvenience and damage as he sustained resulted not from a taking of his property, but from the lawful exercise of a power to which it had always been subject. Gibson v. United States, 166 U. S. 276, 41 L. ed. 1002, 17 Sup. Ct. Rep. 578; Bedford v. United States, 192 U. S. 217, 224, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt, Appt.,
v.
CHICAGO AUDITORIUM ASSOCIATION. (No. 162.)

CHICAGO AUDITORIUM ASSOCIATION, Appt. and Petitioner,
v.
CENTRAL TRUST COMPANY OF ILLINOIS, Trustee of the Estate of Frank E. Scott Transfer Company, Bankrupt. (No. 174.)

(See S. C. Reporter's ed. 581–594.)

Appeal — from circuit court of appeals — bankruptcy case — Federal question.

1. A decision of a circuit court of appeals that a claim against a bankrupt estate for damages growing out of the anticipatory breach of an executory contract, while allowable as a provable debt for the term during which that court thought that the contract was mutually obligatory, should not be allowed beyond that period, is not reviewable in the Federal Supreme Court under the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, Comp. Stat. 1913, § 9609), § 25b-1, as presenting a Federal question which would sustain a writ of error to a state court.

[For other cases, see Appeal and Error, 790–807, in Digest Sup. Ct. 1908.]

Bankruptcy — provable debt — damages for anticipatory breach of contract.

2. The filing of an involuntary petition in bankruptcy against a baggage transfer and livery corporation, followed by an adjudication of bankruptcy, is the equivalent of an anticipatory breach of its executory contract with a hotel company for the latter's baggage and livery business, where the trustee in bankruptcy does not elect to assume performance, and gives rise to a claim provable in the bankruptcy proceedings, as one "founded", within the meaning of the act of July 1, 1898 (30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9647), § 63a-4, "upon a contract, express or implied."

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

Bankruptcy — provable debt — damages for anticipatory breach of contract — term.

3. A bankruptcy court, in allowing as a provable debt a claim for damages arising out of the anticipatory breach by the bankrupt of its executory contract with a hotel company for the latter's baggage and livery business, should not limit it to the damages for the six months following such breach, although the contract reserved to the hotel company an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months.

[For other cases, see Bankruptcy, X. a, in Digest Sup. Ct. 1908.]

[Nos. 162 and 174.]

Argued January 12, 1916. Decided April 3, 1916.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which, reversing a decree of the District Court for the Northern District of Illinois, Eastern Division, allowed, as a provable debt against the bankrupt estate, a part of the damages growing out of the bankrupt's anticipatory breach of an executory contract. Affirmed. Also a

ACROSS APPEAL from, and Certiorari to, the United States Circuit Court of Appeals for the Seventh Circuit on behalf of the creditors to review the same decree. Appeal dismissed, and decree reversed on certiorari.

See same case below, 132 C. C. A. 452, 216 Fed. 308.

The facts are stated in the opinion.

Mr. **Edwin C. Brandenburg** argued the cause, and, with Messrs. Frederick D. Silber and Clarence J. Silber, filed a brief for the Central Trust Company of Illinois:

Subdivisions 1 and 4, of § 63a, of the bankrupt act, must be construed together, and the words, "absolutely owing at the

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605, and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

On the appellate jurisdiction of Federal Supreme Court in bankruptcy cases—see note to James v. Stone, 57 L. ed. U. S. 573.

time of the filing of the petition," etc., appearing in subdivision 1, are to be read into and construed as a part of subdivision 4.

Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; 24 Am. Bankr. Rep. 493; Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 24 Am. Bankr. Rep. 588; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250, 28 Am. Bankr. Rep. 328.

Anticipatory breach of an executory contract results from a positive, unconditional, and unequivocal declaration by a party thereto, of a fixed purpose not to perform the contract, in any event or at any time.

Dingley v. Oler, 117 U. S. 490, 29 L. ed. 984, 6 Sup. Ct. Rep. 850; Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 30 L.R.A. 33, 38 N. E. 773; Zuck v. McClure, 98 Pa. 541; Johnstone v. Milling, L. R. 16 Q. B. Div. 460, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238, 50 J. P. 694; Dalrymple v. Scott, 19 Ont. App. Rep. 477; People v. Globe Mut. L. Ins. Co. 91 N. Y. 174; Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Pennsylvania Steel Co. v. New York City R. Co. 117 C. C. A. 503, 198 Fed. 735.

Neither insolvency nor the filing of an involuntary petition in bankruptcy, followed by adjudication, constitutes a breach of an executory contract, to which the insolvent or bankrupt is a party, and from which a provable debt accrues.

Phenix Nat. Bank v. Waterbury, 197 N. Y. 161, 90 N. E. 435, 23 Am. Bankr. Rep. 250; Re Agra Bank, L. R. 5 Eq. 160, 37 L. J. Ch. N. S. 121, 16 Week. Rep. 270; Malcomson v. Wappoo Mills, 88 Fed. 680; Re Inman, 171 Fed. 185, 22 Am. Bankr. Rep. 524, 175 Fed. 312, 23 Am. Bankr. Rep. 566; Lesser v. Gray, 8 Ga. App. 605, 70 S. E. 104, affirmed in 236 U. S. 70, 59 L. ed. 471, 35 Sup. Ct. Rep. 227, 34 Am. Bankr. Rep. 8; Re Imperial Brewing Co. 143 Fed. 579, 16 Am. Bankr. Rep. 110; Re Montague, 32 Am. Bankr. Rep. 106; Re Swift, 50 C. C. A. 264, 112 Fed. 315, 7 Am. Bankr. Rep. 374; Re Pettingill, 137 Fed. 143, 14 Am. Bankr. Rep. 728; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57, 19 Am. Bankr. Rep. 23.

The resulting claim for damages, if bankruptcy is in fact a breach, constitutes nothing more than a contingent claim, which is nonprovable under the present bankruptcy act, § 63a.

1 Remington, Bankr. 2d ed. § 641; Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757, 10 Am. Bankr. Rep. 139; Cotting v. Hooper, 34 Am. Bankr. Rep. 23; Re D. Levy & Sons Co. 208 Fed. 479, 31 Am. Bankr. Rep. 25; Re American Vacuum Cleaner Co. 192 Fed. 939, 26 Am. Bankr. Rep. 621; Williams v. United States Fidelity & G. Co. 236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. Rep. 289, 34 Am. Bankr. Rep. 181.

For the same reason, as applied to leasehold contracts, subsequent instalments of rent or damages for alleged breach through bankruptcy of one of the parties are not provable in bankruptcy.

Watson v. Merrill, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359, 14 Am. Bankr. Rep. 453; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250, 28 Am. Bankr. Rep. 328; Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667, 24 Am. Bankr. Rep. 588; Slocum v. Soliday, 106 C. C. A. 56, 183 Fed. 410, 25 Am. Bankr. Rep. 460.

The contract involved passed by operation of law as part of the bankrupt's estate to the appellant as its trustee.

Gazlay v. Williams, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687, 20 Am. Bankr. Rep. 18.

And as such, the appellant had a reasonable length of time after its election and qualification as trustee, to either assume or renounce performance of the contract.

Sparhawk v. Yerkes, 142 U. S. 1, 13, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104; Sessions v. Romadka, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; Atchison, T. & S. F. R. Co. v. Hurley, 82 C. C. A. 453, 153 Fed. 503, 18 Am. Bankr. Rep. 396.

The cross appeal should be dismissed.

Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; Kenney v. Craven, 215 U. S. 125, 54 L. ed. 122, 30 Sup. Ct. Rep. 64; Blake v. Openhym, 216 U. S. 322, 54 L. ed. 498, 30 Sup. Ct. Rep. 309; New Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; Missouri ex rel. Carey v. Andriano, 138 U. S. 497, 34 L. ed. 1013, 11 Sup. Ct. Rep. 385.

Mr. William D. Bangs argued the cause, and, with Messrs. Rudolph Matz and John C. Mechem, filed a brief for the Chicago Auditorium Association:

Bankruptcy constitutes a material breach of executory contracts.

A. Disablement from performance is a breach of contract.

Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780.

B. Insolvency is often a disablement.

Chemical Nat. Bank v. World's Columbian Exposition, 170 Ill. 82, 48 N. E. 331; Bank Comrs. v. New Hampshire Trust Co. 69 N. H. 621, 44 Atl. 130.

C. And similarly, the appointment of a receiver.

Pennsylvania Steel Co. v. New York City R. Co. 117 C. C. A. 503, 198 Fed. 721.

D. Or proceedings for liquidation under special statutes.

Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295.

E. Bankruptcy is a complete disablement.

Re Swift, 50 C. C. A. 264, 112 Fed. 315; Re Pettingill, 137 Fed. 143; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; Re Duquesne Incandescent Light Co. 176 Fed. 785; Re Dr. Voorhees Awning Hood Co. 187 Fed. 611.

A claim for damages for a material breach of an executory contract caused by bankruptcy constitutes a provable debt.

Zavelo v. Reeves, 227 U. S. 625, 57 L. ed. 676, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664; Ex parte Pollard, 2 Low. Dec. 411, Fed. Cas. No. 11,252; Re Swift, 50 C. C. A. 264, 112 Fed. 315; Re Pettingill, 137 Fed. 143; Re Neff, 28 L.R.A.(N.S.) 349, 84 C. C. A. 561, 157 Fed. 57; Re Duquesne Incandescent Light Co. 176 Fed. 785; Re Dr Voorhees Awning Hood Co. 187 Fed. 611; Pennsylvania Steel Co. v. New York City R. Co. 117 C. C. A. 503, 198 Fed. 721; Lesser v. Gray, 236 U. S. 70, 59 L. ed. 471, 35 Sup. Ct. Rep. 227; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332.

The present case does not involve an anticipatory breach of contract.

Williston, Wald's Pollock, Contr. pp. 362, 363; Lowe v. Harwood, 139 Mass. 135, 29 N. E. 538.

The claim is provable, although the damages are unliquidated and the trustee has an option to continue the performance of executory contracts.

Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 53 L. ed. 591, 29 Sup. Ct. Rep. 332; Re Swift, 50 C. C. A. 264, 112 Fed. 315; Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757; Cobb v. Overman, 54 L.R.A. 369, 48 C. C. A. 223, 109 Fed. 65.

The rule as to the material breach of a covenant to pay rent does not apply to the material breach of executory contracts.

Co. Litt. p. 292b, §§ 512, 513; Re Roth, 31 L.R.A.(N.S.) 270, 104 C. C. A. 649, 181 Fed. 667; Watson v. Merrill, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359; Slocum v. Soliday, 106 C. C. A. 56, 183 Fed. 410.

An option in one party of cancelation upon stipulated contingencies does not, after material breach by the other party, affect the recovery of damages for breach of contract by that party for whose benefit the option was inserted.

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757.

The general policy of the bankruptcy act favors the provability of claims for damages upon executory contracts matured by bankruptcy.

Williams v. United States Fidelity & G. Co. 236 U. S. 549, 59 L. ed. 713, 35 Sup. Ct. Rep. 289.

Mr. Justice Pitney delivered the opinion of the court:

On July 22, 1911, a creditors' petition in bankruptcy was filed against the Frank E. Scott Transfer Company, an Illinois corporation, and it was adjudged a bankrupt on August 7. The act of bankruptcy charged and adjudicated does not appear. When the proceedings were commenced, the bankrupt held contract relations with the Chicago Auditorium Association under a written agreement made between them February 1, 1911, which had been partially [586] performed. By its terms the Association granted to the Transfer Company, for a term of five years from the date of the contract, the baggage and livery privilege of the Auditorium Hotel, in the city of Chicago; that is to say, the sole and exclusive right, so far as it was within the legal capacity of the Association to grant the same, to transfer baggage and carry passengers to and from the hotel and to furnish livery to its guests and patrons. For the baggage privilege the Transfer Company agreed to pay to the Association the sum of $6,000, in monthly instalments of $100 each, and for the livery privilege the sum of $15,000, in monthly instalments of $250 each, and also agreed to furnish to the hotel and its guests and patrons prompt and efficient baggage and livery service at reasonable rates at all times during the continuance of the privileges. It was further agreed as follows:

"The party of the first part [Chicago Auditorium Association], however, reserves the right, which is an express condition of the foregoing grants, to cancel and revoke either or both of said privileges, by giving six months' notice in writing of its election so to do, whenever the service is not, in the opinion of the party of the first part, satisfactory, or in the event of any change in management of said hotel; and in case of the termination of either or both of said privileges by exercise of the right and option reserved by this paragraph, such privilege or privileges shall cease and determine at the expiration of the six months' notice aforesaid, and both parties hereto shall in that case be released from further liability

respecting the concession so canceled and revoked.

"Said rights and concessions shall not be assignable without the express written consent of the party of the first part, nor shall the assignment of the same, with such written consent, relieve the party of the second part [Scott Transfer Company] from liability on the covenants and agreements of this instrument."

[587] The contract authorized the Association, in the event of default by the Transfer Company in the payment of any instalment of money due, or in the performance of any other covenant, if continued for thirty days, to terminate the privileges at its option, without releasing the Transfer Company from liability upon its covenants. Should either or both of the privileges be thus terminated before January 31, 1916, the Association was to be at liberty to sell the privileges, or make a new or different contract for the remainder of the term, but was not to be obliged to do this, and the Transfer Company, unless released in writing, was to remain liable for the entire amount agreed to be paid by it.

Up to the time of the bankruptcy this contract remained in force, and neither party had violated any of its covenants. The trustee in bankruptcy did not elect to assume its performance, and the Association entered into a contract with other parties for the performance of the baggage and livery service, and obtained therefrom the sum of $234.69 monthly as compensation for those privileges. On February 28, 1912, it exhibited its proof against the bankrupt estate, claiming an indebtedness of $6,537.94, of which $311.20 had accrued prior to the bankruptcy proceedings, and the remainder was claimed as unliquidated damages arising under the contract for alleged breach thereof on the part of the bankrupt through the bankruptcy proceedings. Of this amount $691.86 represented the loss incurred during the first six months of bankruptcy. Objections filed by the trustee were sustained by the referee, except as to that portion of the claim which had accrued prior to the bankruptcy proceedings. On review, the district court sustained this decision. On appeal to the circuit court of appeals, the order of the district court was reversed, and the cause remanded with direction to allow $691.86 upon the claim, and to disallow the remaining portion. 132 C. C. A. 452, 216 Fed. 308.

[588] An appeal to this court by the trustee in bankruptcy was allowed, under § 25b–2 of the bankruptcy act (of July 1, 1898, chap. 541, 30 Stat. at L. 544, 553, Comp. Stat. 1913, §§ 9585, 9609), upon a certificate by a justice of this court that the determination of the questions involved was essential to a uniform construction of the act throughout the United States. This is No. 162. Thereafter a cross appeal by the Auditorium Association was allowed by one of the judges of the circuit court of appeals. This is No. 174.

A motion is made to dismiss the cross appeal, and this must be granted. In the absence of the certificate prescribed by § 25b–2, the sole authority for an appeal from a decision of the circuit court of appeals, allowing or rejecting a claim, is found in § 25b–1: "Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a state to the Supreme Court of the United States." This limits such appeals to cases where Federal questions are involved, of the kind described in § 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, § 1214). The motion to dismiss is resisted upon the ground that the claim of the Association to damages beyond a period of six months was denied by the court of appeals as not constituting a provable debt in bankruptcy, and that a Federal question is thus necessarily presented, provability depending upon a construction of the bankruptcy act. An examination of the opinion of that court, however, shows that while it held that damages for anticipatory breach of the contract were provable, it held that the contract itself, because of the option reserved to the Auditorium Association to cancel it on six months' notice, was mutually obligatory for that term only, and hence no damages beyond that period were allowable. This involved no Federal question. Chapman v. Bowen, 207 U. S. 89, 92, 52 L. ed. 116, 117, 28 Sup. Ct. Rep. 32.

But, in view of the general importance of the question of the amount allowable in its relation to the questions [589] involved in the trustee's appeal, we have concluded that a certiorari should be allowed in lieu of the cross appeal.

Coming to the merits: It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach. The rule has its exceptions, but none that now concerns us. Roehm v. Horst, 178 U. S. 1, 18, 19, 44 L. ed. 953, 960, 961, 20 Sup. Ct. Rep. 780. And see O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410,

412, 57 Atl. 463, 1 Ann. Cas. 422. There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. It was, however, held in Lovell v. St. Louis Mut. L. Ins. Co. 111 U. S. 264, 274, 28 L. ed. 423, 426, 4 Sup. Ct. Rep. 390, where a life insurance company became insolvent and transferred its assets to another company, that a policy holder was entitled to regard his contract as terminated and demand whatever damages he had sustained thereby. And see Carr v. Hamilton, 129 U. S. 252, 256, 32 L. ed. 669, 670, 9 Sup. Ct. Rep. 295. In support of the provability of the claim in controversy, Ex parte Pollard, 2 Low. Dec. 411, Fed. Cas. No. 11,252; Re Swift (C. C. A. 1st) 50 C. C. A. 264, 112 Fed. 315, 319, 321; Re Stern (C. C. A. 2d) 54 C. C. A. 60, 116 Fed. 604; Re Pettingill (D. C. Mass.) 137 Fed. 143, 146, 147; Re Neff (C. C. A. 6th) 28 L.R.A. (N.S.) 349, 84 C. C. A. 561, 157 Fed. 57, 61, are referred to; and see Pennsylvania Steel Co. v. New York City R. Co. (C. C. A. 2d) 117 C. C. A. 503, 198 Fed. 721, 736, 744. To the contrary, Re Imperial Brewing Co. (D. C. Mo.) 143 Fed. 579; Re Inman (D. C. Ga.) 171 Fed. 185, s.c. 175 Fed. 312; [590] besides which a number of cases arising out of the relation of landlord and tenant are cited: Re Ells, 98 Fed. 967; Re Pennewell, 55 C. C. A. 571, 119 Fed. 139; Watson v. Merrill, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 359; Re Roth, 31 L.R.A. (N.S.) 270, 104 C. C. A. 649, 181 Fed. 667; Colman Co. v. Withoft, 115 C. C. A. 222, 195 Fed. 250. Cases of the latter class are distinguishable because of the "diversity betweene duties which touch the realty, and the meere personalty." Co. Litt. 292, b, § 513.

The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the Transfer Company. The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. It may be conceded that the contract was assignable, and passed to the trustee under § 70a (30 Stat. at L. 565, chap. 541, Comp. Stat. 1913, § 9654), to the extent that it had an option to perform it in the place of the bankrupt (see Sparhawk v. Yerkes, 142 U. S. 1, 13, 35 L. ed. 915, 918, 12 Sup. Ct. Rep. 104; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 322, 35 L. ed. 1025, 1028, 12 Sup. Ct. Rep. 235); for although there was a stipulation against assignment without consent of the Auditorium Association, it may be assumed that this did not prevent an assignment by operation of law. Still, the trustee in bankruptcy did not elect to assume performance, and so the matter is left as if the law had conferred no such election.

It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken, with respect to the effect of a state proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a receiver, and [591] dissolving the corporation, in People v. Globe Mut. L. Ins. Co. 91 N. Y. 174, cited with approval in some of the Federal court decisions above referred to. In that case, it did not appear that the company was the responsible cause of the action of the state, so as to make the dissolution its own act; but, irrespective of this, we cannot accept the reasoning. As was said in Roehm v. Horst, 178 U. S. 19, 44 L. ed. 960, 20 Sup. Ct. Rep. 780: "The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due." Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the bankruptcy act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Williams v. United States Fidelity & G. Co. 236 U. S. 549, 554, 59 L. ed. 713, 716, 35 Sup. Ct. Rep. 289. Executory agreements

play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for nonperformance in the future, although without the property or credit often necessary to enable them to perform. [592] We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine of Roehm v. Horst, supra.

The claim for damages by reason of such a breach is "founded upon a contract, express or implied," within the meaning of § 63a–4, and the damages may be liquidated under § 63b. Frederic L. Grant Shoe Co. v. W. M. Laird Co. 212 U. S. 445, 448, 53 L. ed. 591, 593, 29 Sup. Ct. Rep. 332. It is true that in Zavelo v. Reeves, 227 U. S. 625, 631, 57 L. ed. 676, 678, 33 Sup. Ct. Rep. 365, Ann. Cas. 1914D, 664, we held that the debts provable under § 63a–4 include only such as existed at the time of the filing of the petition. But we agree with what was said in Ex parte Pollard, 2 Low. Dec. 411, Fed. Cas. No. 11,252, that it would be "an unnecessary and false nicety" to hold that because it was the act of filing the petition that wrought the breach, therefore there was no breach at the time of the petition. As was held by the same learned judge in Re Pettingill, 137 Fed. 143, 147; "The test of provability under the act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disenabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disenablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b (30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9647)." It was in effect so ruled by this court in Lesser v. Gray, 236 U. S. 70, 75, 59 L. ed. 471, 475, 35 Sup. Ct. Rep. 227, where it was said: "If, as both the bankruptcy and state courts concluded, the contract was terminated by the involuntary bankruptcy proceeding, no legal injury resulted. If, on the other hand, that view of the law was erroneous, then there was a breach and defendant Gray became liable *for any resulting* damage; but he was released therefrom by his [593] discharge." Of course, he could not be released unless the debt was provable.

We therefore conclude that the circuit court of appeals was correct in holding that the intervention of bankruptcy constituted such a breach of the contract in question as entitled the Auditorium Association to prove its claim.

The denial of all damages except such as accrued within six months after the filing of the petition was based upon the ground that the contract reserved to the Association an option to revoke the privileges by giving six months' notice in writing of its election so to do, in which case both parties were to be released from further liability at the expiration of the six months. It was held that because of this the contract was mutually obligatory for that term only, and uncertain and without force for any longer term of service *in futuro*, within the ruling of this court in Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 757. In that case the contract was to pay to a divorced wife "during her life, or until she marries, for her maintenance and support, yearly, the sum of $500;" and it was held that for instalments falling due after bankruptcy the husband remained liable, notwithstanding his discharge, on the ground that the wife's claim for such payments was not provable because of the impossibility of calculating the continuance of widowhood so as to base a valuation upon it. The court referred to the 1903 amendment of § 17 of the bankruptcy act (32 Stat. at L. 797, chap. 487, Comp. Stat. 1913, § 9601), relating to debts not affected by a discharge, and including among these a liability for alimony due or to become due for maintenance or support of wife or child. This, while enacted after the Dunbar suit was begun, and not applicable to it, was cited as showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support of his wife or children. The authority of that decision cannot be extended to cover [594] such a case as the present. Here the obligation of the bankrupt was clear and unconditional. The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges. It does not lie in the mouth of the latter, or of its trustee, to say that its service would not be satisfactory, and there is no presumption that otherwise it would have been advantageous to the Association to exercise the option. It results that the decree, in so far as it limits the provable claim to a period of six months after the bankruptcy, must be reversed, and the cause remanded

for further proceedings in conformity with this opinion.

No. 162. Decree affirmed.

No. 174. Appeal dismissed, certiorari allowed, and decree reversed.

HERMAN H. PINEL and Sarah Slyfield, Appts.,
v.
THOMAS F. PINEL, Thomas F. Pinel as Special Administrator of the Estate of Edgar O. Pinel, Deceased, and Rachael Pinel.

(See S. C. Reporter's ed. 594–598.)

Federal courts — jurisdictional amount — uniting claims — distinct demands.

1. The amount in controversy essential to the jurisdiction of a Federal district court is not involved in a suit by two children to establish their alleged title to an undivided interest in their deceased father's real property, based upon his omission, through accident or mistake, to provide for them in his will, where the value of the interest of neither complainant, taken separately, equals the jurisdictional amount.

[For other cases, see Courts, 908–911, in Digest Sup. Ct. 1908.]

Pleading — averring jurisdictional amount.

2. The averment in the bill in a suit to establish title to land that one of the two complainants is entitled to an undivided one-eighth interest, and the other to an undivided two-eighths interest, making together an undivided three-eighths interest in the property, "which said interests are of the value of $4,500 and upwards over and above all encumbrances," is not the legal equivalent of saying that the interest of either complainant was of the value of more than the $3,000 which must be involved in order to give a Federal district court jurisdiction.

[For other cases, see Pleading, 331–336, in Digest Sup. Ct. 1908.]

[No. 181.]

Argued January 17, 1916. Decided April 3, 1916.

APPEAL from the District Court of the United States for the Eastern District of Michigan to review a decree dismissing, for want of jurisdiction, the bill in a suit to establish title to land. Affirmed.

The facts are stated in the opinion.

Mr. Emil W. Snyder argued the cause, and, with Mr. Frank E. Robson, filed a brief for appellants:

The amount in controversy is sufficient to give the district court jurisdiction.

Kilgore v. Norman, 119 Fed. 1008; Smithers v. Smith, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297; North American Cold Storage Co. v. Chicago, 151 Fed. 120; Clay v. Field, 138 U. S. 464, 479, 34 L. ed. 1044, 1949, 11 Sup. Ct. Rep. 419; Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co. 43 Fed. 545; Woodside v. Ciceroni, 35 C. C. A. 177, 93 Fed. 1; Greenfield v. United States Mortg. Co. 133 Fed. 788; Lovett v. Prentice, 44 Fed. 459; Bates v. Carpentier, 98 Fed. 452; Shields v. Thomas, 17 How. 3–6, 15 L. ed. 93, 94.

The limit of the jurisdictional amount in this case is not $3,000, but $2,000, for the reason that the statutory amount at the time the cause of action arose governs, and not the amount at the time of bringing the suit.

Taylor v. Midland Valley R. Co. 197 Fed. 323.

It has been held that the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say, in advance, that the defense will be presented by the defendant, or, if presented, sustained by the court?

Schunk v. Moline, M. & S. Co. 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; Jones v. Rowley, 73 Fed. 286.

It has been several times decided by this court that a suit cannot properly be dismissed by a circuit court when not involving an amount sufficient to come within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. The mere denial by affidavit does not deprive the court of jurisdiction.

Put-in-Bay Waterworks, Light & R. Co. v. Ryan, 181 U. S. 431, 45 L. ed. 937, 21 Sup. Ct. Rep. 709; Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

Mr. Lynn M. Johnston argued the cause, and, with Mr. L. C. Stanley, filed a brief for appellees:

The record does not show the necessary jurisdictional amount in dispute.

Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; The Connemara (Sinclair v. Cooper) 103 U. S. 754, 26 L. ed. 322; Clay v. Field, 138 U. S. 479, 34 L. ed. 1049, 11 Sup. Ct. Rep. 419; Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192; Hilton v. Dickinson, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900; Auer v. Lombard, 19 C. C. A. 72, 33 U. S. App. 438, 72 Fed. 209; Peper v. Fordyce, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; Wetherby v. Stinson, 10 C. C. A. 243,

18 U. S. App. 714, 62 Fed. 173; Henderson v. Wadsworth, 115 U. S. 264, 29 L. ed. 377, 6 Sup. Ct. Rep. 140; Gibson v. Shufeldt, 122 U. S. 30, 30 L. ed. 1084, 7 Sup. Ct. Rep. 1066; Bowman v. Bowman, 30 Fed. 849; Rich v. Bray, 2 L.R.A. 225, 37 Fed. 273; King v. Wilson, 1 Dill. 556, Fed. Cas. No. 7,810; Massa v. Cutting, 30 Fed. 1; Woodman v. Latimer, 2 Fed. 842; Seaver v. Bigelow, 5 Wall. 208, 18 L. ed. 595; Terry v. Hatch (Terry v. Bank of Commerce) 93 U. S. 44, 23 L. ed. 796; Chatfield v. Boyle, 105 U. S. 231–234, 26 L. ed. 944, 945; Bland v. Fleeman, 29 Fed. 669; Busey v. Smith, 67 Fed. 15; Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369.

The matter in dispute is determined by the whole record.

Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 29 L. ed. 502, 6 Sup. Ct. Rep. 192; Hilton v. Dickinson, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; Bowman v. Bowman, 30 Fed. 849.

Mr. Justice Pitney delivered the opinion of the court:

This is a direct appeal under § 238, Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215), from an order dismissing a bill of complaint for want of jurisdiction. There are two complainants, and the jurisdictional questions certified are, (1) whether the amount in controversy is sufficient to give the court jurisdiction, and (2) whether the parties are collusively joined.

It is averred in the bill that complainants and defendants are the children of one Charles T. Pinel, a resident of the state of Michigan, who died June 26, 1888, possessed in fee simple of a tract of land situate in that state, and leaving a last will and testament which was afterwards duly admitted to probate there, by which he left his entire estate to the defendants, failing to provide for complainants, who are two of his children, and for another child, Charles W. Pinel; that their omission from the will was not intentional on the part of the said Charles T. Pinel, but was made by a mistake or accident; that the laws of the state of Michigan (Comp. Laws 1897, § 9286) [596] provide that when any testator shall omit to provide in his will for any of his children, and it shall appear that such omission was not intentional and was made by mistake or accident, such child shall have the same share in the estate of the *testator* as if he had died intestate; that by virtue of the statute complainants and the said Charles W. Pinel were severally entitled to the same shares in the estate of Charles T. Pinel, deceased, as if he had died intestate; that testator left a widow and nine children, one of whom is since deceased; that after testator's death Charles W. Pinel conveyed all his interest in the estate to the complainant Sarah Slyfield; and that, by reason of the premises, "complainant Herman Pinel is entitled to an undivided one-eighth interest, and complainant Sarah Slyfield to an undivided two-eighths interest, or in all both complainants together to an undivided three-eighths interest in the aforesaid property, which said interests are of the value of $4,500 and upwards over and above all encumbrances." The prayer is, in effect, that the title of complainants to an undivided three-eighths interest in the land may be established.

The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. Clay v. Field, 138 U. S. 464, 479, 34 L. ed. 1044, 1049, 11 Sup. Ct. Rep. 419; Troy Bank v. G. A. Whitehead & Co. 222 U. S. 39, 56 L. ed. 81, 32 Sup. Ct. Rep. 9. This case comes within the former class, since the title of each complainant is separate and distinct from that of the other; it being evident that the testator's omission to provide for one of his children by will, based upon mistake or accident, is independent of the question whether a like mistake was made with respect to another child.

[597] The action having been brought in the district court under the first paragraph of § 24, Judicial Code (act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1091, Comp. Stat. 1913, § 991), on the ground of diversity of citizenship, it is necessary that the matter in controversy exceed the sum or value of $3,000, and that this shall appear by distinct averment upon the face of the bill, or otherwise from the proofs. The averment that complainant Pinel is entitled to an undivided one-eighth interest, and complainant Slyfield to an undivided two-eighths interest, making together an undivided three-eighths interest in the property in question, "which said interests are of the value of $4.500 and upwards over and above all encumbrances," is not the legal equivalent of saying that the interest of either complainant is of the value of more than $3,000. It is not necessarily to be inferred that the value of an undivided two-

eighths is two-thirds of the value of an undivided three-eighths. The probable cost and difficulty of partition, and other like considerations, prevent the application of a mere rule of proportion. Affidavits were submitted pro and con upon the motion to dismiss, but they do not help matters. Complainants submitted five affidavits, all in a stereotyped form and based on information and belief, stating that the value of the farm as a whole is $15,000 and upwards, but saying nothing about encumbrances, nor stating distinctly the value of an undivided one-eighth or two-eighths interest. Defendants submitted four affidavits valuing the farm at not more than $9,000 if free and clear of encumbrances, but showing it encumbered to an amount upwards of $3,500. Were we to accept the highest valuation stated by anybody ($15,000) and deduct from it the amount of undisputed encumbrances, we should have a net valuation less than $11,500. Assuming undivided shares to be of proportionate value, a two-eighths interest would be worth less than $3,000.

Upon the whole, it does not satisfactorily appear that [598] the interest claimed by either complainant is sufficient in value to confer jurisdiction, and hence the bill was properly dismissed. It is obvious that, in the view we take of the case, the question of collusive joinder becomes immaterial.

Decree affirmed.

HENRY A. UTERHART and Emil Heuel, as Trustees under the Last Will and Testament of Conrad Stein, Deceased, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 598–605.)

Federal succession tax — vested or contingent interest — refunding.

The interests which the residuary legatees took by a will by which, as construed by a state court of competent jurisdiction, the testator directed that the whole of his residuary estate should, "so far as necessary," be applied to the support and education of his four minor children during their minorities, if the youngest child survived that period, and that the trustees should pay "so much" of the rents and income for that purpose "as shall be reasonable and proper," and bequeathed the residue, upon the youngest child attaining majority or sooner dying, to seven named children in equal shares, empowering the trustees to pay over by way of advance to the seven in equal amounts or shares "so much of the capital of the testator's residuary personal estate or the income thereof as in their judgment they may deem reasonable," and providing that they should not be compelled to make distribution of the principal of the estate or any part thereof "except in the exercise of their reasonable discretion" until the said youngest child attained his majority,—were contingent, and not vested prior to July 1, 1902, within the meaning of the provision of the act of June 27, 1902 (32 Stat. at L. 406, chap. 1160), § 3, for the refunding of succession taxes collected on contingent beneficial interests not so vested, where said youngest child had not attained the age of twenty-one years on that day—except with respect to such amounts as were actually advanced out of the trust funds by the trustees in the exercise of their discretion, prior to that date.

[For other cases, see Internal Revenue, III. h, in Digest Sup. Ct. 1908.]

[No. 214.]

Argued January 24, 1916. Decided April 3, 1916.

APPEAL from the Court of Claims to review a judgment dismissing a petition for the refund of Federal succession taxes. Reversed and remanded, with direction to enter judgment in favor of claimants.

See same case below, 49 Ct. Cl. 709.

The facts are stated in the opinion.

Mr. H. T. Newcomb argued the cause, and, with Mr. Morris F. Frey, filed a brief for appellants:

The judicial construction of the will binds the government; in denying this the government is making a collateral attack upon the judgment of a court of competent jurisdiction, this attack being supported by nothing except suggestions of error.

Orr v. Gilman, 183 U. S. 278, 288, 46 L. ed. 196, 202, 22 Sup. Ct. Rep. 213; Chanler v. Kelsey, 205 U. S. 466, 477, 51 L. ed. 882, 888, 27 Sup. Ct. Rep. 550; Ingersoll v. Coram, 211 U. S. 335, 53 L. ed. 208, 29 Sup. Ct. Rep. 92; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; Cornett v. Williams, 87 U. S. 226, 22 L. ed. 254; Laing v. Rigney, 160 U. S. 531, 542, 40 L. ed. 525, 528, 16 Sup. Ct. Rep. 366; Manson v. Duncanson, 166 U. S. 533, 546, 547, 41 L. ed. 1105, 1109, 1110, 17 Sup. Ct. Rep. 647.

NOTE.—On repeal of statute imposing succession tax as affecting estate of one who died before the repealing act took effect —see note to Trippet v. State, 8 L.R.A. (N.S.) 1210.

As to taxes on succession and collateral inheritance, generally—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037, and State ex rel. Ise v. Cline, 50 L.R.A.(N.S.) 991.

The universal test of the right of the government to have any tax assessed was that, with respect to personal property passing by will or by intestate succession, from one dying on or after June 13, 1898, there should be a right of succession which, prior to July 1, 1902, should ripen into an absolute right of immediate possession or enjoyment.

Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331; United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59; United States v. Jones, 236 U. S. 106, 59 L. ed. 488, 35 Sup. Ct. Rep. 261, Ann. Cas. 1916A, 316; McCoach v. Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421; Hertz v. Woodman, 218 U. S. 205, 219, 54 L. ed. 1001, 1007, 30 Sup. Ct. Rep. 621.

The rule that such discretionary power as that which Conrad Stein gave to his trustees is not to be taken away or controlled, while exercised in good faith, is firmly established. So, also, is the rule that legatees, whose interests are subject to such discretionary power, take nothing save when it is exercised and to the extent that it is exercised.

2 Sugden, Powers, p. 161, 3d Am. ed; 2 Perry, Trusts, § 508, p. 817; 1 Jarman, Wills, 6th Am. ed. p. 398; Hill, Trustees, 4th Am. ed. 767; Keyser v. Mitchell, 67 Pa. 473; Buchar's Estate, 225 Pa. 427, 25 L.R.A. (N. S.) 421, 74 Atl. 237; Lyman v. Parsons, 26 Conn. 493; Dandridge v. Washington, 2 Pet. 370, 7 L. ed. 454; Nichols v. Eaton, 91 U. S. 716, 23 L. ed. 254.

The tax could lawfully have been collected upon amounts awarded to these legatees, in the exercise of the discretionary power provided for in the will, only.

Ryle v. United States, 239 U. S. 658, ante, 489, 36 Sup. Ct. Rep. 221; Muenter v. Union Trust Co. 115 C. C. A. 390, 195 Fed. 480; Hanson, Death Duties, 6th ed. p. 36; Atty. Gen. v. Wade [1910] 1 K. B. 703, 79 L. J. K. B. 569, 102 L. T. N. S. 494.

Assistant Attorney General Wallace argued the cause, and, with Mr. William C. Herron, filed a brief for defendant in error:

The New York decree either (a) gave the residuary estate absolutely to the children by name, share and share alike, postponing payment merely until Carl died or reached majority; or (b) gave the residuary estate absolutely to the children, share and share alike, when Carl died or attained majority, meantime giving each child the income of his or her proportionate share.

In either case the authorities, without dissent, so far as we are aware, hold the interest vested.

Hanson v. Graham, 6 Ves. Jr. 239, 5 Revised Rep. 277, Re Williams [1907] 1 Ch. 180, 76 L. J. Ch. N. S. 41, 95 L. T. N. S. 759; Re Gossling [1903] 1 Ch. 448, 72 L. J. Ch. N. S. 433, 88 L. T. N. S. 279; Roper, Legacies, 2d Am. ed. p. 553; Jarman, Wills, 6th ed. p. 749; Bigelow, Bills, Notes & Cheques, pp. 794, 796; Theobald, Wills, Canadian ed. pp. 582, 588; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109; Potter v. Couch, 141 U. S. 296, 313, 314, 35 L. ed. 721, 731, 11 Sup. Ct. Rep. 1005; Johnson v. Washington Loan & T. Co. 224 U. S. 224, 237, 238, 56 L. ed. 741, 745, 746, 32 Sup. Ct. Rep. 421; Shelton v. King, 229 U. S. 90, 93, 94, 57 L. ed. 1086, 1087, 1088, 33 Sup. Ct. Rep. 686; Sanford v. Lackland, 2 Dill. 6, Fed. Cas. No. 12,312; Traver v. Schell, 20 N. Y. 91; Lovett v. Gillender, 35 N. Y. 617; Manice v. Manice, 43 N. Y. 303; Warner v. Durant, 76 N. Y. 133; Smith v. Edwards, 88 N. Y. 92; Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388; Burrill v. Sheil, 2 Barb. 457; Re Cogswell, 4 Dem. 248.

A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate or to let in some other interest. In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest.

Johnson v. Washington Loan & T. Co. 224 U. S. 224, 56 L. ed. 741, 32 Sup. Ct. Rep. 421; McArthur v. Scott, 113 U. S. 340, 378, 380, 28 L. ed. 1015, 1026, 1027, 5 Sup. Ct. Rep. 652; Cropley v. Cooper, 19 Wall. 167, 22 L. ed. 109.

Unless some impossible standard of physical control of personal property is to be adopted, the interest of these legatees in the whole residuary estate must be considered to have vested in possession prior to July 1, 1902. The case is really governed by United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59.

Mr. Justice Pitney delivered the opinion of the court:

This was a suit to recover succession taxes paid by appellants under the act of June 13, 1898 (chap. 448, 30 Stat. at L. 448, 464, Comp. Stat. 1913, § 6144), on account of interests in personal property passing to the residuary legatees under the will of Conrad Stein, deceased. It was brought under the act of June 27, 1902 (chap. 1160, § 3, 32 Stat. at L. 406), which provides for refunding "so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two." The testator was domiciled in the

state of New York, and the will was probated and appellants were appointed executors and trustees in that jurisdiction. The residuary legatees were seven of the nine children of testator, and at the time of his death on April 6, 1900, several of them were minors. All of the seven were living on July 1, 1902. The youngest, Carl Stein, had not attained the age of twenty-one years on that date. The residuary estate amounted to more than $1,000,000, and the taxes collected with respect to it aggregated $17,130.82, being based upon the theory that each of these legatees took a vested seventh interest at the death of the testator. If the taxes had been assessed on the advances actually made by appellants as executors and trustees for the benefit of the residuary legatees prior to July 1, 1902, they would have amounted to only $745.12.

One of the clauses of the will contained words bequeathing the residuary estate outright to the seven children in equal shares; but this was qualified by inconsistent language in other clauses, and some time prior to January 16, 1902, [602] one of the executors brought suit in the supreme court of the state of New York against his coexecutors and the beneficiaries for a judicial construction of the will, and a decree was made on the date mentioned, of which the pertinent clauses are set forth in the margin.[1] [603] Testator's personalty passed under the will, and the executors and trustees proceeded under and complied strictly with the directions contained in it, as interpreted and construed by the decree.

The court of claims held (49 Ct. Cl. 709) that the interest bequeathed by the will to the residuary legatees was a vested estate, and not a contingent beneficial interest, citing Vanderbilt v. Eidman, 196 U. S. 480, 49 L. ed. 563, 25 Sup. Ct. Rep. 331, and United States v. Fidelity Trust Co. 222 U. S. 158, 56 L. ed. 137, 32 Sup. Ct. Rep. 59.

It is very properly admitted by the government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (Knowlton v. Moore, 178 U. S. 41, 57, 44 L. ed. 969, 976, 20 Sup. Ct. Rep. 747), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees.

It is, however, contended that the will, as thus construed, either gave the residuary estate absolutely to the children by name, share and share alike, postponing payment [604] merely until Carl died or reached majority, or that it gave the estate to them absolutely when Carl died or attained majority, meanwhile giving to each child the income of his or her proportionate share. With this view we cannot concur. The decree declares the true construction to be "that *the whole* of his residuary estate, real and personal, should, *so far as necessary*, be applied to the support and education of his minor children, Josephine Stein, Paula Stein, Ella Stein, and Carl Stein, during the minorities if Carl Stein survive such period." Then follows a clause to the effect that the trustees should apply the income to the support and education of the minor children until they respectively attain the age of twenty-one years, if Carl survive such period, and that on his attaining the age of twenty-one or sooner dying the testator gave, devised, and bequeathed the residue to the seven named (including Carl) in equal shares. A subsequent clause directs the executors and trustees "to apply *so much*

[1] "It is further ordered, adjudged, and decreed: That it was the intention of the said Conrad Stein, and such is the true meaning and construction of his will, that the whole of his residuary estate, real and personal, should, so far as necessary, be applied to the support and education of his minor children, Josephine Stein, Paula Stein, Ella Stein and Carl Stein during the minorities if Carl Stein survive such period. To that end he gave, devised, and bequeathed to Emil Heuel and Alexander Stein, his executors and trustees, and to Josephine Stein, his executrix and trustee, all his residuary estate, both real and personal, upon trust to receive the rents, issues, and profits and income thereof until his son Carl Stein attains the age of twenty-one years, and to apply the same to the support and education of the testator's said minor children, Josephine Stein, Paula Stein, Ella Stein, and Carl Stein, until they respectively attain the age of twenty-one years, if Carl Stein survive such period, and on Carl Stein attaining the age of twenty-one years, or sooner dying, the said testator gave, devised, and bequeathed the said residuary estate, both real and personal, to his children Charlotte Truebenbach, Wilhelmina Schneider, Elizabeth Heuel, Josephine Stein, Paula Stein, Ella Stein, and Carl Stein in equal shares and parts.

"The said executors and executrix and trustees are empowered by the said will to let and lease the said residuary real estate and to make such repairs and improvements upon said residuary real estate as in their judgment may be necessary. After the payment of taxes and other expenses of the administration of the estate, they are to apply so much of the rents of the real estate, and of the income of the personal estate, as shall be reasonable and proper, to

of the rents of the real estate, and of the income of the personal estate *as shall be reasonable and proper*, to the support and education of the testator's said minor children during their respective minorities as aforesaid." They are empowered, during the minority of the minor children, "to pay over by way of advance" to the seven, "in equal amounts or shares, *so much* of the capital of the testator's residuary personal estate, or the income thereof, *as in their judgment they may deem reasonable* so to pay over." And, finally, "the said executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, *except in the exercise of their reasonable discretion*, until the said Carl Stein attains the age of twenty-one years."

It will be observed not only that the trust continued until the youngest child reached the age of twenty-one, but that no one of the seven was entitled in the meantime to receive anything of either principal or income except [605] on the affirmative exercise of a discretion conferred upon the executors and trustees.

This having been authoritatively decided to be the true effect and meaning of the will, we are of opinion that the interests to which the residuary legatees succeeded were contingent, and not vested prior to July 1, 1902, within the meaning of the refunding act as construed in previous decisions of this court upon the subject (Vanderbilt v. Eidman, 196 U. S. 480, 500, 49 L. ed. 563, 570, 25 Sup. Ct. Rep. 331; United States v. Jones, 236 U. S. 106, 111, 59 L. ed. 488, 490, 35 Sup. Ct. Rep. 261; McCoach v. Pratt, 236 U. S. 562, 59 L. ed. 720, 35 Sup. Ct. Rep. 421), except with respect to such amounts as were actually paid out of the trust fund by the trustees prior to that date, in the exercise of their discretion; the proper tax upon which, according to the findings, would have been $745.12.

The judgment will be reversed, and the cause remanded, with direction to enter judgment in favor of appellants for the tax collected in excess of that amount upon the interests of the residuary legatees.

Judgment reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

UNITED STATES OF AMERICA, Plff. in Err.,
v.
UNION MANUFACTURING COMPANY and J. T. Prince.

(See S. C. Reporter's ed. 605–611.)

Federal courts — proper district for suit — criminal prosecutions — false representations by consignee.

1. The offense of fraudulently misrepresenting the weight of certain interstate shipments of lumber for the purpose of obtaining or attempting to obtain the transportation of the property at less than the established rates, which is condemned by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 10, as amended by the act of June 18, 1910 (36 Stat. at L. 549, chap. 309, Comp. Stat. 1913, § 8574), may, when committed by the consignee, be prosecuted in the Federal district in which the place of destination is situated as having been "wholly or in part committed" in that district, within the meaning of that section; and the fact that the consignee was also the consignor is of no significance.

[For other cases, see Courts, 979–997, in Digest Sup. Ct. 1908.]

NOTE.—On proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

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the support and education of the testator's said minor children during their respective minorities as aforesaid. The rents of the real estate are to be applied first to the uses aforesaid, and after making such application the said executors and executrix and trustees are, from time to time, whenever they shall judge proper, to divide any surplus rents among the said testator's said children, Charlotte Truebenbach, Wilhelmina Schneider, Elizabeth Heuel, Josephine Stein, Paula Stein, Ella Stein, and Carl Stein in equal proportions, the shares of any minor child to be paid to the guardian of that child's estate.

"The said executors and executrix and trustees are further empowered from time to time during the minority of the said minor children to pay over by way of advance to the said Charlotte, Wilhelmina, Elizabeth, Josephine, Paula, Ella, and Carl, in equal amounts or shares, so much of the capital of the testator's residuary personal estate, or the income thereof, as in their judgment they may deem reasonable so to pay over, the shares going to any minor children to be paid to the guardian of that child's estate.

"It is further ordered, adjudged, and decreed: That the said executors and executrix are authorized and empowered, after Carl Stein shall have attained the age of twenty-one years, to sell and convey from time to time all or any part of the testator's residuary real estate.

"And it is further adjudged and decreed: That the said executors and executrix and trustees shall not be compelled to make distribution of the principal of the estate or any part thereof, except in the exercise of their reasonable discretion, until the said Carl Stein attains the age of twenty-one years."

Carriers — obtaining transportation at less than established rates — fraudulent misrepresentation by consignee.

2. A consignee is none the less guilty of the offense of fraudulently obtaining interstate transportation at less than the established rates, contrary to the prohibition of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 10, as amended by the act of June 18, 1910 (36 Stat. at L. 549, chap. 309, Comp. Stat. 1913, § 8574), where he fraudulently understates the weight of the shipment, with the effect of influencing the adjustment of the freight, because the transportation had been completed and the shipment delivered to him before the fraudulent representations were made.

[For other cases, see Carriers, II. b, 5, in Digest Sup. Ct. 1913 Supp.]

[No. 628.]

Argued February 28, 1916. Decided April 3, 1916.

IN ERROR to the District Court of the United States for the Southern District of Florida to review a judgment sustaining a demurrer to an indictment charging the consignee of an interstate shipment with fraudulently misrepresenting the weight in order to secure the transportation at less than the carrier's established rates. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. G. Carroll Todd, Assistant to the Attorney General, argued the cause and filed a brief for plaintiff in error.

Mr. W. G. Brantley argued the cause and filed a brief for defendants in error.

Mr. Justice Pitney delivered the opinion of the court:

This is a writ of error under the criminal appeals act of March 2, 1907 (chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704), to review a judgment of the district court for the southern district of Florida, sustaining a demurrer to an indictment for fraudulently misrepresenting the weights of certain shipments of lumber, in violation of the third paragraph of § 10 of the act to regulate commerce, as amended June 18, 1910 (chap. 309, 36 Stat. at L. 549, Comp. Stat. 1913, § 8574).[1] The demurrer [607] was sustained upon the ground that the statute, as construed by the circuit court of appeals for the sixth circuit in Davis v. United States, 43 C. C. A. 448, 104 Fed. 136, requires the prosecution to take place in the district where the goods are billed by the shipper, and the delivery for transportation takes place, which in this instance was not in the southern district of Florida, but in Georgia.

The indictment contains ten counts, charging as many different offenses. They are alike in form, and a summary of the first will suffice. It recites that the South Georgia Railway Company was a common carrier by rail, engaged in the interstate transportation of yellow pine lumber for hire from Baden, in the state of Georgia, to Greenville, in the southern district of Florida, and had filed and published schedules and tariffs showing the rate and charge for transportation of such lumber under 6 inches in thickness in carload lots between those points to be $7 for each carload lot of the weight of 24,000 pounds, excess in proportion; that the schedules and tariffs further provided that when the actual weight of a shipment was not ascertained at point of shipment or at destination or in transit, the freight charges should be based upon an estimated weight of 5,000 pounds for each 1,000 feet; that the Union Manufacturing Company was and is a corporation engaged in shipping said property from Baden to Greenville, and J. T. Prince was its agent, [608] having general charge and control of the shipments and the payment of freight charges therefor; that on a date specified, and while said schedules and tariffs were in effect, said railway company transported from Baden to Greenville for the manufacturing company a specified carload of yellow pine lumber under 6 inches in thickness, and delivered it at Greenville to the manufacturing company; that the actual weight of said carload lot was not ascertained at Baden, or at Greenville, or in transit; that the manufacturing company thereafter unloaded the lumber from the car and ascertained the number of feet thereof; and that the said company, and Prince, acting as its agent, well knowing the number of feet to be 9,074, then and there falsely and fraudulently represented to the railway company that the number of feet was 7,200, in consequence of which the railway company charged and the Union Lumber Company paid for the transportation of said lumber less than the

[1] "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and wilfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with

lawful charge provided in the schedules and tariffs, and at a less rate than the lawfully established rate.

In our opinion, the court below misapplied the decision in Davis v. United States, supra. In that case, which arose under the act as it stood before the amendment of 1910 (25 Stat. at L. 855, chap. 382, 1 Rev. Stat. Supp. 687, Comp. Stat. 1913, § 8569), the circumstances were very different from those now presented. The acts charged were misrepresentations by false billing and classification of certain property delivered by defendants to the railway company at Cincinnati, Ohio, for transportation thence to Dallas, Texas. The contract of carriage was made at Cincinnati, where defendants resided and carried on business, and the bill of exceptions showed that everything connected with the shipment of the goods except the carriage and delivery took place in Cincinnati. The court said (p. 139): "We think that false billing or other misrepresentation of the goods, as stated in the act, which [609] results in their being received by the carrier under a contract of carriage thus fraudulently obtained, is the obtaining of transportation within the meaning of the statute. Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete." It was accordingly held that the offense was indictable in the southern district of Ohio, and not in the northern district of Texas, within which was the destination of the goods. We are not called upon to either concede or question the propriety of this decision upon the facts that were there presented. General expressions contained in the opinion are, of course, to be interpreted in the light of those facts. Another case of the same kind is Re Belknap, 96 Fed. 614. These cases are not in point with the present. In each of them the fraud was that of the consignor. Here it is the consignee and its agent against whom fraud is charged. (The fact that the consignee was also the consignor is of no significance, since the fraud alleged was in what it did as consignee.) There the fraud inhered in the making of the contract of affreightment; here it had to do with the liquidation of the amount payable for freight at destination.

The act, by its very terms, applies to consignees as well as to consignors. But as it applies only to interstate transportation, the consignee is normally a resident of a different state, and therefore of a different district, from that where the goods are billed by the shipper and the delivery for transportation takes place. To say, therefore, that the act contemplates an indictment only in the district where the goods are billed by the shipper is in effect to say that in most cases the consignee either may not be indicted at all, or else must be indicted in a district of which he is not a resident, and which in many instances he may never have visited. We hold that the offenses charged in this indictment were "wholly or in [610] part committed" in the southern district of Florida. See United States v. Freeman, 239 U. S. 117, ante, 172, 36 Sup. Ct. Rep. 32.

It is insisted in behalf of defendants in error that since the indictment shows that the transportation had been completed and the lumber delivered to the consignee before the alleged fraudulent representations were made, it cannot be said that the fraud charged amounted to either *obtaining or attempting to obtain transportation for the property* at less than the established rates. If the statute on which the indictment is based were analogous to the familiar acts rendering criminal the obtaining of money or other property by false pretenses, the argument would be cogent. Under such statutes, it is commonly if not universally held to be essential to criminality that the false pretense shall precede the obtaining of the property. People v. Haynes, 14 Wend. 546, 563, 564, 28 Am. Dec. 530, reversing 11 Wend. 557; State v. Church, 43 Conn. 471, 479; State v. Moore, 111 N. C. 667, 674, 16 S. E. 384; State v. Willard, 109 Mo. 242, 247, 19 S. W. 189; Watson v. People, 27 Ill. App. 493, 496.

The statutory provision with which we are dealing has a very different purpose. It is not designed especially to protect the property rights of the carrier, for the offense is made equally punishable whether committed with or without the consent or connivance of the carrier. It originated in the 1889 amendment to the act to regulate commerce (chap. 382, 25 Stat. at L. 855, 858, 1 Rev. Stat. Supp. 684, 687, Comp. Stat. 1913, §§ 8569, 8576), and is but one of many provisions enacted by Congress with the object of preventing discriminations and

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or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; . . . shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine," etc.

favoritism as between shippers by requiring the publication of tariffs and prohibiting any departure from them. The prohibitions of the original act of February 4, 1887 (chap. 104, §§ 2, 3, 6, 10, 24 Stat. at L. 379, 1 Rev. Stat. Supp. 529, Comp. Stat. 1913, §§ 8564, 8565, 8569, 8574), were addressed to the carrier alone. The 1889 amendment brought shipper and consignee within the scope of the law, both by enacting that false billing, etc., should be punishable criminally, [611] and by providing similar punishment for inducing discriminations by the payment of money or other thing of value, solicitation, or otherwise. The 1910 amendment (chap. 309, § 10, 36 Stat. at L. 539, 549, Comp. Stat. 1913, § 8574) extended the range of the prohibition to certain other fraudulent practices by consignors and consignees, committed for like purposes.

In denouncing as criminal "false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or [by any] other device or means" employed in order to "obtain or attempt to obtain transportation for such property at less than the regular rates then established," the lawmaker regarded not merely the physical transportation of the property, but the entire transaction through which consignor or consignee might seek to evade the policy of the act to subject all interstate shipments to uniform rates of charge prescribed in published tariffs. In a case where for any reason the payment of the freight is not made prior to the delivery of the goods to the consignee, but remains to be afterwards adjusted, the effort to obtain an advantage not permitted by the schedules may still be exerted through fraudulent representations influencing the adjustment of the freight, with precisely the same effect as if the representations had preceded delivery of the goods. When this is accomplished, there is a fraudulent obtaining of transportation at less than the established rate, within the meaning of the prohibition. Thus it needs only that we interpret the statute according to the plain meaning of the terms employed, in the light of subject-matter and context, in order to conclude, as we do, that the acts set forth in this indictment are punishable criminally under the act.

The judgment of the District Court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

[612] SOUTHERN EXPRESS COMPANY, Plff. in Err.,
v.
JOHN BYERS.

(See S. C. Reporter's ed. 612-616.)

Evidence — documentary — carrier's rate schedules.

1. Rate schedules of an interstate carrier on file with the Interstate Commerce Commission are admissible in evidence in an action against it to recover damages for delay in the delivery of an interstate shipment on the issue of the validity and effect of a provision in the bill of lading by which the carrier undertook to limit its liability to a specified sum.

[For other cases, see Evidence, IV. r, in Digest Sup. Ct. 1908.]

Damages — mental anguish — carrier's liability.

2. Damages for mental suffering only are not recoverable from a carrier on account of its delay in the delivery of an interstate shipment.

[For other cases, see Damages, VI. q, in Digest Sup. Ct. 1908.]

[No. 201.]

Submitted March 2, 1916. Decided April 3, 1916.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Buncombe County, in that state, awarding damages against a carrier for mental suffering only on account of

NOTE.—As to validity of agreement to restrict carrier's liability, generally,—see notes to Deming v. Merchants' Cotton Press & Storage Co. 13 L.R.A. 518; Missouri P. R. Co. v. Ivey, 1 L.R.A. 500; Hartwell v. Northern P. Exp. Co. 3 L.R.A. 342; Richmond & D. R. Co. v. Payne, 6 L.R.A. 849; Adams Exp. Co. v. Harris, 7 L.R.A. 214; Duntley v. Boston & M. R. Co. 9 L.R.A. 452; Gulf, C. & S. F. R. Co. v. Gatewood, 10 L.R.A. 419; Pacific Exp. Co. v. Foley, 12 L.R.A. 799; Ballou v. Earle, 14 L.R.A. 433; Little Rock & Ft. S. R. Co. v. Cravens, 18 L.R.A. 527; Everett v. Norfolk & S. R. Co. 1 L.R.A.(N.S.) 985; New Jersey Steam Nav. Co. v. Merchants' Bank, 12 L. ed. U. S. 465, and Chicago, M. & St. P. R. Co. v. Solan, 42 L. ed. U. S. 688.

On the validity of stipulation limiting carrier's liability to agreed valuation, as affected by the Hepburn act—see note to Bernard v. Adams Exp. Co. 28 L.R.A.(N.S.) 293.

On the Carmack amendment as affecting state regulation as to stipulations limiting liability of common carrier for loss or damage to goods—see notes to Adams Exp. Co. v. Croninger, 44 L.R.A.(N.S.) 257, and Louisville & N. R. Co. v. Miller, 50 L.R.A.(N.S.) 819.

its delay in the delivery of an interstate shipment. Reversed and remanded for further proceedings.

See same case below, 165 N. C. 542, 81 S. E. 741.

The facts are stated in the opinion.

Messrs. Julius C. Martin, Thomas S. Rollins, George H. Wright, and Robert C. Alston submitted the cause for plaintiff in error:

The liability of a common carrier for mental anguish growing out of loss, injury, or delay of a shipment moving in interstate commerce is to be controlled by the law as ascertained and administered by the Federal judiciary.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 57 L. ed. 314, 319, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; Slater v. Mexican Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; Western U. Teleg. Co. v. Brown, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024; Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177.

That law does not permit recovery for mental anguish under the conditions set out in this record.

Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; Western U. Teleg. Co. v. Cook, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624; Felton v. Bullard, 37 C. C. A. 1, 94 Fed. 781; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Western U. Teleg. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92; Western U. Teleg. Co. v. Chouteau, 49 L.R.A.(N.S.) 221, note; Chapman v. Western U. Teleg. Co. 88 Ga. 767, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; Chase v. Western U. Teleg. Co. 10 L.R.A. 464, 44 Fed. 554; Crawson v. Western U. Teleg. Co. 47 Fed. 544; Kester v. Western U. Teleg. Co. 55 Fed. 603; Gahan v. Western U. Teleg. Co. 59 Fed. 433; Western U. Teleg. Co. v. Hill, 163 Ala. 18, 23 L.R.A.(N.S.) 648, 50 So. 248, 21 Am. Neg. Rep. 1, 19 Ann. Cas. 1058; Kennon v. Gilmer, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; McDermott v. Severe, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Tyler v. Western U. Teleg. Co. 54 Fed. 634; Butner v. Western U. Teleg. Co. 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; Davis v. Western U. Teleg. Co. 46 W. Va. 48, 32 S. E. 1026.

The contract of carriage is inconsistent with the conception that mental damages may be allowed.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 286, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Telfair County v. Webb, 119 Ga. 916, 47 S. E. 218; Atlanta Ice & Coal Co. v. Mixon, 126 Ga. 457, 55 S. E. 237.

No brief was filed for defendant in error.

Mr. Justice McReynolds delivered the opinion of the court:

Claiming damages solely on account of mental anguish occasioned by failure promptly to deliver a casket and [613] grave clothes intended for his wife's burial, and accepted by plaintiff in error with knowledge of the facts at Asheville, North Carolina, for transportation to Hickory Grove, South Carolina, Byers recovered a judgment against it for $250, and this was affirmed by the supreme court of North Carolina. 165 N. C. 542, 81 S. E. 741.

In defense the Express Company averred: That while engaged in interstate commerce it received the described articles at Asheville and transported them to Hickory Grove; that, as required by act of Congress approved June 29, 1906 [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563], and amendments, it had filed a schedule of rates with the Interstate Commerce Commission; that at time of shipment it issued a bill of lading limiting liability to $50; that it had paid the shipper the full amount expended by him in purchasing the articles; that no present liability exists, and especially under the laws of the United States it is not responsible for such damages as those specified.

There was put in evidence a duly executed receipt for $64.17, "being in full payment for one coffin delivered to Southern Express Company at Asheville, North Carolina, on April 1st, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, South Carolina;" and Byers testified that "the Southern Express Company paid him for all the money he had paid out on the casket and other things contained in the shipment, but did not pay him anything for damages." The bill of lading was also introduced. It specified no value and undertook to restrict the carrier's liability to $50. Clause 1 is copied in the margin.[1]

[1] 1. In consideration of the rate charged for carrying said property which is regulated by the value and classification thereof

Objection was sustained to a seasonable [614] offer by the company to prove its schedules of rates on file with the Interstate Commerce Commission.

Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the Federal courts. In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission. Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; George M. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; New York, P. & N. R. Co. v. Peninsula Produce Exch. 240 U. S. 34, ante, 511, 36 Sup. Ct. Rep. 230.

It was plain error to exclude the rate schedules.

[615] Having been requested in apt time, the trial court refused to charge the jury as follows: "As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to recover any such damage; the jury is therefore directed to render a verdict for the defendant." This instruction should have been given.

The action is based upon a claim for mental suffering only,—nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation." Cooley, Torts, 3d ed. page 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in so doing we think they were clearly right upon principle and also in accord with the great weight of authority. Chase v. Western U. Teleg. Co. 10 L.R.A. 464, 44 Fed. 554; Crawson v. Western U. Teleg. Co. 47 Fed. 544; Wilcox v. Richmond & D. R. Co. 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; Tyler v. Western U. Teleg. Co. 54 Fed. 634; Kester v. Western U. Teleg. Co. 55 Fed. 603; Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; Gahan v. Western U. Teleg. Co. 59 Fed. 433; McBride v. Sunset Teleph. Co. 96 Fed. 81; Stansell v. Western U. Teleg. Co. 107 Fed. 668; Western U. Teleg. Co. v. Sklar, 61 C. C. A. 281, 126 Fed. 295; Alexander v. Western U. Teleg. Co. 126 Fed. 445; Rowan v. Western U. Teleg. Co. 149 Fed. 550; Western U. Teleg. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92; Kyle v. Chicago, R. I. & P. R. Co. 105 C. C. A. 151, 182 Fed. 613. But see Beasley v. Western U. Teleg. Co. 39 Fed. 181.

[616] In So Relle v. Western U. Teleg. Co. (1881) 55 Tex. 308, 40 Am. Rep. 805, the supreme court of Texas held the addressee of a message might recover damages of a telegraph company because of mere mental suffering. Subsequently the courts of Alabama, Iowa, Kentucky, Nevada, North Carolina, and Tennessee approved and enforced

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and is based upon a valuation of not exceeding $50 for any shipment of 100 pounds or less, and not exceeding 50 cents per pound for any shipment in excess of 100 pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars ($50) on any shipment of 100 pounds or less, and for not exceeding 50 cents per pound on a shipment weighing more than 100 pounds, and said property is valued at, and the liability of this company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as $50 if 100 pounds or less in weight, or 50 cents per pound if weight exceeds 100 pounds, or the value declared bears to the actual value if greater.

If the said property is offered for shipment under the special rates named in sections "D" and "E" of the existing Official Express Classification, it is agreed that the value of the same does not exceed ten dollars ($10) per package, said rates not applying on packages of greater value.

a like rule; those of Dakota, Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Oklahoma, Virginia, and West Virginia definitely rejected the innovation. Many of the pertinent cases are reviewed in Western U. Teleg. Co. v. Chouteau (1911) 28 Okla. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 3 N. C. C. A. 879, 49 L.R.A.(N.S.) 206, and note; the general subject is discussed and the authorities cited in Sutherland on Damages, 3d ed. §§ 975 et seq., Sedgwick on Damages, 9th ed. §§ 43 et seq., and Shearman & Redfield on Negligence, 6th ed. §§ 756 et seq.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice McKenna and Mr. Justice Holmes concur in the result.

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[617] G. F. VARNER and W. E. Marshall, Partners, Doing Business as the Wichita Lumber Company, Appts.,
v.
NEW HAMPSHIRE SAVINGS BANK and P. J. Conklin. (No. 264.)

HAINES TILE & MANTEL COMPANY, Appt.,
v.
NEW HAMPSHIRE SAVINGS BANK and P. J. Conklin. (No. 265.)

JACKSON-WALKER COAL & MATERIAL COMPANY, Appt.,
v.
NEW HAMPSHIRE SAVINGS BANK and P. J. Conklin. (No. 266.)

(See S. C. Reporter's ed. 617–619.)

Appeal — from circuit court of appeals — review of facts.

A decree of a circuit court of appeals will be affirmed by the Federal Supreme Court where the essential question is one of fact, and the latter court thinks that the evidence, though sharply conflicting and disclosing substantial difficulties, sustains the conclusion reached below.

[For other cases, see Appeal and Error, VIII. l, 1, in Digest Sup. Ct. 1908.]

[Nos. 264, 265, 266.]

Argued March 8 and 9, 1916. Decided April 3, 1916.

THREE APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit to review decrees which, reversing a decree of the District Court for the District of Kansas, adjudged that mortgage creditors of the bankrupt were entitled to priority over mechanics' lienors. Affirmed.

See same case below, 132 C. C. A. 631, 216 Fed. 721.

The facts are stated in the opinion.

Mr. Chester I. Long argued the cause, and, with Messrs. J. A. Brubacher, George Gardner, and A. M. Cowan, filed a brief for appellants.

Messrs. Kos Harris and Samuel C. Eastman argued the cause, and, with Messrs. V. Harris, R. L. Holmes, C. G. Yankey, and W. E. Holmes, filed a brief for appellees.

Mr. Justice McReynolds delivered the opinion of the court:

This is a contest for priority between creditors of a bankrupt. Appellees claim under mortgages upon certain real estate in Wichita, alleged to have been recorded before building operations on the property were commenced. Appellants maintain construction began prior to recordation, and that they are secured by preferred mechanics' liens created by the Kansas statute. Disagreeing with the district court, but in accord with the referee's opinion, the circuit court of appeals (132 C. C. A. 631, 216 Fed. 721) held that no "such work as amounted to the commencement of the building within the meaning of the Kansas statute" was performed prior to the time when the mortgages were placed on record, and "that what was done was but a mere pretense at the commencement of a building, done to defeat bona fide prior liens." And it accordingly adjudged the mortgage creditors entitled to priority.

The essential question presented is one of fact; and there is sharp dispute in the testimony. Substantial difficulties are disclosed, but, after considering the evidence, we think it sustains the conclusions reached by the Circuit Court of Appeals; and the judgment entered there is accordingly affirmed.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see notes to Bagley v. General Fire Extinguisher Co. 53 L. ed. U. S. 605, and St. Anthony's Church v. Pennsylvania R. Co. 59 L. ed. U. S. 1119.

[620] BALTIMORE & OHIO RAILROAD COMPANY, Plff. in Err.,
v.
HARRY F. HOSTETTER.

(See S. C. Reporter's ed. 620–625.)

Judgment — jurisdiction to garnish debt due to nonresident — full faith and credit.

Jurisdiction in garnishment of a debt due from a railway company to a nonresident employee may be acquired without notice to or service of process upon him (other than an extrajudicial notice given by the garnishee), so as to make the judgment in the garnishment proceedings valid as to him, and entitle it to full faith and credit in the state where he resides.

[For other cases, see Judgment, 231–240, 938–1004, in Digest Sup. Ct. 1908.]

[No. 245.]

Submitted January 25, 1916. Decided April 10, 1916.

IN ERROR to the Circuit Court of Marion County, in the state of West Virginia, to review a judgment which affirmed a judgment of the Intermediate Court of said county, which, on a trial *de novo* on an appeal from a justice's court judgment, refused to enforce a judgment rendered in another state in garnishment proceedings. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. George E. Hamilton submitted the cause for plaintiff in error. Messrs. Francis R. Cross and A. Hunter Boyd, Jr., were on the brief.

Mr. W. H. Conaway submitted the cause for defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Hostetter, the defendant in error, a resident of West Virginia, sued in a justice's court in that state for wages due him by the railroad company, now plaintiff in error. The defense was that the wages had been paid by the railroad company as the result of a garnishment proceeding taken against it in the state of Virginia, where it was suable, to enforce a judgment rendered in Virginia against Hostetter when he resided in that state, and after a domiciliary service on him. The case went from the justice's court for a *de novo* trial to the intermediate court of Marion county, where, as the result of a verdict against the railroad company, it was condemned to pay again, the court holding that the Virginia garnishment proceeding was not entitled to be enforced as against Hostetter under the full faith and credit clause of the Constitution of the United States because he was not served with process in such proceeding, he then residing in West Virginia, although extrajudicial notice was given him by the railroad company of the proceeding. The case is here on writ of error to review the judgment of the court below, affirming that of the intermediate court, and whether proper force was given to the full faith and credit clause is the question for decision.

It is true that in the argument for the defendant in error various suggestions are made as to the insufficiency of the record concerning the existence of the Virginia judgment upon which reliance on the full faith and credit [623] clause was placed, on the ground that the record contains mere recitals with reference to the judgment, etc., etc. For the sake of brevity we do not stop to review these suggestions, although we have considered them all, since we think they are not only without merit, but many of them are in effect frivolous, because in our opinion the record suffices to establish the facts which were stated by the court below as the basis for its judgment, and which we briefly recapitulate as follows:

The plaintiff in July, 1911, resided in Clifton Forge, Virginia, and was indebted to one Wagner in the sum of $35, for which debt Wagner obtained a judgment against him in a justice's court of Virginia, based upon a summons served "on said plaintiff . . . by delivering a copy thereof to the wife the plaintiff at his usual place of abode. . . . Said record further shows . . . that on the 17th day of September, 1912, a garnishee summons was issued by H. H. Harlow, a justice of the peace in the city of Staunton, Virginia, . . . which garnishee summons was directed against the said Baltimore & Ohio Railroad Company . . . charging that it had money, or other personal estate, in its possession or control belonging to the said Hostetter, and requiring the said railroad company to appear . . . to answer said garnishment or suggestion; . . . and that on the 3d day of October, 1912, said justice last above named rendered a judgment against the said Hostetter and the Baltimore & Ohio Railroad Company in favor of the said Wagner in the sum of $38.40, with interest . . . In this garnishment or suggestion proceed-

NOTE.—As to protection of a nonresident creditor against garnishment—see notes to Illinois C. R. Co. v. Smith, 19 L.R.A. 577; Goodwin v. Claytor, 67 L.R.A. 209; Starkey v. Cleveland, C. C. & St. L. R. Co. L.R.A. 1915F, 880; and King v. Cross, 44 L. ed. 211.

On the right of garnishee to attack judgment against principal defendant for lack of jurisdiction—see note to Atwood v. Roan, 51 L.R.A.(N.S.) 597.

ing, no notice or process of any kind was given to or served upon the said Hostetter, he then being a resident of this state [West Virginia], and had been such resident for more than a year previous to the date of the institution of the garnishment proceeding. From this said last-named judgment the Baltimore & Ohio Railroad Company [624] appealed to the corporation court of the city of Staunton, and this appeal was heard and passed upon by said court on the 27th day of February, 1913. So far as the record shows, no notice of such proceeding in the courts of Virginia was given to the defendant until on or about the 14th day of February, 1913, when the said railroad company did notify, in writing, the said Hostetter, of the pendency of the said garnishment proceedings on appeal in said corporation court. . . . It is not contended that any formal notice was given to said Hostetter of the garnishment proceedings for the reason that the statute of Virginia under which said proceedings was instituted does not require notice to be given a nonresident of that state of the pendency of the garnishment or suggestion."

Although the railroad had paid in virtue of the judgment rendered in the garnishment proceeding taken as above stated, the court, agreeing in opinion, as we have said, with the trial court, held that the garnishment proceeding and the judgment in it were no protection to the railroad company because there was no power in the Virginia courts to garnishee in that state in the hands of the railroad a sum of money due by it to an employee domiciled in another state without service on such employee in Virginia, and that the full faith and credit clause imposed no duty to enforce a judgment in garnishment proceedings affected with the want of power stated.

In view of the decisions of this court dealing with the exact situation here presented and expressly holding that the principles upon which the court below based its action were erroneous and could not be upheld consistently with the duty to apply and enforce the full faith and credit clause, we need do no more than cite the cases referred to. Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207.

[625] As it follows that the judgment below, in so far as it compelled the railroad to pay the second time the sum which it had discharged under the Virginia judgment, was erroneous, it must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MARY LENORE BULLEN, George Bullen, Jr., Richard Nixon Bullen, William Graham Bullen, and John Nixon Bullen, Plffs. in Err.,

v.

STATE OF WISCONSIN.

(See S. C. Reporter's ed. 625-632.)

Constitutional law — due process of law — impairing contract obligations — inheritance tax.

1. A fund represented by stocks, bonds, and notes kept in a state other than that where the decedent resided, which he conveyed upon certain trusts to a trust company of such other state, reserving to himself an absolute power of control, which he exercised during his life by a revocation (followed by a second conveyance to the trust company upon the same terms), and by taking the whole income for himself, may be subjected to an inheritance tax in the state of his domicil, without violating the 14th Amendment or the contract clause of the Federal Constitution.

[For other cases, see Constitutional Law, 554-558, 1450-1474, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — error not assigned below.

2. Errors not assigned on appeal to the highest state court will not be considered by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 2164-2174, in Digest Sup. Ct. 1908.]

[No. 262.]

Argued March 8, 1916. Decided April 10, 1916.

IN ERROR to the County Court of Waukesha County, in the State of Wisconsin, to review a judgment enforcing an inherit-

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NOTE.—As to taxes on succession and collateral inheritances—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; Rodman v. Com. 33 L.R.A.(N.S.) 592; State ex rel. Ise v. Cline, 50 L.R.A.(N.S.) 991; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

On succession tax upon gift in contemplation of death—see note to Re Dessert, 46 L.R.A.(N.S.) 790.

On physical presence or absence of personal property or evidence thereof as affecting liability to succession tax—see note to Re Helena, 46 L.R.A.(N.S.) 1167.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel Hill v. Dockery, 63 L.R.A. 571.

ance tax upon a trust fund held outside the state, entered pursuant to the mandate of the Supreme Court of that state, on an appeal from the Circuit Court of said county. Affirmed.

See same case below, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109.

The facts are stated in the opinion.

Mr. John R. Montgomery argued the cause, and, with Messrs. Louis E. Hart, Jaspersen Smith, and Lloyd R. Steere, filed a brief for plaintiffs in error:

The Wisconsin rule is that the tax is an excise tax, or a tax on a privilege. The thing or commodity upon which it is levied is the transfer transaction, or right to receive property.

Nunnemacher v. State, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Beals v. State, 139 Wis. 544, 121 N. W. 347; State v. Pabst, 139 Wis. 561, 121 N. W. 351.

This implies, however, the further qualification that the transfer transaction occurs under or by virtue of, or that the right to receive property is derived through, the laws of Wisconsin. That state has no extraterritorial jurisdiction.

Bliss v. Bliss, 221 Mass. 201, L.R.A. 1916A, 889, 109 N. E. 148; Walker v. The Treasurer, 221 Mass. 600, 109 N. E. 647; State v. Brevard, 62 N. C. (Phill. Eq.) 141; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; Bittinger's Estate, 129 Pa. 338, 18 Atl. 132; Re Joyslin, 76 Vt. 88, 56 Atl. 281; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873.

A decedent's personal property in a foreign jurisdiction will be subject, in a proper case, to taxation both at home and in the foreign state, if the laws of both states are requisite to the legal transfer of the property at the owner's death, and it does not matter that the machinery of the law would not need to be invoked in the particular case.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Sup. 277; Mann v. Carter, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130; Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657.

The inheritance tax laws of Wisconsin and Illinois are both adopted from New York. Both are, therefore, subject to the same rules of interpretation.

People v. Griffith, 245 Ill. 532, 92 N. E. 313.

An inheritance tax cannot be levied by any state unless the operation of its laws is necessary in order to effect the transfer.

Walker v. The Treasurer, 221 Mass. 600, 109 N. E. 647; Re Clark, 37 Wash. 671, 80 Pac. 267; Clark v. The Treasurer, 218 Mass. 292, 105 N. E. 1055; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Moore v. Ruckgaber, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; Woodruff v. Atty. Gen. [1908] A. C. 508, 24 Times L. R. 912; Blackwood v. Reg. L. R. 8 App. Cas. 82, 52 L. J. P. C. N. S. 10, 48 L. T. N. S. 441, 31 Week. Rep. 645; State v. Brevard, 62 N. C. (Phill. Eq.) 141; Alvany v. Powell, 55 N. C. (2 Jones, Eq.) 51; Re Joyslin, 76 Vt. 88, 56 Atl. 281.

This is a corollary to the entire line of decisions by this court of questions relating to inheritance taxes.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Carpenter v. Pennsylvania, 17 How. 456, 15 L. ed. 127; Scholey v. Rew, 23 Wall. 331, 23 L. ed. 99; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; Clapp v. Mason, 94 U. S. 589, 24 L. ed. 212; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; Murdock v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Moore v. Ruckgaber, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105.

An inheritance tax is a lawful exercise of the taxing power only when some necessary incident of the transfer transaction depends for its efficacy upon the law of the state levying the tax. Where the complete transfer transaction may be accomplished without invoking any privilege or sanction conferred by the laws of the taxing state, and where no prohibition of the laws of the taxing state could prevent the accomplishment of the transfer transaction, then the inheritance tax is levied upon a right which is purely imaginary, and which does not exist in fact.

Walker v. The Treasurer, 221 Mass. 600, 109 N. E. 647; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Re Howard, 80 Vt. 489, 68 Atl. 513; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515.

The tests suggested in Blackstone v. Miller and Eidman v. Martinez will determine whether the laws of Wisconsin apply to the present transfer transaction. Suppose Wis-

consin had turned back the current of legislation and forbidden such an assignment in trust, or had denied the right to transfer at death more than one third of one's property. This could not have affected in any manner whatsoever the transfer transaction under the Illinois assignment in trust, or the right of the plaintiffs in error to receive the benefit of it. Hence, the Wisconsin law accorded no privilege which the state could tax.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Moore v. Ruckgaber, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521.

Inasmuch as the transfer transaction in this case could be carried to completion without the aid of the Wisconsin law, there was no transfer transaction or right to receive property under the Wisconsin law. The right or privilege taxed by Wisconsin did not exist, and a judgment against a citizen of the United States for a tax on something which does not exist deprives him of his property without due process of law and takes his private property for public use without just compensation.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A. (N.S.) 295, 129 S. W. 301; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

It is not sufficient to authorize an inheritance tax, that the courts of a state are open to the parties interested for the assertion of their rights under the contract by which the transfer transaction is effected at the death of the assignor. This is a privilege which the laws of every state afford. If the mere privilege of using the courts of a state for the enforcement of the transfer transaction authorizes an inheritance tax thereon, every state could tax every inheritance. If Wisconsin could tax this transfer transaction, so could Maine and California for the same reason. No necessary incident of the transfer by the assignment in trust depends for its efficacy upon the law of any other state than Illinois. Hence, no state other than Illinois can levy an inheritance tax on the transaction.

Walker v. The Treasurer, 221 Mass. 600, 109 N. E. 647.

The general rule that personalty in a foreign state passes by the law of the decedent's domicil, and is therefore subject to a domiciliary tax, is held in California, subject to the limitation that there be no rule to the contrary in the state where the personal property is actually located.

Re Hodges, 170 Cal. 492, L.R.A. 1916A, 837, 150 Pac. 344.

Illinois has a rule to the contrary where the situs of such personalty has been fixed by placing it permanently in the state. The imposition of the Illinois inheritance tax on the foreign bonds and stocks here involved proves the existence of such rule, limiting the more general one of *mobilia sequuntur personam.*

People v. Griffith, 245 Ill. 532, 92 N. E. 313.

Real estate in a foreign jurisdiction is never subject to an inheritance tax at the domicil of its owner.

Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Bittinger's Estate, 129 Pa. 338, 18 Atl. 132; Connell v. Crosby, 210 Ill. 380, 71 N. E. 350; Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

This is true, because (a) the title is transferred by the law of the state wherein the land lies; (b) the law of the state of the owner's domicil does not furnish any factor or incident necessary to the efficacy of the transfer of title; (c) the law of one state cannot control the transfer of land situated in another state.

Clarke v. Clarke, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873.

If the inheritance tax is upon the transfer transaction or right to receive property, then the situs of the thing taxed is the situs of the right to receive the property, not the situs of the property itself. The determining factor is not the location of the property, but whether the beneficiary came into possession of it through the exercise of a privilege conferred by the state.

People v. Griffith, supra.

The maxim *Mobilia sequuntur personam* may only be resorted to when convenience and justice so require. It is not allowed to obscure the facts when the facts become important.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

The right to impose an inheritance tax does not depend directly upon the situs of

the property, but upon the law under which it is transferred.

"Taxation;" "Situs of property," 37 Cyc. 1564.

The general rule as to taxation is that where personalty is out of the state of the owner's domicil, that which is tangible is taxable where it is located, and is not taxable at home. That which is intangible, and therefore likely to escape foreign taxation, has its situs at the owner's domicil, and is taxable there.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493.

There is a well-recognized exception that not only tangible property located in a state foreign to the owner's domicil, but intangible property so located and held there for permanent investment or use in business, has its situs in the foreign jurisdiction, and is taxable there, and not at the owner's domicil.

Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; Lewis's Estate, 203 Pa. 211, 52 Atl. 205.

The situs of the intangible property held by the Northern Trust Company was in Illinois.

Union Refrigerator Transit Co. v. Kentucky, supra; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Metropolitan L. Ins. Co. v. New Orleans and Com. v. West India Oil Ref. Co. supra.

It is within the power of any citizen of the United States to fix the situs of his personal property at a place other than his domicil.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; Metropolitan L. Ins. Co. v. New Orleans and Com. v. West India Oil Ref. Co. supra.

The judgment levying the Illinois inheritance tax, being entitled to full faith and credit, is conclusive on the Wisconsin courts as to the law under which the transfer transaction became effective.

Connell v. Crosby, 210 Ill. 380, 71 N. E. 350; Tilt v. Kelsey, 207 U. S. 43, 52 L. ed. 95, 28 Sup. Ct. Rep. 1; Re Clark, 37 Wash. 671, 80 Pac. 267.

The assignment in trust, having been made upon an actual consideration, was not a gift, but a valid contract, and the law taxing it impairs the obligation of the contract.

Gelsthorpe v. Furnell, 20 Mont. 299, 39 L.R.A. 170, 51 Pac. 267; Chanler v. Kelsey, 205 U. S. 466, 51 L. ed. 882, 27 Sup. Ct. Rep. 550.

The levy of a tax by Wisconsin on the amount already paid for the inheritance tax in Illinois is erroneous, because the amount so paid never passed to the plaintiffs in error. A tax upon this deprives them of their property without due process of law.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; People v. Richardson, 269 Ill. 275, 109 N. E. 1033.

Mr. Walter Drew argued the cause, and, with Mr. Walter C. Owen, Attorney General of Wisconsin, filed a brief for defendant in error:

The decision of the highest court of a state as to the construction and scope of a state law is binding upon this court.

United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211; Jacobson v. Massachusetts, 197 U. S. 11, 24, 49 L. ed. 643, 649, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765.

The determination of questions of fact will not be reviewed here upon a writ of error to the highest court of the state.

Illinois ex rel. Dunne v. Economy Light & P. Co. 234 U. S. 497, 523, 524, 58 L. ed 1429, 1439, 34 Sup. Ct. Rep. 973; Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. ed. 584, 589, 34 Sup. Ct. Rep. 309.

This court will not examine the constitutionality of a state statute as affecting parties not before it.

Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Engel v. O'Malley, 219 U. S. 128, 135, 55 L. ed. 128, 135, 31 Sup. Ct. Rep. 190; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 332, 57 L. ed. 1206, 1214, 33 Sup. Ct. Rep. 833; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 418, 58 L. ed. 1011, 1024, L.R.A. 1915C, 1189, 34 Sup. Ct. Rep. 612.

It is the well-settled rule in this court that errors not pressed and relied on below are conclusively deemed to have been waived,—that when the decision of the highest court of a state is challenged in error, only the propositions which have been called to its attention and upon which it has ruled are open to consideration, and that the scope of review here cannot be enlarged by assignments of error to include questions not efficiently raised in the court below.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 53, 59 L. ed. 127, 128, 35 Sup. Ct. Rep. 21; Dewey v. Des Moines, 173 U. S. 193, 199, 200, 43 L. ed. 665, 666, 667, 19 Sup. Ct. Rep. 379; Montana R. Co. v. Warren, 137 U. S. 348, 351, 34 L. ed. 681, 682, 11 Sup. Ct. Rep. 96; Old Jordan Min. & Mill. Co. v. Société Anonyme des Mines, 164

U. S. 261, 264, 41 L. ed. 427, 428, 17 Sup. Ct. Rep. 113; Gila Valley, G. & N. R. Co. v. Hull, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229; Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739; Spies v. Illinois, 123 U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21.

The state of Wisconsin, in imposing this tax, impaired no obligation of any contract.

Chanler v. Kelsey, 205 U. S. 466, 478, 479, 51 L. ed. 882, 888, 889, 27 Sup. Ct. Rep. 550; Orr v. Gilman, 183 U. S. 278, 288, 289, 46 L. ed. 196, 202, 22 Sup. Ct. Rep. 213.

The right of the owner to control the devolution of his property after his death, and of the legatee or heir to receive property from his testator or ancestor, is not a natural right, but one which is wholly created and conferred by statute law, and which the state may take away entirely or conditionally as it may see fit.

Mager v. Grima, 8 How. 490, 493, 12 L. ed. 1168, 1170; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 288, 42 L. ed. 1037, 1040, 18 Sup. Ct. Rep. 594; United States v. Perkins, 163 U. S. 625, 627, 628, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; Knowlton v. Moore, 178 U. S. 41, 55, 56, 44 L. ed. 969, 975, 976, 20 Sup. Ct. Rep. 747; Plummer v. Coler, 178 U. S. 115, 137, 44 L. ed. 998, 1009, 20 Sup. Ct. Rep. 829.

It must be conceded that, if this transfer of intangible personal property, although held in a foreign state, had been by will or intestate law, it would have been subject to an inheritance tax in the state of the domicil upon the principle *mobilia sequuntur personam*.

Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105, 194 N. Y. 281, 87 N. E. 428; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Re Corning, 3 Misc. 160, 23 N. Y. Supp. 285; Re Cornell, 170 N. Y. 423, 63 N. E. 445; Re Dingman, 66 App. Div. 228, 72 N. Y. Supp. 694; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699; Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657; Mann v. Carter, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130; Re Hartman, 70 N. J. Eq. 664, 62 Atl. 560; Lines's Estate, 155 Pa. 378, 26 Atl. 728; Milliken's Estate, 206 Pa. 149, 55 Pac. 853; People v. Union Trust Co. 255 Ill. 168, L.R.A.1915D, 450, 99 N. E. 377, Ann. Cas. 1913D, 514; Douglas County v. Kountze, 84 Neb. 506, 121 N. W. 593; Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; Moore v. Ruckgaber, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; Hawley v. Malden, 232 U. S. 1, 11, 12, 58 L. ed. 477, 482, 483, 34 Sup. Ct. Rep. 201.

The power to tax successions is not derived solely from state grant of privilege or state right to regulate, but is fundamental.

Knowlton v. Moore, 178 U. S. 41, 56–61, 44 L. ed. 969, 975–977, 20 Sup. Ct. Rep. 747.

While no case is found precisely like the instant case on all the facts, the decision of the highest court of the state in this case is in harmony with the court decisions in similar cases in other jurisdictions, and is supported in principle by the clear weight of authority.

Keeney v. New York, 222 U. S. 525, 56 L. ed. 299, 38 L.R.A.(N.S.) 1139, 32 Sup. Ct. Rep. 105, 194 N. Y. 281, 87 N. E. 428; Countess de Noailles' Estate (Re Helena) 236 Pa. 213, 46 L.R.A.(N.S.) 1167, 84 Atl. 665; Lines's Estate, 155 Pa. 378, 26 Atl. 728; People v. Union Trust Co. 255 Ill. 168, L.R.A.1915D, 450, 99 N. E. 377, Ann. Cas. 1913D, 514; Douglas County v. Kountze, 84 Neb. 506, 121 N. W. 593; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699; Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657; Mann v. Carter, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130; Re Hodges, 170 Cal. 492, L.R.A.1916A, 837, 150 Pac. 344.

A reversal would invite wholesale evasion of the inheritance tax.

Knoxville & O. R. Co. v. Harris, 99 Tenn. 684, 53 L.R.A. 921, 43 S. W. 115; Re Palmer, 117 App. Div. 360, 102 N. Y. Supp. 236; Re Birdsall, 22 Misc. 180, 49 N. Y. Supp. 450, affirmed in 43 App. Div. 624, 60 N. Y. Supp. 1133; State Street Trust Co. v. The Treasurer, 209 Mass. 379, 95 N. E. 851.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding to fix the inheritance tax upon the estate of George Bullen, deceased, a resident of Wisconsin. The supreme court of the state affirmed a judgment for a tax upon a fund of nearly a million dollars which the heirs and next of kin say cannot be taxed in Wisconsin without violating the 14th Amendment and the contract clause of the Constitution of the United States. 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109.

The facts are simple. Bullen formerly had lived in Chicago, and continued to do some business there after moving to Wisconsin, which he did in 1892. He kept in Chicago the bonds, stocks, and notes constituting the fund, and in 1902 conveyed them to the Northern Trust Company of

that city upon certain trusts. In 1904, by virtue of powers reserved, he repossessed himself of the fund, but in 1907 he conveyed it to the company upon the former trusts again. The limitations, so far as material, were of relatively small sums to a sister and niece residing in Massachusetts, and, subject to those gifts of one third of the income to his widow for life and the rest of the income and the principal to his four sons. But the instrument contained the following clause: "Fifth. I, the donor, expressly reserve the right to direct and control the disposition of the said trust property and estate, to revoke and vacate this trust at any time during my life, to enter into and upon and take possession of the same, or any part thereof, to require a reconveyance to me of the said trust property, or any part thereof, and to dispose of it as I may see fit. During my lifetime the principal and income shall be used for such beneficiaries [630] and in such manner as I may from time to time appoint, and in default of any appointment during my lifetime, and at all events, after my death, the said income and the said principal shall be applied, paid over or held as herein provided." It also declared that no portion of principal or income should be paid under some of the leading clauses before Bullen's death, unless by his direction. In fact, he received the whole income during his life. The supreme court held that an inheritance tax was due in respect of the whole fund as upon a transfer intended to take effect in enjoyment after the donor's death.

The deeds of trust were not a merely simulated transaction. Bullen made a will shortly after the first transfer, which was of similar tenor, but which, it is found, "has not been probated," perhaps because the parties relied upon the deeds. The deeds transferred title and they had a purpose. Bullen at the time was suffering from locomotor ataxia, his wife also was in precarious health, and the chief instrument contemplated the possible disability of both. The ultimate limitations would operate unless revoked, which they were not. But Bullen, as has been seen, reserved an absolute power of control over all of his gifts, and exercised it during his life by a revocation (followed, to be sure, by a reconveyance upon the same terms), and by taking all the income of the fund. The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax: "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes." Sugden, Powers, 8th ed. 396. See Gray, Perpetuities, § 526b, 1st ed. pp. 334, 335. We do not [631] speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it [631] is on the wrong side of the line indicated by the policy if not by the mere letter of the law. What we do say is that the supreme court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute, that there is no constitutional objection to its doing so, and that although Illinois also has taxed the fund, as it might, we are not aware that it has attempted to qualify the effect that Wisconsin has given to the power, and do not intimate that it could have done so, if it had tried. See Hawley v. Malden, 232 U. S. 1, 13, 58 L. ed. 477, 483, 34 Sup. Ct. Rep. 201.

The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock. Blackstone v. Miller, 188 U. S. 189, 204, 47 L. ed. 439, 444, 23 Sup. Ct. Rep. 277; Eidman v. Martinez, 184 U. S. 578, 586, 589, 590, 592, 46 L. ed. 697, 702–705, 22 Sup. Ct. Rep. 515; Thomson v. Advocate General, 12 Clark & F. 1, 18, 21, 13 Sim. 153, 9 Jur. 217; Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; Re Swift, 137 N. Y. 77, 88, 18 L.R.A. 709, 32 N. E. 1096; Mann v. Carter, 74 N. H. 345, 15 L.R.A.(N.S.) 150, 68 Atl. 130; Hopkins's Appeal, 77 Conn. 644, 60 Atl. 657; Hartman's Case, 70 N. J. Eq. 664, 62 Atl. 560. The same would be true of a universal succession established by will, and the notion of privity or identity of person that is recognized in these cases has been carried over to more limited bequests and in some degree to deeds. Norcross v. James, 140 Mass. 188, 2 N. E. 946. The principle that allows the tax is to be [632] applied, if ever, to a disposition that operates upon the great mass of the donor's

estate, and that takes effect only upon his death; at least, so far as concerns the persons before this court, the donor's widow and sons. Lines's Estate, 155 Pa. 378, 26 Atl. 728.

It is suggested that there was a subordinate error in not deducting the amount of the Illinois inheritance tax. But this appears not to have been assigned in the appeal to the Supreme Court of the state, and therefore we need not inquire whether there was any constitutional obstacle to the state of Wisconsin adopting the gross fund disposed of rather than the net amount received as the measure of the tax.

Judgment affirmed.

SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
W. E. PRESCOTT.

(See S. C. Reporter's ed. 632–641.)

Error to state court — Federal question — liability of interstate carrier.

1. Whether the arrival of an interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part of the goods, leaving the rest, with the carrier's permission, to meet his convenience in removal, discharged the carrier's contract set forth in the bill of lading issued pursuant to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), and created a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of a loss by fire, the burden of showing that it was not negligent,—is a Federal question which will support the appellate jurisdiction of the Federal Supreme Court over a state court.

[For other cases, see Appeal and Error, 2022–2025, in Digest Sup. Ct. 1908.]

Carriers — governmental control — terminal service.

2. The retention of an interstate shipment by a carrier as warehouseman under the bill of lading which, in accordance with the published regulations, provides that every service to be performed under it shall be subject to the conditions specified, among which is an express condition governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival, is a terminal service forming a part of the transportation, in the sense of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), and is governed by that statute.

[For other cases, see Carriers, III. a, in Digest Sup. Ct. 1908.]

Carriers — agreement varying conditions of published regulations — liability as warehousemen.

3. The parties to an interstate shipment may not, by special agreement, alter the conditions specified in the bill of lading governing the carrier's liability when a shipment is not removed within forty-eight hours after notice to the consignee of its arrival, which conform to the carrier's published regulations.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

Carriers — liability as warehousemen — published regulations — local law.

4. The arrival of an interstate shipment at destination, the payment of the freight by the consignee, his signature to a receipt for the shipment, and his removal of a part thereof, leaving the rest, with the carrier's permission, to await his convenience in removal, did not discharge the carrier's liability under the bill of lading issued pursuant to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), nor create a new obligation as warehouseman, governed by the local law, which casts upon the warehouseman, in case of loss by fire, the burden of showing that it was not negligent, where the bill of lading, in accordance with the published regulations, provided that every service to be performed under it should be subject to the conditions specified, among which was an express condition governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival.

[For other cases, see Carriers, II. b, 3, in Digest Sup. Ct. 1908.]

Carriers — liability as warehousemen — published regulations — local law.

5. The measure of the carrier's liability as warehouseman under a bill of lading for an interstate shipment, issued pursuant to the act of February 4, 1887 (24 Stat. at

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Note.—On the general subjects of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On right of carrier to terminate its responsibility as warehouseman—see note to Brunson v. Atlantic Coast Line R. Co. 9 L.R.A.(N.S.) 577.

On burden of proof as to negligence where property is destroyed while in the possession of a carrier holding as a warehouseman—see note to Yazoo & M. Valley R. Co. v. Hughes, 22 L.R.A.(N.S.) 975.

L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), which, in accordance with the carrier's published regulations, provided that every service to be performed under it should be subject to the conditions specified, among which was an express condition governing the carrier's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival,—is not to be tested by the exceptional rule of the local law, placing the burden upon a warehouseman, in case of loss by fire, to show that it was not negligent.

[For other cases, see Carriers, II. b, 8, in Digest Sup. Ct. 1908.]

[No. 358.]

Argued February 23, 1916. Decided April 10, 1916.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Circuit Court of Edgefield County, in that state, in favor of plaintiff in a suit by a consignee to recover for the loss of an interstate shipment while in the possession of a carrier after arrival at destination. Reversed.

See same case below, 99 S. C. 422, 83 S. E. 781.

The facts are stated in the opinion.

Mr. Frank G. Tompkins argued the cause, and, with Mr. Benjamin L. Abney, filed a brief for plaintiff in error:

The rules of the Federal statutes and Federal decisions govern the liability of the carrier to the consignee.

Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Heyman v. Southern R. Co. 203 U. S. 271, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Adams Exp. Co. v. Kentucky, 206 U. S. 136, 51 L. ed. 991, 27 Sup. Ct. Rep. 606; Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177.

When the state courts attempted to try the case under state laws as to where the burden of proof rested, there was a contravention of the right of the plaintiff in error, under the Federal statutes and decisions.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; Clark v. Barnwell, 12 How. 272, 13 L. ed. 985; Western Transp. Co. v. Downer, 11 Wall. 129, 20 L. ed. 160; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Story, Bailm. § 410; Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566; Schmidt v. Blood, 24 Am. Dec. 153, note.

Mr. J. Willard Ragsdale argued the cause, and Messrs. W. H. Townsend and J. William Thurmond filed a brief for defendant in error:

The findings of fact by the supreme court of South Carolina will not be reviewed by this court.

Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 226, 48 L. ed. 944, 948, 24 Sup. Ct. Rep. 632; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 585.

At the time of the fire the railway company held the freight as warehouseman under a separate contract from that of transportation. The consignee paid the transportation charges and receipted in full for the whole shipment, and actually removed a part of the shipment.

Stewart v. Central R. Co. 3 Ga. App. 397, 60 S. E. 1; Kenny Co. v. Atlanta & W. P. R. Co. 122 Ga. 365, 50 S. E. 132. See also to same effect, Lewis v. Louisville & N. R. Co. 25 L.R.A.(N.S.) 938, and note, 135 Ky. 361, 122 S. W. 184, 21 Ann. Cas. 527.

Congress has no power to regulate purely internal commerce of the states.

Howard v. Illinois S. R. Co. 207 U. S. 536, 52 L. ed. 324, 28 Sup. Ct. Rep. 141.

If a Federal question is involved, the judgment should be affirmed.

Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566; Fleischman v. Southern R. Co. 76 S. C. 246, 9 L.R.A.(N.S.) 519, 56 S. E. 974; Brunson v. Atlantic Coast Line R. Co. 76 S. C. 9, 9 L.R.A.(N.S.) 577, 56 S. E. 538; Sutton v. Southern R. Co. 82 S. C. 345, 64 S. E. 401; Wabash R. Co. v. Hayes, 234 U. S. 91, 58 L. ed. 1230, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

Mr. Justice Hughes delivered the opinion of the court:

This action was brought to recover for the loss of nine boxes of shoes which were destroyed by fire, on July 4, 1913, [634] while in the possession of the Southern Railway Company, plaintiff in error. These boxes were part of a lot of thirteen boxes which had been shipped on June 21, 1913, at Petersburg, Virginia, by the Seaboard Air Line Railway and connections, consigned to

W. E. Prescott, defendant in error, at Edgefield, South Carolina, and had arrived at Edgefield over the line of the Southern Railway Company on June 23, 1913. The plaintiff alleged three causes of action against the latter company: (1) as common-carrier, (2) as warehouseman, and (3) for penalty because of failure to adjust and pay the claim, after notice, as provided by law. The answer of the railway company, with a general denial, set up that the shipment was interstate and governed by the act to regulate commerce. At the close of the plaintiff's case, the railway company moved for a nonsuit and decision was reserved. The railway company then put in evidence the tariff rules, filed with the Interstate Commerce Commission, which governed the shipment. These provided that the reduced rates specified would "apply on property shipped subject to the condition of carrier's bill of lading," and that otherwise there would be an increased charge, as stated. One of the stipulations of the bill of lading was that "property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival" might be kept in car, depot, or warehouse, "subject to reasonable charge for storage and to carrier's responsibility as warehouseman only." The freight bill contained the provision: "Demurrage and storage will be assessed at the expiration of the free time provided by the rules of this company."

The agent for the railway company (confirming what had been said by the plaintiff's witness) testified that after notice of the arrival of the goods, the consignee had paid the entire freight charges, that he (the company's agent) "had accepted the freight" and had the consignee's [635] "receipt for the goods." Four boxes were then taken away, and the rest were permitted to remain to meet the consignee's convenience in removal. The agent further testified: "Q. What was the agreement with reference to holding those goods? A. He just wanted to know if it would be agreeable to leave them there, and I said it would be. Q. You did not make any charges for storing them? A. No, sir. Q. And did not expect him to pay any? No. sir." The consignee's representative had testified that, while nothing had been said on the point, he expected to pay storage.

At the close of the testimony, the plaintiff withdrew his causes of action against the defendant as common carrier and for the penalty, and the case went to the jury solely with respect to the liability of the defendant as warehouseman. The railway company moved for a direction of a verdict upon the ground that, under the Federal act and the tariff regulations, the bill of lading defined the rights of the parties. The motion was denied. The trial court submitted to the jury the question of liability for the care of the goods as one arising under the state law, which cast upon the defendant the burden of showing that it was not negligent. The position of the railway company, as shown by its requests for instructions which were denied, was that the shipment had not lost its interstate character; that the provisions of the bill of lading were controlling; that the defendant's liability as warehouseman was governed by Federal law; and that the burden was upon the plaintiff to show negligence as a basis for recovery.

Judgment upon a verdict in favor of the plaintiff was affirmed by the supreme court of the state. 99 S. C. 422, 83 S. E. 781. With respect to the Federal question, the court said: "The defendant claims that, inasmuch as this is an interstate shipment, the Federal statute governs. This question does not legitimately arise in this case for the reason [636] that the appellant moved for a nonsuit on the ground that 'the evidence here shows that this freight arrived here on the 23d of June and that the freight was paid and receipted for by the agent of Dr. Prescott. He came for it and paid the freight, and I submit that where a common carrier delivered freight in good order, and has it in its depot and paid for, then its liability as a common carrier ceases.' The court reserved its decision on that question and before it was announced, the plaintiff withdrew the cause of action against defendant as common carrier and also the cause of action for the penalty. It therefore being conceded in the circuit court that the contract of carriage was ended, and the appellant held the goods by a separate contract, the question as to appellant's liability as common carrier and the Federal statute under which it might have arisen is not before this court, and the only question argued which we can consider is the question as to warehouseman." The court then applied the rule of liability as defined by the state law. Id. p. 424. And this writ of error has been prosecuted.

As the shipment was interstate, and the bill of lading was issued pursuant to the Federal act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court, cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that there was no dispute as to the fact that the goods had arrived,

that the consignee had paid the freight and signed a receipt for the goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law, and of creating a new obligation governed by state law.

[637] By the act to regulate commerce (§ 1) the "transportation" it regulates is defined as including "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." [34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563.] It is made the duty of the carrier "to provide . . . such transportation upon reasonable request therefor." All charges made for "any service" rendered in such transportation must be "just and reasonable." Section 6 requires that the carrier's schedules, printed as provided, "shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." And it is further provided, in the same section, that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation"—that is, as defined—"except such as are specified in such tariffs." The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the "transportation" in the sense of the Federal act and governed by that act. Thus, in the case of Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177, it was held, with respect to goods lost through the negligence of the terminal carrier while in possession as warehouseman under this stipulation, that the provision [638] of the bill of lading limiting liability to the declared value of the goods was applicable. The court deemed it to be evident "that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like." It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 57 L. ed. 683, 688, 33 Sup. Ct. Rep. 391; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. ed. 868, 876, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 59 L. ed. 853, L.R.A. 1915E, 665, P.U.R.1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the act. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend "any privileges or facilities," save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling, and the parties cannot substitute therefor a special agreement.

[639] In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal act, regard must, of course, be had to the substance of the transaction. The question is not one of form, but of actuality. Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 126, 57 L. ed. 442, 448, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 341, 57 L. ed. 1215, 1218, 33 Sup. Ct. Rep. 837; Illinois

C. R. Co. v. De Fuentes, 236 U. S. 157, 163, 59 L. ed. 517, 519, P.U.R.1915A, 840, 35 Sup. Ct. Rep. 275; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co. 238 U. S. 456, 458, 59 L. ed. 1406, 1408, 35 Sup. Ct. Rep. 896. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the railway company, awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that, until such delivery, the goods should be held under a special contract, in lieu of the prescribed conditions, and this they could not effect without violating the act which governed the shipment. It could not be said, for example, that while under the filed regulations the railway company was to make a "reasonable charge for storage" pending delivery, that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued, and we must look to the bill of lading to determine the legal obligation attaching to that service.

Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements [640] of state legislation and decisions. Adams Exp. Co. v. Croninger, 226 U. S. 491, 506, 509, 510, 57 L. ed. 314, 320–322, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 672, 57 L. ed. 690, 695, 33 Sup. Ct. Rep. 397; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 112, 58 L. ed. 868, 876, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 420, 58 L. ed. 1377, 1382, L.R.A.1915E, 942, 34 Sup. Ct. Rep. 790; Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 603, 59 L. ed. 1137, 1139, 35 Sup. Ct. Rep. 715; Cleveland C. C. & St. L. R. Co. v. Dettlebach, supra; New York P. & N. R. Co. v. Peninsula Produce Exch. 240 U. S. 34, ante, 511, 36 Sup. Ct. Rep. 230. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law. Adams Exp. Co. v. Croninger and Missouri K. & T. R. Co. v. Harriman, supra. It was explicitly provided that in case the property was not removed within the specified time, it should be kept, subject to liability "as warehouseman only." The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence. Cau v. Texas & P. R. Co. 194 U. S. 427, 432, 48 L. ed. 1053, 1057, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; Western Transp. Co. v. Downer, 11 Wall. 129, 135, 20 L. ed. 160, 161; DeGrau v. Wilson, 17 Fed. 698, 700, 701, affirmed in 22 Fed. 560; Claflin v. Meyer, 75 N. Y. 260, 262, 263, 31 Am. Rep. 467; Whitworth v. Erie R. Co. 87 N. Y. 413, 419, 420; Draper v. Delaware & H. Canal Co. 118 N. Y. 122, 123, 23 N. E. 131; St. Louis, I. M. & S. R. Co. v. Bone, 52 Ark. 26, 11 S. W. 958; Lyman v. Southern R. Co. 132 N. C. 721, 44 S. E. 550; Lancaster Mills v. Merchants' Cotton-Press & Storage Co. 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; National Line S. S. Co. v. Smart, 107 Pa. 492; Denton v. Chicago, R. I. & P. R. Co. 52 Iowa, 161, 35 Am. Rep. 263, 2 N. W. 1093; [641] Cox v. Central Vermont R. Co. 170 Mass. 129, 49 N. E. 97; Yazoo & M. Valley R. Co. v. Hughes, 94 Miss. 242, 22 L.R.A.(N.S.) 975, 47 So. 662; 24 Am. Dec. 150–153, note; 22 L.R.A.(N.S.) note, pp. 975–980. In the present case, it is undisputed that the loss was due to fire which destroyed the company's warehouse with its contents, including the property in question. The fire occurred in the early morning when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company. The trial court denied the motion for a direction of a verdict, and charged the jury that "the burden of showing that there was no negligence is on the defendant." Applying the rule established by the state decisions (Brunson v. Atlantic Coast Line R. Co. 76 S. C. 9, 9 L.R.A.(N.S.) 577, 56 S. E. 538; Fleischman v. Southern R. Co. 76 S. C. 237, 9 L.R.A.(N.S.) 519, 56 S. E. 974; see also Wardlaw v. South Carolina R. Co. 11 Rich.

L. 337), the supreme court of the state overruled the defendant's objection and sustained the judgment. 99 S. C. p. 424. It has been recognized by the state court, as was said in the Fleischman Case, supra, that the rule it applies is a "somewhat exceptional rule" to which the court adheres "notwithstanding the great number of opposing authorities in other jurisdictions." 76 S. C. p. 248.

For the reasons we have stated, we think that the obligation of the railway company was not governed by the state law, and that, in this view, the exceptions of the plaintiff in error were well taken.

Judgment reversed.

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[642] FAIRBANKS STEAM SHOVEL COMPANY, Appt.,
v.
WILLIAM V. WILLS, Trustee in Bankruptcy of Federal Contracting Company.

(See S. C. Reporter's ed. 642–649.)

Chattel mortgage — acknowledging and recording — residence of mortgagor — principal office of corporation.

1. The county in which the principal office of the corporate mortgagor is located by its certificate of incorporation is, unless changed by formal action, the residence of the mortgagor within the meaning of the requirement of Hurd's Ill. Rev. Stat. 1909, chap. 95, that a chattel mortgage, not accompanied by a change of possession, shall be invalid as against third persons unless acknowledged and recorded in the county where the mortgagor resides.

[For other cases, see Chattel Mortgage, III., in Digest Sup. Ct. 1908.]

Estoppel — of trustee in bankruptcy — attacking chattel mortgage of bankrupt.

2. The equities, if any, arising out of the representation by the corporate chattel mortgagor, contrary to fact, that its principal place of business was in a specified county, or out of the fact that the mortgage was given to secure a part of the purchase price of the chattel covered by it, could not operate to estop the mortgagor's trustee in bankruptcy from asserting that the mortgage was invalid as to him because not acknowledged or recorded in the county where the mortgagor resides, as is required by Hurd's Ill. Rev. Stat. 1909, chap. 95, when not accompanied by a change of possession, in order to be valid as against third persons.

[For other cases, see Estoppel, III. d, in Digest Sup. Ct. 1908.]

Federal courts — proper district for suit — consent to jurisdiction.

3. The chattel mortgagee of a bankrupt corporation, by answering and making defense upon the merits, consents to the jurisdiction of a Federal bankruptcy court of a district other than that of the bankrupt's residence to entertain a petition filed in the bankruptcy proceedings, in which the invalidity of the mortgage as against the trustee in bankruptcy is asserted, because it was not filed and recorded in the county where the bankrupt resides.

[For other cases, see Courts, 938–941a, in Digest Sup. Ct. 1908.]

Judgment — collateral attack — adjudication of bankruptcy.

4. An adjudication of bankruptcy is not open to collateral attack.

[For other cases, see Judgment, III. 1, 2, in Digest Sup. Ct. 1908.]

Appeal — questions waived below.

5. The question of the capacity of a trustee in bankruptcy to sue in the bankruptcy court to recover possession of property taken by the mortgagee under a chattel mortgage made by the bankrupt, upon the ground that the mortgage was not properly acknowledged and recorded, is waived when not taken in the trial court.

[For other cases, see Appeal and Error, VIII. j, in Digest Sup. Ct. 1908.]

Bankruptcy — title of trustee — relation.

6. The title of the chattel mortgagee of a bankrupt corporation could not be perfected as against the trustee in bankruptcy, who asserts the invalidity of the mortgage as against him because not properly acknowledged and recorded, by taking possession of the chattel under the mortgage after the filing of the petition in bankruptcy and before the adjudication, in view of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 557, chap. 541), § 47a–2, as amended by the act of June 25, 1910 (36 Stat. at L. 840, chap. 412, Comp. Stat. 1913, § 9631), giving trustees in bankruptcy the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer, the estate being *in custodia legis* from the filing of the petition, and the title of the trustee relating back to that date.

[For other cases, see Bankruptcy, VII., in Digest Sup. Ct. 1908.]

[No. 82.]

Argued and submitted December 2 and 3, 1915. Decided April 10, 1916.

APPEAL from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Illinois, confirming the report of a referee in favor of a trustee in bankruptcy who asserts the invalidity, as against him, of a chattel mortgage made by the bankrupt because not properly acknowledged and recorded. Affirmed.

See same case below, 129 C. C. A. 224, 212 Fed. 688.

The facts are stated in the opinion.

NOTE.—As to proper Federal district for suit—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

Mr. Elisha B. Durfee argued the cause, and, with Messrs. John A. Bellatti, Walter Bellatti, and George B. Scofield, filed a brief for appellant:

Even before the new equity rules, it was not necessary to raise the defenses of want of facts and the jurisdiction of the subject-matter by plea. They would be noticed if obvious.

Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941.

There is a difference between the capacity or competency to sue generally, or in the particular action which they bring, and the right and title and capacity to hold the property.

Society for Propagation of the Gospel v. Pawlet, 4 Pet. 480, 7 L. ed. 927.

Where possession of property is procured by fraud or mistake by a person who is afterwards adjudged bankrupt, it is true at least that unless there are subsequent creditors who could have given credit on the faith of the ownership by the bankrupt, the title is defeasible in the hands of the trustee, and the burden is on whichever party is plaintiff to show about this. This court, in the case of Montgomery v. Bucyrus Mach. Works, 92 U. S. 257, 23 L. ed. 656, held that, as no creditors were deceived into giving credit on the apparent ownership of the property by the bankrupt, the defrauded vendor was entitled to the property, as against the assignee in bankruptcy. There was a like holding in Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993.

It is the law of Illinois, that on a conditional sale, if no creditor has given credit to the vendee on the faith of the ownership of the property while it is in his possession, the vendor may reclaim the property, and his rights are superior.

Ketchum v. Watson, 24 Ill. 592; Van Duzor v. Allen, 90 Ill. 499; Gilbert v. National Cash Register Co. 176 Ill. 288, 52 N. E. 22.

Since the bankrupt or trustee was plaintiff here, the burden should be on him to show that there was at least one creditor who could have given credit to the bankrupt while the dredge was in its possession.

Miller v. New Orleans Acid & Fertilizer Co. 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176.

While the recording of a chattel mortgage within four months, etc., under the amendment of June 25, 1910, might constitute a preference under certain circumstances, the taking possession under the circumstances here would not. There must have been a conveyance within four months to have that effect, and here there was none whatever. The title was retained.

Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306.

But the amendment of June 25, 1910, of the bankruptcy act, can have no detrimental effect on this transaction which occurred in 1907. It would impair the obligation of the contract to make it void or its realization more hazardous; and such an intention will not be imputed, if not expressed.

Holt v. Henley, 232 U. S. 637, 58 L. ed. 767, 34 Sup. Ct. Rep. 459.

Corporations were required to locate in their charters their principal place of business, that there might be no difficulty in determining their location or residence.

"Residence," "Domicil," Century Dict.; Pelton v. Northern Transp. Co. 37 Ohio St. 450; Western Transp. Co. v. Scheu, 19 N. Y. 408; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; Hewitt v. General Electric Co. 164 Ill. 420, 45 N. E. 725; Jenkins v. California Stage Co. 22 Cal. 537.

In this way this court worked out the citizenship of corporations for the purposes of jurisdiction.

St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; Southern R. Co. v. Allinson, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401.

A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, unless by virtue of legislation.

Bank of Augusta v. Earle, 13 Pet. 521, 588, 10 L. ed. 275, 307; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363.

There has been much diversity of decision in the lower courts on the question of what court has jurisdiction to adjudge a corporation bankrupt. Some hold that only the court in the district in which the principal place of business has been fixed in the charter of the corporation has jurisdiction, and that courts elsewhere are without jurisdiction. Others hold that wherever the corporation does the larger part of its business, even if in a state foreign to its domicil, it may be adjudged bankrupt by a court there.

White Mountain Paper Co. v. Morse, 62 C. C. A. 369, 127 Fed. 643; Re Elmira Steel Co. 5 Am. Bankr. Rep. 505, 109 Fed. 456; Re United Button Co. 137 Fed. 668; Re Boston, H. & E. R. Co. 9 Blatchf. 101, Fed. Cas. No. 1,677; Re Alaska American Fish Co. 162 Fed. 498; Re Pennsylvania Consol. Coal Co. 163 Fed. 579; Re Duplex Radiator Co. 142 Fed. 906; Re Marine Mach. & Conveyor Co. 91 Fed. 630; Tiffany v. La Plume Condensed Milk Co. 141 Fed. 444; Dressel v.

North State Lumber Co. 3 N. B. N. Rep. 449, 107 Fed. 255; Re Matthews Consol. Slate Co. 75 C. C. A. 603, 144 Fed. 737; Louisville Trust Co. v. Comingor, 184 U. S. 26, 46 L. ed. 416, 22 Sup. Ct. Rep. 293.

Here the court below lacked territorial jurisdiction and jurisdiction of the subject-matter, and found and stated it on the record. Where facts material to the issues appear, that show want of jurisdiction, the court must dismiss, *sua sponte*. Here the fact that the principal place of business of the bankrupt was in Chicago, Cook county, in the northern district, and not in Beardstown, Cass county, Illinois, in the southern district of Illinois, was the very question at issue on which both decisions below were founded.

Hartog v. Memory, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

The bankrupt court had no jurisdiction of this independent proceeding on the facts developed against appellant.

Harris v. First Nat. Bank, 216 U. S. 382, 54 L. ed. 528, 30 Sup. Ct. Rep. 296; Re Rochford, 59 C. C. A. 391, 124 Fed. 182; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; Morris v. Gilmer, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; Lovell v Newman, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375.

The court, *sua sponte*, should have dismissed this proceeding in equity, when it appeared quite obvious on the face of the record that the plaintiff, on the facts, had a plain, adequate, and complete remedy at law to recover the specific personal property. At most the injunction should not have been continued beyond time for an officer to take possession of the property on a writ of replevin.

Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 57 L. ed. 1288, 33 Sup. Ct. Rep. 941; Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 776, 11 Sup. Ct. Rep. 178; Scott v. Neely, 140 U. S. 110, 35 L. ed. 360, 11 Sup. Ct. Rep. 712; Parker v. Winnipiseogee Lake Cotton & Woollen Co. 2 Black, 545, 17 L. ed. 333; Lewis v. Cocks, 23 Wall. 466, 23 L. ed. 70; Sullivan v. Portland & K. R. Co. 94 U. S. 806, 24 L. ed. 324.

Since the controversy on this petition against appellant was carried on in the bankruptcy cause, entitled therein, with all parties participating, in full view of the bankruptcy proceeding, which was still open, the court was bound to consider its jurisdiction in both proceedings on its finding that the principal place of business of the alleged bankrupt always was in another district. And it should have, *sua sponte*, dismissed both.

Butler v. Eaton, 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985.

Mr. Elbert C. Ferguson submitted the cause for appellee. Messrs. William Mumford and John C. Burchard were on the brief:

Our statute relating to the organization of corporations having been adopted from the New York statute, it must receive the same construction given the same or similar language by the New York courts.

Re Qua v. Graham, 187 Ill. 71, 52 L.R.A. 641, 58 N. E. 357; Rhoads v. Chicago & A. R. Co. 227 Ill. 328, 11 L.R.A.(N.S.) 623, 81 N. E. 371, 10 Ann. Cas. 111.

The charter or certificate of complete organization of the corporation fixes its residence, and this cannot be changed except by following the method provided by law.

Norfolk Bank For Sav. & Trusts v. Godwin, 32 C. C. A. 31, 57 U. S. App. 286, 86 Fed. 725; People ex rel. Knickerbocker Press v. Barker, 87 Hun, 341, 34 N. Y. Supp. 269; Western Transp. Co. v. Scheu, 19 N. Y. 408; Pelton v. Northern Transp. Co. 37 Ohio St. 450; Ex parte Schollenberger, 96 U. S. 369, 24 L. ed. 853; First Nat. Bank v. Wilcox, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203.

This mortgage, not having been acknowledged or recorded according to law, is void as against the trustee.

Frank v. Miner, 50 Ill. 444; Long v. Cockern, 128 Ill. 29, 21 N. E. 201; Stephenson v. Browning, 48 Ill. 78; Hammers v. Dole, 61 Ill. 307.

The district court of the United States for the southern district of Illinois had jurisdiction to entertain the petition filed December 30, 1912, and to determine the question of its own jurisdiction.

First Nat. Bank v. Klug, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490.

The district court of the United States for the southern district of Illinois, having adjudicated the Federal Contracting Company to be a bankrupt, this judgment is final and binding on that corporation and its creditors until vacated on appeal or otherwise.

23 Cyc. 1090, and cases cited; Remington, Bankr. § 450; Black, Judgm. § 248; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799.

The district court had power to hear and determine the questions involved in this appeal.

Collier, Bankr. 9th ed. p. 478; Dressel v. North State Lumber Co. 5 Am. Bankr. Rep. 744, 107 Fed. 255.

The petition for bankruptcy was filed in the proper district.

Dressel v. North State Lumber Co. supra; Re Marine Mach. & Conveyor Co. 1 Am. Bankr. Rep. 421, 91 Fed. 630; Collier, Bankr. 9th ed. 33.

All property of the bankrupt becomes, by the filing of the petition, *in custodia legis*.

Re Jules & F. Co. 27 Am. Bankr. Rep. 136; Everett v. Judson, 30 Am. Bankr. Rep. 1; Andrews v. Partridge, 30 Am. Bankr. Rep. 4; Burlingham v. Crouse, 30 Am. Bankr. Rep. 6; Toof v. City Nat. Bank, 30 Am. Bankr. Rep. 79.

The rights of the trustee are those of an attaching or execution creditor, having an unsatisfied execution at the date of the institution of bankruptcy proceedings.

Collier, Bankr. 9th ed. pp. 659, 662.

Possession taken by the mortgagee after the filing of the bankruptcy petition is of no avail to perfect his title.

Re Jules & F. Co. 27 Am. Bankr. Rep. 136; Toof v. City Nat. Bank, 30 Am. Bankr. Rep. 79.

Mr. Justice Pitney delivered the opinion of the court:

This is a controversy arising in a bankruptcy proceeding. On December 30, 1912, a creditors' petition in bankruptcy was filed in the United States district court for the southern district of Illinois against the Federal Contracting Company, a corporation of that state, and on March 25, 1913, it was adjudicated a bankrupt. Between those dates, and on March 6, the Fairbanks Steam Shovel Company, the present appellant, without actual knowledge of the filing of the petition, seized a certain floating steam dredge, then in possession of the Contracting Company at Beardstown, Cass county, which is in the southern district of Illinois; doing this by virtue of a chattel mortgage given by the Contracting Company to appellant on June 8, 1912, the dredge then being in the possession of the mortgagor at Beardstown. After the adjudication of bankruptcy, but before the appointment of a trustee, the bankrupt filed a petition against appellant in the bankruptcy proceeding, setting up that the mortgage was not acknowledged or recorded in Cook County, Illinois, where the principal office of the bankrupt was located by its charter, and for this reason was invalid against the trustee in bankruptcy to be appointed, and praying that appellant might be restrained from selling [644] the dredge, as it threatened to do. The court entered a temporary restraining order, which was served; appellant, without questioning the jurisdiction of the court, appeared and answered, admitting that it had taken possession of the dredge under the provisions of the mortgage, alleging that the mortgage was duly executed and was given to secure a part of the purchase price of the dredge, and that at the time of its execution the bankrupt, through its officers, represented to appellant that its principal place of business was at Beardstown; and further, that, before the adjudication of bankruptcy, appellant took actual possession of the dredge, and thereby perfected its title thereto; and asking that the injunction be dissolved, etc. No trustee having yet been appointed, it was ordered by the court, upon a stipulation between the parties, that the sale should proceed, under an arrangement providing, among other things, that if appellant purchased the dredge, it should hold it subject to the decision of the controversy. The sale was held accordingly, and the dredge was purchased by appellant. Thereafter appellee was appointed trustee in bankruptcy, and was substituted as a party to the controversy in place of the bankrupt. The matter was heard before the referee, who reported in favor of the trustee. The district court overruled exceptions and confirmed the report; and, on appeal, the circuit court of appeals affirmed the decree. 129 C. C. A. 224, 212 Fed. 688. The appeal to this court antedated the act of January 28, 1915, chap. 22, §§ 4 and 6, 38 Stat. at L. 804.

The principal question is whether the chattel mortgage was properly acknowledged and recorded so as to be valid against the trustee in bankruptcy.

The law of Illinois respecting chattel mortgages may be found in chap. 95 of Hurd's Rev. Stat. 1909. Par. 1 provides that no such mortgage shall be valid as against the rights and interests of any third person unless possession shall be delivered to and remain with the grantee, [645] or the instrument shall provide for the possession of the property to remain with the grantor, and the instrument be acknowledged and recorded as thereinafter directed. Par. 2 provides that such instrument shall be acknowledged before a specified officer of "the county where the mortgagor resides," if a resident of the state, with a proviso that in counties having a population of more than 200,000 (this applies to Cook county), such instrument, "if the mortgagor is a resident of the state," shall be acknowledged before one of several designated officers of the town, precinct, district, or county "in which the mortgagor resides." By par. 4, the mortgage, when so acknowledged, "shall be admitted to record by the recorder of the county in which the mortgagor shall reside at the time when the instrument is executed and recorded."

The bankrupt was incorporated in the

year 1905 under a general act (Hurd's Rev. Stat. 1909, chap. 32), the second paragraph of which requires the organizers to make, subscribe, and acknowledge a statement setting forth the name of the proposed corporation, the object for which it is formed, its capital stock, the location of the principal office, etc., which is to be filed in the office of the secretary of state. If the object of the proposed corporation is clearly and definitely stated and is a lawful object, the secretary of state issues to the corporators a license as commissioners to open books for subscription to the capital stock. After the stock is subscribed, directors or managers elected, etc., the secretary of state (¶ 4) issues a certificate of the complete organization of the corporation. But, before this is done, the corporation must "file with the secretary of state a statement setting forth the postoffice address of its business office, giving street and number." (Act of May 10, 1901, Laws 1901, p. 124; Hurd's Rev. Stat. 1909, chap. 32, par. 192.)

Other sections (chap. 32, ¶¶ 50 et seq.) contain elaborate [646] provisions to be complied with when the directors of any corporation "may desire to change the name, to change the place of business, to enlarge or change the object for which such corporation was formed, to increase or decrease the capital stock," etc. There is to be a special meeting of the stockholders, called on notice mailed to each stockholder and published in a newspaper, and votes representing two-thirds of all the stock of the corporation shall be necessary for the adoption of the proposed change; an appropriate certificate is to be filed in the office of the secretary of state, and a like certificate made a matter of record in the county where the principal business office of the corporation is located; and a notice of the change is also to be published in a newspaper for three successive weeks.

The statement made by the organizers of the bankrupt corporation declared: "The location of the principal office is in the city of Chicago, in the county of Cook, and state of Illinois." A license was issued to them as commissioners to open books for subscription to the capital stock, and in due course they made their report to the secretary of state, in which it was stated: "That the postoffice address of the business office of said company is at No. — Park Hotel, streets not numbered, in the city of Beardstown, in the county of Cass, and state of Illinois." Upon receipt of this, the secretary of state issued a certificate of complete organization, including in it the first statement, the report of the commissioners, and other papers filed in his office respecting the organization of the corporation, as required by the statute. The first meetings of the stockholders were held in Chicago, and another stockholders' meeting was held there about two years later. All other recorded meetings of stockholders and directors were held in Beardstown. An office was nominally maintained in Chicago, but no records or books of account were kept nor any business transacted [647] there. So far as the practical conduct of the business was concerned, and to all outward appearances, the principal office was in Beardstown. But no change of "the place of business" was made in the manner prescribed by the statute.

The chattel mortgage was made, acknowledged, and recorded in Cass county, and was never either recorded or acknowledged in Cook county.

The circuit court of appeals held, affirming the district court, that the "residence" of the bankrupt was in Chicago, which is in Cook county, and that therefore the mortgage, having never been properly acknowledged or recorded, was invalid as against the trustee in bankruptcy.

This, in our opinion, was a correct disposition of the question. The statutes of Illinois recognize the propriety of a fixed location for the principal office of a corporation, requiring this to be specified in the certificate of organization and to be left unchanged except on formal action by two thirds in interest of the stockholders. Whether "principal office" and "business office" are synonymous is not entirely clear, and we are referred to no decision by the state courts throwing light upon this. But, supposing them to be synonymous, it does not seem to us that the report of the commissioners for stock subscriptions can have the effect of establishing the office in Cass county, for we find no authority in the commissioners to materially change the location of the principal office as formally declared by the organizers.

We are of opinion that a corporation organized under the laws of Illinois is to be deemed a resident of the state within the meaning of the chattel mortgage act, and that the county of its residence must be taken to be the county in which its principal office is located. So far as the decisions of the state courts throw light upon the question, they bear out this view. Bank of North America v. Chicago, D. & V. R. Co. 82 Ill. 493, 496; Hewitt v. General [648] Electric Co. 164 Ill. 420, 425, 45 N. E. 725. And a similar view prevails in other jurisdictions. In Ex parte Schollenberger, 96 U. S. 369, 377, 24 L. ed. 853, 854, this court, by Mr. Chief Justice Waite, said: "A corporation cannot change its residence or its citizenship. It can have its legal home or"

the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws." And in Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 496, 504, 38 L. ed. 248, 251, 14 Sup. Ct. Rep. 401, the court, by Mr. Justice Brown, said: "In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place." A case in point with the present is First Nat. Bank v. Wilcox, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203. And see Western Transp. Co. v. Scheu, 19 N. Y. 408; Union S. B. Co. v. Buffalo, 82 N. Y. 351, 355; Pelton v. Northern Transp. Co. 37 Ohio St. 450; Jenkins v. California Stage Co. 22 Cal. 537; Cohn v. Central P. R. Co. 71 Cal. 488, 12 Pac. 498.

It is hardly necessary to say that whatever equities, if any, arose out of the mortgagor's representation that its principal place of business was at Beardstown, or out of the fact that the mortgage was given to secure a part of the purchase price of the dredge, were confined in their effect to the immediate parties, and could not operate to estop the trustee in bankruptcy, representative of the interests of creditors, for whose protection the recording act was passed.

It is objected by appellant that a determination that the bankrupt corporation had its principal place of business and therefore its residence in Cook county, which is in the northern district, shows at the same time that the United States district court for the southern district of [649] Illinois had no jurisdiction to entertain the proceeding in bankruptcy under § 2 of the bankruptcy act, and hence no jurisdiction over the present controversy. (See Harris v. First Nat. Bank, 216 U. S. 382, 54 L. ed. 528, 30 Sup. Ct. Rep. 296.) As to this, the circuit court of appeals correctly held that appellant, by answering and making defense upon the merits, consented to the jurisdiction, so that whether, under §§ 23a and 23b, construed together with § 70e, as amended, consent to the jurisdiction of the district court was required, need not be considered.

On like grounds, it is insisted that the adjudication of bankruptcy was invalid, and that the trustee had no capacity to sue. But the adjudication is not open to collateral attack, and the question of capacity was waived because not raised in the trial court.

Appellant's title was not perfected, as against the trustee in bankruptcy, by taking possession of the dredge under the mortgage after the filing of the petition in bankruptcy, and before the adjudication. Since the amendment of § 47a-2 of the bankruptcy act by the act of June 25, 1910 (chap. 412, § 8, 36 Stat. at L. 838, 840, Comp. Stat. 1913, §§ 9586, 9631), trustees have the rights and remedies of a lien creditor or a judgment creditor as against an unrecorded transfer. The estate was *in custodia legis* from the filing of the petition, and the title of the trustee related back to that date. Acme Harvester Co. v. Beekman Lumber Co. 222 U. S. 300, 307, 56 L. ed. 208, 213, 32 Sup. Ct. Rep. 96; Everett v. Judson, 228 U. S. 474, 478, 57 L. ed. 927, 929, 46 L.R.A.(N.S.) 154, 33 Sup. Ct. Rep. 568.

Other questions are raised, but they are unsubstantial and require no particular mention.

Decree affirmed.

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[650] STATE OF GEORGIA, Complainant,
v.
TENNESSEE COPPER COMPANY and the Ducktown Sulphur, Copper, & Iron Company, Limited.

(See S. C. Reporter's ed. 650, 651.)

Injunction — against pollution of air — suit by state.

Injunctive relief to the state of Georgia against the discharge of noxious gases from copper smelters in Tennessee in such quantities as are destructive to vegetation in Georgia awarded by final decree.

[For other cases, see Injunction, II. b, in Digest Sup. Ct. 1908.]

[No. 1, Original.]

Submitted February 28, 1916. Final decree entered April 3, 1916.

ORIGINAL SUIT in equity by the state of Georgia to enjoin the discharge of noxious gases from copper smelters in Tennessee so as to injure vegetation in Georgia. Final decree entered.

Messrs. Lamar Hill, J. A. Drake, Clifford Walker, and Mark Bolding submitted on behalf of complainant a motion for final decree of injunction.

Mr. George H. West, in behalf of Messrs. W. B. Miller and J. A. Fowler, submitted an application on behalf of defendant, the Ducktown Sulphur, Copper, & Iron Company, for final decree dismissing the bill as to it.

Messrs. J. A. Drake, Lamar Hill, Clifford Walker, and Mark Bolding submitted on behalf of complainant objections to the motion to dismiss.

The Chief Justice announced the following order:

This cause coming on to be heard on the report of the inspector heretofore appointed to observe operations of the plant and works of defendant the Ducktown Sulphur, Copper, & Iron Company, Limited, and upon consideration thereof

It is now here ordered, adjudged, and decreed (and all former decrees are accordingly modified) as follows:

1. That defendant the Ducktown Sulphur, Copper, & Iron Company, Limited, hereafter shall not permit escape into the air from its works of fumes carrying more than 45 per cent of the sulphur contained in green ores subjected to smelting.

2. That it shall not hereafter from April 10th to October 1st in any year permit escape into the air of gases the total sulphur content of which shall exceed 25 tons during one day, and not more than 50 tons per day shall be permitted to escape at other times.

3. That it shall keep a daily record of the amount of green ores smelted, sulphur in green ore, acid made, sulphur in acid, per centum of sulphur recovered, sulphur escaping, and per centum of sulphur escaping, so that statements may be compiled therefrom substantially the same as table 3, page 19, printed report of the inspector. [651] It shall also keep a weather record showing direction and velocity of wind, humidity, temperature, and pressure at intervals of six hours. These records, verified by the oath of a responsible officer or employee of the defendant, shall be reported to the clerk of this court immediately after the end of each calendar month.

4. That it shall deposit with the clerk of this court an additional sum of $125.40 to cover expenses and compensation of inspector.

5. That the clerk shall pay to Dr. John T. McGill, inspector heretofore appointed, the sum of $3,375.40—$3,000 being compensation for services, and $375.40 to meet expenses incurred in excess of payments heretofore made to him.

6. The costs of the proceedings in the cause from February 24, 1914, to this date, will be charged to defendant the Ducktown Sulphur, Copper, & Iron Company, Limited; costs accruing prior to February 24, 1914, will be divided equally between the Tennessee Copper Company and the Ducktown Sulphur, Copper, & Iron Company, Limited.

7. The cause will be retained on the docket until further order of the court.

April 3, 1916.

[652] STATE OF NORTH CAROLINA, Complainant,
v.
STATE OF TENNESSEE.

(See S. C. Reporter's ed. 652–668.)

Boundaries — between states.

The true boundary line between the states of North Carolina and Tennessee through the Slick Rock and Tellico basins decreed to be as delineated in the report of commissioners appointed for that purpose.

[For other cases, see Boundaries, III. c, in Digest Sup. Ct. 1908.]

[No. 4, Original.]

April 3, 1916.

ORIGINAL Suit in Equity brought by the State of North Carolina against the State of Tennessee for the judicial establishment of a part of the boundary line between the two states. The true boundary decreed to be as delineated in the report of commissioners appointed for that purpose.

This cause coming on to be heard on the motion of counsel for the complainant, concurred in by the counsel for the defendant, to confirm the report of the commissioners heretofore appointed by this court to ascertain, retrace, remark, and re-establish the real, certain, and true boundary line between the states of North Carolina and Tennessee between certain points mentioned in said report, which said report is in the words and figures following, to wit:

Pursuant to a decree of the Supreme Court of the United States, issued at the October Term, 1914, which appointed D. B. Burns of Asheville, N. C., W. D. Hale of Maryville, Tenn., and Addison, Ky., and Joseph Hyde Pratt of Chapel Hill, N. C., Commissioners to permanently mark and set Monuments on the line in dispute in said controversy between said States, and which set out in detail the duties of said Commissioners, we the said D. B. Burns, W. D. Hale and Joseph Hyde Pratt, Commissioners, do herewith respectfully submit our report.

We have, as ordered, reproduced on the accompanying map, No. 1, the State Line from Tree No. 1—the same being the 59th mile-tree marked by the Commissioners in 1821—southwestwardly to the point where the dispute, began which point is 15 feet south 32 46' west from Tree No. 29—the hemlock fore and aft tree marked by the

NOTE.—On judicial settlement of state boundaries—see note to Nebraska v. Iowa, 36 L. ed. U. S. 798.

Commissioners in 1821—just north of Little Tennessee river. The description of said reproduced line is as follows, *viz.*:

[653] BEGINNING at the 59th mile tree, a large red oak or mountain oak, marked on the southeast side (SE). This tree stands in the Rich Gap of the Smoky Mountain and 260 feet North 30 47′ East from the lowest part of said gap, and runs with the meanders of the mountain South 25 50′ 00″ West 190 feet to a stake,
thence South 43 55′ 35″ West 472 feet to a stake,
thence South 60 58′ 55″ West 212 feet to a stake,
thence South 83 18′ 42″ West 344 feet to a stake,
thence South 82 32′ 00″ West 235 feet to a stake,
thence South 55 05′ 47″ West 561 feet to a stake,
thence South 32 31′ 35″ West 545 feet to a stake,
thence South 51 24′ 25″ West 424 feet to a stake,
thence South 43 58′ 57″ West 284 feet to a stake,
thence South 40 20′ 30″ West 520 feet to a stake,
thence South 45 52′ 47″ West 332 feet to a stake,
thence South 0 30′ 10″ East 410 feet to a stake,
thence South 6 58′ 06″ East 191 feet to a stake,
thence South 2 26′ 42″ West, passing the Dalton Gap at 567 feet—a very deep gap through which the Old Tellassee Trail passes, 1367.6 feet to a stake,
thence South 65 58′ 00″ West 149 feet to a stake,
thence South 47 06′ 05″ West 516 feet to a stake,
thence South 62 08′ 15″ West 264 feet to a stake,
thence South 74 42′ 15″ West 155 feet to a stake,
thence South 53 02′ 15″ West 579 feet to a stake,
thence South 25 22′ 15″ West 134 feet to a stake,
thence South 15 59′ 15″ West 637 feet to a stake,
thence South 28 52′ 30″ West 783 feet to a stake,
thence South 33 43′ 51″ West 517 feet to a stake,
thence South 0 31′ 51″ East 279.5 feet to a stake,
then South 5 31′ 57″ West, passing a pile of rocks at the supposed location of the 61st mile tree at 423 feet, 463 feet to a stake,
thence South 2 40′ 30″ East 450 feet to a stake,
thence South 17 21′ 33″ West 451 feet to a stake,
[654] thence South 41 01′ 06″ West 93 feet to a stake,
thence South 43 45′ 39″ West 511 feet to a stake,
thence South 17 49′ 27″ West 437 feet to a stake,
thence South 34 00′ 30″ West 246 feet to a stake,
the turnpike road in a deep gap,
thence South 73 30′ 00″ West 380.2 feet to a stake,
thence South 60 43′ 30″ West 125.4 feet to a stake,
thence South 52 18′ 00″ West 1304.4 feet to a stake,
thence North 72 19′ 00″ West 490 feet to a stake,
thence South 57 34′ 00″ West 456 feet to a stake,
thence North 63 18′ 30″ West 365 feet to a stake,
thence North 72 23′ West, passing the Locust Gap, where the 62nd mile tree is said to have stood, at 112 feet, 745 feet to a stake,
thence South 83 42′ West 539.7 feet to a stake,
thence South 34 25′ 30″ West 198.7 feet to a stake,
thence South 82 52′ 30″ West 531.6 feet to a stake,
thence South 54 14′ 00″ West 370 feet to a stake,
thence North 75 17′ 30″ West 550 feet to a stake,
thence South 76 15′ 30″ West 550 feet to a stake,
thence South 69 28′ 30″ West 200 feet to a stake,
thence South 85 32′ 00″ West 400 feet to a stake,
thence South 71 35′ 00″ West 670 feet to a stake,
thence South 66 21′ 00″ West, passing an 18″ hickory, supposed to be the 63rd mile tree, at 344 feet, 500 feet to a stake,
thence South 10 59′ 00″ West 200 feet to a stake,
thence South 63 07′ 00″ West 150 feet to a stake,
thence South 27 44′ 00″ West 450 feet to the top of a high knob,
thence South 51 52′ 00″ West 580 feet to a stake,
thence South 56 03′ 00″ West 260 feet to a stake,
thence South 45 13′ 30″ West 390 feet to a stake,
thence South 65 48′ 30″ West 150 feet to a stake,
thence South 26 22′ 00″ West 220 feet to a stake,

thence South 16 12′ 00″ East 260 feet to a stake,
[655] thence South 52 44′ 30″ West 390 feet to a stake,
thence South 17 48′ 30″ East 590 feet to the top of Lone Pine Knob,
thence North 73 47′ 30″ West 380 feet to a stake,
thence South 76 27′ 30″ West 610 feet to a stake,
thence South 66 20′ 30″ West 450 feet to a stake,
thence South 15 07′ 30″ West 350 feet to a stake,
thence South 59 33′ 30″ West 680 feet to a stake,
thence North 67 51′ 30″ West 470 feet to a stake,
thence South 49 24′ 30″ West passing a fore and aft hemlock north of Little Tennessee river at 775 feet, 790 feet to where the lines of contention diverge, we set up a Rock 8 inches thick, 12 inches wide, and 18 inches high, and cut on the southeast side of it N. C. on the northwest side TENN., on the northeast side 0+00 and on the southwest side 1915, and cut an X in the top of the Rock. This is Monument No. 1. From this point, on the 7th day of August 1915, we began the survey and marking of the line, marking side line trees with 3 hacks and fore and aft trees with 2 hacks above a blaze, as follows:

South 79 11′ 00″ West 135 feet to the river bank, thence down the river on the North bank North 38 27′ 30″ West 285 feet to a stake,
thence North 26 43′ 00″ West 295 feet to a stake,
thence North 22 18′ 30″ West 385 feet to a stake,
thence North 56 42′ 00″ West, passing the stump of tree No. 30 at 259 feet, 619 feet to a stake,
thence North 78 55′ 30″ West 361 feet to a stake,
thence North 78 50′ 00″ West 242 feet to a stake,
thence South 85 11′ 00″ West 372.2 feet to a stake,
thence South 76 29′ 30″ West 276.5 feet to a Boulder on the North bank of Little Tennessee river at low water mark, said Boulder is 4 feet wide, 10 feet long and 3 feet high, and on it we cut an X and on the southeast side of the X we cut N. C. 1915 and on the northwest side TENN. 29+70.7. This is Monument No. 2 thence [656] South 54 38′ 00″ West 313 feet crossing the river to a Boulder on the South bank of the river and on the west bank of Slick Rock Creek. This Boulder is 6 feet wide, 15 feet long and 4 feet high, and on it we cut an X and on the east side of the X we cut N. C. on the west side TENN. on the north side 1915 and on the south side 32+83.7. This Boulder being 3283.7 feet from Monument No. 1. This is Monument No. 3. From this point we ran up and with the bed of Slick Rock Creek as follows:
South 30 13′ 00″ East 209.3 feet to a X on a rock,
thence South 7 24′ 00″ West 494 feet to a X on a rock,
thence South 4 17′ 00″ East 630 feet to a X on a rock,
thence South 33 26′ 00″ West 360.7 feet to a X on a rock,
thence South 60 21′ 00″ West 505.7 feet to a X on a rock,
thence South 2 36′ 30″ East 427.6 feet to a X on a rock,
thence South 21 33′ 30″ East 305.6 feet to a X on a rock, near Ravens Den,
thence North 82 29′ 30″ West 640.4 feet to a X on a rock,
thence South 87 14′ 30″ West 173.5 feet to a X on a rock,
thence South 19 21′ 30″ West 273.3 feet to a X on a rock,
thence South 39 36′ 30″ East 171.0 feet to a X on a rock,
thence South 70 45′ 00″ East 320.3 feet to a X on a rock,
thence South 25 28′ 00″ East 177.9 feet to a X on a rock,
thence South 21 39′ 30″ West 289.0 feet to a X on a rock,
thence North 59 17′ 30″ West 728.4 feet to a X on a rock,
thence South 88 36′ 30″ West 858.0 feet to a X on a rock,
thence North 70 01′ 30″ West 481.6 feet to a X on a rock,
thence South 50 27′ 30″ West 413.0 feet to a X on a rock,
thence South 3 19′ 00″ West 320.0 feet to a X on a rock, at top of lower falls
thence South 47 27′ 00″ East 464.0 feet to a X on a rock,
thence South 47 15′ 00″ West 113.9 feet to a X on a rock,
thence North 82 52′ 00″ West 531.4 feet to a X on a rock,
thence South 38 42′ 00″ West 172.7 feet to a X on a rock,
thence South 14 09′ 00″ East 534.6 feet to a X on a rock,
thence South 5 09′ 30″ West 798.9 feet to a X on a rock,
[657] thence South 12 20′ 30″ East 257.7 feet to a X on a rock,
thence South 38 02′ 30″ East 291.8 feet to a X on a rock,
thence South 37 20′ 30″ West 236.0 feet to a X on a rock, near the mouth of Slick Rock Gap, branch,

thence North 57 33′ 30″ West 485.5 feet to a X on a rock,
thence North 85 41′ 30″ West 432.3 feet to a X on a rock,
thence South 17 13′ 00″ West 432.3 feet to a rock in Slick Rock Creek near the west bank and about 30 feet above where the Belding Trail crosses the creek. This Rock is 3 feet wide, 5 feet long and 2 feet high. On it we cut an X and cut N. C. on the southeast side, TENN. on the northwest side, 1915 on the southwest side and 156+ 69.8 on the northeast side of the cross. This is Monument No. 4.
thence South 23 40′ 30″ West 189.9 feet to a X on a rock,
thence North 75 04′ 30″ West 279.3 feet to a X on a rock,
thence North 47 01′ 30″ West 870.5 feet to a X on a rock,
thence North 72 23′ 00″ West 320.5 feet to a stake,
thence South 19 47′ 30″ West passing the mouth of Little Slick Rock Creek at 85 feet, 685.2 feet to a X on a rock,
thence South 41 03′ 00″ West 465.5 feet to a X on a rock,
thence South 24 22′ 00″ West, passing the mouth of Nichols Cove branch at 140 feet, 622.8 feet to a X on a rock,
thence South 6 35′ 30″ West 275.5 feet to a X on a rock,
thence South 26 39′ 00″ West 518.0 feet to a X on a rock,
thence South 1 58′ 00″ East 507.5 feet to a X on a rock at the Panther Den,
thence South 58 02′ 00″ West 276.7 feet to a X on a rock,
thence South 39 07′ 30″ West 135.6 feet to a X on a rock,
thence South 82 52′ 30″ West 287.2 feet to a X on a rock,
thence North 56 19′ 30″ West 335.0 feet to a X on a rock,
thence North 52 35′ 30″ West 304.0 feet to a X on a rock,
thence South 84 13′ 30″ West 281.8 feet to a X on a rock,
thence South 43 16′ 30″ West 254.8 feet to a X on a rock,
thence South 9 07′ 00″ East 154.4 feet to a X on a rock,
[658] thence South 36 44′ 00″ East 179.6 feet to a X on a rock,
thence South 14 15′ 00″ West 173.4 feet to a X on a rock,
thence North 86 45′ 30″ West 322.0 feet to a X on a rock,
thence North 71 16′ 00″ West 251.4 feet to a X on a rock,
thence North 17 05′ 30″ West 405.2 feet to a X on a rock,
thence North 68 35′ 00″ West 329.5 feet to a X on a rock,
thence South 43 09′ 00″ West 207.3 feet to a X on a rock,
thence South 23 56′ 30″ West 369.9 feet to a X on a rock,
thence South 44 30′ 30″ West 82.0 feet to a X on a rock,
thence South 4 47′ 00″ West 425.1 feet to a X on a rock,
thence South 8 51′ 00″ East 129.6 feet to a X on a rock,
thence South 53 26′ 00″ West 599.4 feet to a X on a rock,
thence South 2 30′ 00″ East 254.6 feet to a X on a rock,
thence South 16 07′ 30″ East 168.6 feet to a X on a rock,
thence South 35 12′ 00″ West 370.0 feet to a X on a rock,
thence North 67 59′ 30″ West 393.4 feet to a X on a rock at the mouth of a small branch,
thence South 14 36′ 30″ West 494.0 feet to a X on a rock,
thence South 70 54′ 00″ West 160.5 feet to a X on a rock,
thence North 66 12′ 00″ West 561.2 feet to a X on a rock,
thence South 68 50′ 00″ West 197.3 feet to a X on a rock,
thence South 18 18′ 30″ West 350.1 feet to a X on a rock,
thence South 45 16′ 30″ East 241.9 feet to a X on a rock,
thence South 50 11′ 30″ East 281.8 feet to a X on a rock,
thence South 43 40′ 30″ West 316.2 feet to a X on a rock,
thence South 11 19′ 30″ West 238.6 feet to a stake,
thence North 83 33′ 30″ East 314.4 feet to a X on a rock,
thence South 0 44′ 00″ East 193.8 feet to a X on a rock at the mouth of a small branch,
thence South 34 02′ 30″ West 240.0 feet to a X on a rock,
thence South 11 40′ 00″ East 206.7 feet to a X on a rock,
thence South 40 51′ 00″ West 539.3 feet to a X on a rock,
thence South 10 18′ 30″ East passing the foot of falls at 198 feet, 247.6 feet to a X on a rock,
thence South 73 41′ 00″ East 134.2 feet to a X on a rock in the falls,
[659] thence South 12 37′ 00″ West 262.6 feet to a X on a rock in the falls,
thence South 11 28′ 30″ East passing the top of falls at 20 feet, 224.2 feet to a X on a rock,
thence South 23 21′ 30″ West 578.6 feet to a X on a rock,
thence South 48 36′ 30″ West 428.6 feet to a X on a rock,

thence South 10 43′ 30″ East 217.3 feet to a Large Boulder on the West bank of Slick Rock Creek near the mouth of Big Stack Gap branch, and at the point of a ridge leading to the Big Fodderstack Mountain and near tree No. 46. This Boulder is 6 feet wide, 10 feet long and 5 feet high. On it we cut an X and on the southeast side of the X we cut N. C. on the northwest side TENN. on the southwest side 1915 and on the northeast side 335+24.9, it being 33,524.9 feet from Monument No. 1. This is Monument No. 5.

Thence up said ridge leading to the Big Fodderstack mountain South 2 45′ 00″ West 148.6 feet to a stake,
thence South 26 58′ 30″ West 751.1 feet to a stake,
thence North 72 59′ 00″ West 468.9 feet to a stake,
thence South 72 41′ 00″ West 532.8 feet to a stake,
thence South 35 01′ 30″ West 156.7 feet to a stake,
thence South 13 04′ 00″ West 487.0 feet to a stake,
thence South 52 34′ 00″ West 866.6 feet to a stake,
thence South 14 01′ 00″ West 51.4 feet to a stake,
thence South 45 19′ 00″ West 127.7 feet to a stake,
thence South 62 42′ 30″ West 526.8 feet to a stake,
thence South 30 39′ 00″ West 181.8 feet to a stake,
thence South 29 50′ 30″ West 337.4 feet to a stake,
thence South 62 54′ 30″ West 358.3 feet to a stake,
thence South 9 05′ 30″ West 177.0 feet to a stake,
thence South 37 07′ 30″ West 164.0 feet to a stake,
thence South 26 04′ 30″ West 302.7 feet to a stake,
thence South 29 15′ 00″ West 335.0 feet to a stake,
thence South 42 23′ 00″ West 104.0 feet to a stake,
thence South 58 23′ 00″ West 814.0 feet to a stake,
[660] thence South 78 59′ 00″ West 510.6 feet to a stake,
thence North 73 26′ 00″ West 559.6 feet to a stake,
thence North 53 08′ 00″ West 261.1 feet to a stake,
thence South 86 21′ 00″ West 279.8 feet to a stake,
thence South 75 19′ 00″ West 147.0 feet to a stake,
thence North 86 57′ 00″ West 207.4 feet to a stake,
thence South 60 01′ 00″ West 342.8 feet to the top of the Big Fodderstack mountain where we set Monument No. 6. A Stone 5 inches thick, 14 inches wide and 18 inches high, and on it we cut on the southeast side N. C. 427+25.0 D. B. B. W D. H. J H. P. on the northwest side TENN 1915, and an X in the top. This Stone stands 42725 feet from Monument No. 1. Thence along Big Fodderstack Mountain with its meanders and with the lines of D. B. Burn's former survey South 14 29′ 30″ East 138.1 feet to a stake, thence South 8 53′ 30″ East 541.4 feet to a stake, thence South 28 15′ 30″ East passing Harrison Gap at 1196 feet, 1323.2 feet to a stake,
thence South 11 12′ 30″ West 810.8 feet to a stake,
thence South 34 50′ 00″ East 510.7 feet to a stake,
thence South 29 38′ 00″ East 167.8 feet to a stake,
thence South 23 20′ 00″ East 1063.0 feet to a stake,
thence South 41 18′ 30″ East 311.1 feet to a stake on the Rock Stack,
thence South 60 38′ 30″ East 354.6 feet to a stake,
thence South 83 22′ 00″ East 453.3 feet to a stake,
thence South 60 02′ 00″ East 489.4 feet to a stake,
thence South 37 57′ 30″ East 206.9 feet to a stake, on the top of a very high knob,
thence South 10 09′ 30″ East 574.5 feet to a stake,
thence South 9 05′ 30″ East 586.2 feet to a stake,
thence South 21 34′ 00″ East 195.3 feet to a stake,
thence South 2 41′ 00″ East 444.7 feet to Monument No. 7, a Stone 5 inches thick, 10 inches wide and 18 inches high, and cut an X in the top of it. On the east side we [661] inscribed N. C. 1915 and on the West side TENN 508+96. This Stone stands in the Glen Gap and is 50,896 feet from Monument No. 1. Continuing on same course 228.9 feet to a stake, thence South 47 50′ 30″ East 334.7 feet to a stake,
thence North 82 05′ 30″ East 150.7 feet to a stake,
thence North 80 40′ 30″ East 252.8 feet to a stake,
thence South 67 14′ 30″ East 651.0 feet to a stake,
thence South 40 33′ 00″ East 133.9 feet to a stake on the Chestnut Knob,
thence South 5 27′ 00″ East 301.1 feet to a stake,
thence South 20 29′ 00″ West 433.5 feet to a stake,

thence South 33 45' 30" West 352.4 feet to a stake,
thence South 33 52' 00" West 450.5 feet to a stake,
thence South 26 05' 00" West 205.2 feet to a stake,
thence South 6 21' 30" West 60.7 feet to a stake,
thence South 17 37' 30" West 515.8 feet to a stake,
thence South 13 56' 00" West 139.0 feet to a stake,
thence South 21 45' 00" East 325.2 feet to a stake,
thence South 42 15' 00" East 324.9 feet to a stake,
thence South 40 47' 30" East 327.4 feet to a stake, in the Denton Gap,
thence South 7 15' 30" East 335.1 feet to a stake,
thence South 22 31' 30" West 176.7 feet to a stake,
thence South 14 59' 30" East 563.9 feet to a stake,
thence South 14 33' 00" East 355.5 feet to a stake, in the Cherry Log Gap,
thence South 4 38' 00" East 487.5 feet to a stake,
thence South 0 16' 00" East 71.3 feet to a stake,
thence South 4 01' 30" East 89.4 feet to a stake,
thence South 16 01' 00" West 210.3 feet to a stake,
thence South 0 30' 00" West 326.6 feet to a stake,
thence South 5 30' 30" West 819.4 feet to a stake,
thence South 40 32' 00" East 262.5 feet to a stake,
thence South 41 19' 00" East 343.9 feet to a stake,
thence South 29 48' 00" West 14.9 feet to a Large Boulder [662] on the Stratton Bald Mountain at its Junction with Big Fodderstack Mountain and at the point where the two lines of contention join. This Boulder is Monument No. 8, and is 3 feet wide at its base, 10 feet long and 3 feet high. On the top of this Boulder we cut an X on the southeast side N. C. 601+ 40.7, and on the northwest side TENN. 1915. This Boulder stands 60,140.7 feet from Monument no 1, thence along the top of the main ridge that divides the waters of Citico creek, North Fork of Tellico river and Sycamore creek from the waters of Santeetlah and Snowbird creeks, as follows:
thence South 73 34' 00" West 194.0 feet to a stake,
thence South 50 34' 30" West 393.6 feet to a stake,
thence South 52 49' 30" West 84.0 feet to a stake,
thence South 50 55' 30" West 178.0 feet to a stake,
thence South 31 43' 30" West 301.0 feet to a stake,
thence South 32 02' 30" West 1575.8 feet to a stake,
thence South 48 45' 30" West 631.2 feet to a stake,
thence South 24 54' 30" West 113.5 feet to a stake,
thence South 25 23' 30" West 581.5 feet to a stake,
thence South 34 27' 30" West 502.0 feet to a stake,
thence South 31 55' 30" West 143.2 feet to a stake,
thence South 35 18' 00" West 364.8 feet to a stake,
thence South 35 39' 00" West 623.6 feet to a stake,
thence South 8 58' 30" West 480.4 feet to a stake,
thence South 40 20' 00" West 523.0 feet to a stake,
thence South 59 35' 00" West 768.0 feet to a stake,
thence South 12 45' 00" West crossing the Tellico Trail at 297 feet, on top of the Strawberry Knob, 639.3 feet to a stake,
thence South 71 42' 30" West 591.7 feet to a stake,
thence South 86 36' 30" West 209.3 feet to a stake,
thence South 68 49' 30" West 477.7 feet to a stake,
thence North 71 42' 00" West 332.5 feet to a stake,
thence South 79 01' 00" West 362.8 feet to a stake,
thence South 70 57' 00" West 412.4 feet to a stake,
[663] thence South 73 39' 00" West 383.9 feet to a stake at Rock Stop Bear Stand,
thence South 28 26' 00" West 389.1 feet to a stake,
thence South 45 42' 00" West 281.3 feet to a stake,
thence South 72 20' 30" West 490.3 feet to a stake,
thence South 73 31' 30" West 352.7 feet to a stake,
thence South 72 44' 30" West 227.3 feet to a stake,
thence South 25 09' 00" West 208.0 feet to a stake,
thence South 26 31' 00" West 598.7 feet to a stake, in Beech Gap,
thence South 11 01' 00" West 269.0 feet to a stake,
thence South 50 51' 30" East 403.0 feet to a stake,

thence South 35 55′ 30″ East 161.0 feet to a stake,
thence South 36 36′ 30″ East 369.0 feet to a stake,
thence South 32 28′ 30″ East 1272.4 feet to a stake,
thence South 36 24′ 00″ West 142.9 feet to a stake,
thence South 37 42′ 30″ West 391.9 feet to a stake,
thence South 47 53′ 00″ West 292.8 feet to a stake,
thence South 12 09′ 30″ West 668.7 feet to a stake,
thence South 0 58′ 00″ West 631.3 feet to a stake,
thence South 76 29′ 00″ East 586.4 feet to a stake,
thence North 75 12′ 00″ East 187.6 feet to a stake,
thence South 81 49′ 00″ East 431.4 feet to a stake,
thence South 66 09′ 30″ East passing Stratton's Grave on the crest of the mountain at 148 feet, 245.4 feet to a stake,
thence South 25 50′ 30″ East passing the John Meadows Gap at 168 feet, 688.4 feet to a stake,
thence South 19 13′ 00″ East 283.7 feet to a stake,
thence South 22 35′ 30″ East 490.5 feet to a stake,
thence South 25 04′ 30″ East 144.0 feet to a stake,
thence South 18 23′ 30″ West 785.0 feet to a stake, on the top of John Knob,
thence South 39 58′ 00″ West 148.4 feet to a stake,
thence South 38 22′ 00″ West 147.6 feet to a stake,
thence South 48 28′ 00″ West 434.0 feet to a stake,
[664] thence South 15 49′ 00″ West 746.6 feet to a stake,
thence South 5 26′ 00″ West 341.0 feet to a stake,
thence South 2 47′ 00″ East 583.4 feet to a stake,
thence South 17 49′ 00″ West 371.0 feet to a stake,
thence South 20 38′ 00″ West 290.0 feet to a stake,
thence South 19 42′ 30″ West 384.6 feet to a stake,
thence South 20 37′ 30″ West 317.9 feet to a stake,
thence South 12 47′ 00″ East 312.9 feet to a stake,
thence South 25 10′ 00″ West 515.6 feet to a stake,
thence South 17 15′ 00″ West 248.3 feet to a stake,
thence South 22 53′ 00″ West 284.5 feet to a stake,
thence South 18 25′ 00″ West 514.2 feet to a stake,
thence South 1 00′ 00″ East 673.6 feet to the top of Little Haw Knob,
thence South 11 31′ 30″ West 370.2 feet to a stake,
thence South 15 43′ 30″ East 502.2 feet to a stake,
thence South 30 35′ 30″ East passing McClelland's mile stone marked N. C. 78 at 303 feet, 346.8 feet to a stake,
thence South 54 38′ 30″ East 243.6 feet to a stake,
thence South 67 13′ 30″ East 344.6 feet to a stake,
thence South 79 08′ 30″ East 593.5 feet to a stake,
thence South 83 36′ 00″ East 355.5 feet to a stake,
thence South 86 36′ 30″ East 392.5 feet to a stake,
thence South 62 04′ 30″ East 735.5 feet to a stake, on the top of Haw Knob,
thence South 6 04′ 30″ East 362.7 feet to a stake,
thence South 1 04′ 30″ East 193.1 feet to a stake,
thence South 4 36′ 30″ West 321.7 feet to a stake,
thence South 9 11′ 30″ East 325.5 feet to a stake,
thence South 32 29′ 30″ East 121.0 feet to a stake,
thence South 49 34′ 00″ East 478.3 feet to a stake,
thence South 37 48′ 00″ East 343.1 feet to a stake,
thence South 24 19′ 00″ East 713.6 feet to a stake,
thence South 66 03′ 30″ East 205.3 feet to a stake,
thence South 57 47 30″ East 283.7 feet to a stake,
thence South 71 16′ 00″ East 223.8 feet to a stake,
[665] thence South 5 23′ 00″ West 111.2 feet to a stake,
thence South 30 09′ 00″ West 395.0 feet to a stake,
thence South 40 45′ 00″ West 607.0 feet to a stake,
thence South 21 14′ 00″ West 225.0 feet to a stake,
thence South 6 33′ 00″ West 170.0 feet to a stake, at northwest end of Laurel Top,
thence South 21 25′ 30″ East 465.4 feet to a stake, at southeast end of Laurel Top,
thence South 36 34′ 00″ West 296.4 feet to a stake,
thence South 45 12′ 30″ West 1101.9 feet to a stake,
thence South 44 59′ 30″ West 178.3 feet to a stake,

thence South 65 52' 30" West 140.5 feet to a stake, on the top of Lebo Knob,
thence South 46 01' 30" West 106.8 feet to a stake,
thence South 60 33' 00" West 450.3 feet to a Rock Ledge projecting out of the ground 2 feet high, 5 feet long and 1 foot thick and marked

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C. Co. I G. Co.
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This is the place known as the County Corners and we used this rock for Monument No. 9, and on the top of it we cut an X on the southeast face N. C. 1915 and on the northwest face TENN. 1003+90.0. This Stone is 100,390 feet from Monument No. 1 and is the point at which the lines of contention diverge; thence down the State Ridge as it meanders South 51 21' 00" West passing the Hog Jaw Gap at 535 feet, 831.1 feet to a stake,
thence South 55 29' 30" West 311.4 feet to a stake,
thence South 42 13' 00" West 244.0 feet to a stake,
thence South 72 04' 00" West 337.5 feet to a stake,
thence North 81 54' 00" West 47.7 feet to a stake, top of Grassy Top,
thence South 60 51' 00" West 71.7 feet to the Junction of the State Ridge and Rough Ridge, known as Little Junction,
thence South 66 21' 00" West 137.0 feet to a stake,
[666] thence South 24 14' 30" West 271.1 feet to a stake,
thence South 21 39' 00" West 351.4 feet to a stake,
thence South 30 51' 30" West 412.4 feet to a stake,
thence South 23 40' 00" West 236.2 feet to a stake,
thence South 34 11' 30" West 676.9 feet to a stake,
thence South 14 08' 00" West 1426.2 feet to a stake,
thence South 40 10' 30" West 528.9 feet to a stake,
thence South 51 27' 30" West 602.6 feet to a stake,
thence South 28 34' 30" West 202.6 feet to a stake,
thence South 56 01' 00" West 498.7 feet to a stake,
thence South 45 39' 00" West 642.2 feet to a stake,
thence South 15 10' 00" West 370.1 feet to a stake,
thence South 63 56' 30" West 260.3 feet to a stake,
thence North 89 04' 30" West 257.1 feet to a stake,
thence South 58 56' 30" West 241.5 feet to a stake,
thence South 83 58' 30" West 431.8 feet to a stake,
thence South 38 50' 30" West 700.1 feet to a stake,
thence South 32 17' 00" West 331.7 feet to a stake,
thence South 10 32' 00" East 399.1 feet to a stake,
thence South 37 30' 00" West 179.5 feet to a stake,
thence South 58 29' 00" West 358.5 feet to Red Log Gap where we set a Stone 5 inches thick, 7 inches wide and 18 inches high, and on top of it we cut an X on the southeast side N. C. 1915 on the northwest side TENN and on the northeast side 1122+00. This stone stands 112,200 feet from Monument No. 1, and is Monument No. 10.
thence South 57 29' 00" West 140.6 feet to a stake,
thence South 46 20' 00" West 453.6 feet to a stake,
thence South 83 13' 00" West 542.9 feet to a stake,
thence South 52 58' 30" West 561.6 feet to a stake,
thence North 81 00' 30" West 394.8 feet to a stake,
thence South 70 42' 00" West 547.2 feet to a stake,
thence South 83 55' 30" West 414.5 feet to a stake,
thence South 70 39' 00" West 406.1 feet to McClelland's mile Rock, a large Boulder over one end of which a tree has grown, said Rock is marked N. C.
[667] thence South 57 47' 00" West 498.5 feet to a stake,
thence South 61 51' 30" West 334.7 feet to a stake,
thence South 59 58' 00" West 361.9 feet to a stake,
thence South 77 15' 30" West 243.5 feet to a stake,
thence South 65 56' 00" West 384.4 feet to a stake,
thence South 88 22' 00" West 132.0 feet to a stake,
thence South 56 16' 00" West 241.6 feet to a stake,
thence North 63 43' 30" West 133.6 feet to a stake,
thence South 56 05' 00" West 474.4 feet to a stake,
thence North 81 30' 30" West 303.0 feet to a stake,
thence South 79 04' 30" West 501.0 feet to a stake,
thence South 57 56' 00" West 615.6 feet to a stake,

thence South 79 41′ 30″ West 411.1 feet to a stake,
thence South 69 40′ 00″ West 153.7 feet to a stake,
thence South 51 32′ 30″ West 378.4 feet to a stake,
thence South 72 12′ 00″ West 232.4 feet to Monument No. 11—a Stone 6 inches thick, 14 inches wide and 18 inches high. On the top of it we cut an X on the southeast side N. C. on the southwest side 1915 on the northwest side TENN. on the northeast side 1210+69.0
This Stone stands 121,069 feet from Monument No. 1 and 61 feet from the northeast bank of Tellico river, thence crossing Tellico river South 50 44′ 30″ West 138.0 feet to a stake,
thence South 36 48′ 30″ West 107.7 feet to a stake,
thence South 43 47′ 30″ West 81.9 feet to a stake,
thence South 30 17′ 30″ West 120.1 feet to a stake,
thence South 35 52′ 30″ West 202.1 feet to a stake,
thence South 48 47′ 00″ West passing the 86 Mile Tree, an 18 inch holly marked 86 M at 95 feet, 131.7 feet to a stake,
thence South 35 26′ 00″ West 396.4 feet to a stake,
thence South 17 33′ 30″ West 147.4 feet to a stake,
thence South 34 03′ 30″ East 439.7 feet to a stake,
thence South 10 32′ 00′ East 242.5 feet to a stake,
thence South 46 26′ 00″ West 415.3 feet to a stake,
thence South 87 32′ 00″ West 286.3 feet to a stake,
[668] thence South 70 18′ 00″ West 354.0 feet to a stake,
thence South 35 37′ 30″ West 431.3 feet to a stake,
thence South 58 28′ 00″ West 472.4 feet to a stake,
thence South 5 00′ 30″ West 293.4 feet to a stake,
thence South 75 17′ 30″ West 584.3 feet to a stake,
thence South 24 37′ 30″ West 357.1 feet to a stake,
thence South 74 21′ 30″ West 309.8 feet to a stake,
thence South 21 48′ 30″ West 445.6 feet to a stake,
thence South 39 11′ 00″ West 460.3 feet to a stake,
thence South 64 02′ 00″ West 261.5 feet to the top of Jenks Knob at the point where the two lines of contention join. Here we set up Monument No. 12—a Stone 4 inches thick, 8 inches wide and 18 inches high on top of which we cut an X on the southeast side N. C. on the southwest side 1915 on the northwest side TENN. and on the northeast side 1277+48.2. This Stone stands 127,748.2 feet from Monument No. 1 and at the end of the contention in this cause.

Signed this the 20th day of October, 1915.

(Signed) D. B. Burns.
(Signed) W. D. Hale.
(Signed) Joseph Hyde Pratt,
Chairman.

On consideration whereof,

It is now here ordered, adjudged, and decreed by this court that the real, certain, and true boundary line between the states of North Carolina and Tennessee between said certain points is as delineated in the said report and on the map attached thereto and made a part hereof.

It is further ordered, adjudged, and decreed that each party pay one half of the costs in this case.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1915.

Vol. 241.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1915.

CHIN FONG, Appt.,
v.
SAMUEL W. BACKUS, Commissioner of Immigration for the Port of San Francisco.

(See S. C. Reporter's ed. 1–5.)

Appeal — from district court — Federal question — construction of treaty.

The contention on habeas corpus that the immigration officers, by denying admission to a Chinaman as a returning merchant because his original entry was surreptitious, superadded qualifications for re-entry to those prescribed by the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, Comp. Stat. 1913, § 4324), § 2, and hence infringed the obligations of the treaty of November 17, 1880 (22 Stat. at L. 826), between the United States and China, allowing to Chinese merchants freedom of ingress and egress in the manner permitted to citizens of the most favored nations,— does not involve the construction of a treaty within the meaning of the provisions of the Judicial Code, § 238, authorizing direct appeals from the district courts to the Federal Supreme Court.

[For other cases, see Appeal and Error, 988–989, in Digest Sup. Ct. 1908.]

[No. 664.]

Argued April 5 and 6, 1916. Decided April 17, 1916.

APPEAL from the District Court of the United States for the Northern District of California to review an order refusing relief by habeas corpus to a Chinaman in custody pending deportation. Dismissed for want of jurisdiction.

See same case below, 213 Fed. 288.

The facts are stated in the opinion.

Mr. Jackson H. Ralston argued the cause, and, with Mr. William E. Richardson, filed a brief for appellant.

Assistant Attorney General Wallace argued the cause and filed a brief for appellee:

The appeal in this case should be dismissed for lack of jurisdiction.

Sloan v. United States, 193 U. S. 614, 620, 48 L. ed. 814, 817, 24 Sup. Ct. Rep. 570; Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43; Low Wah Suey v. Backus, 225 U. S. 460, 468, 56 L. ed. 1165, 1167, 32 Sup. Ct. Rep. 734; Brolan v. United States, 236 U. S. 216, 218, 59 L. ed. 544, 547, 35 Sup. Ct. Rep. 285; Lamar v. United States, 240 U. S. 60, ante, 526, 36 Sup. Ct. Rep. 255; Norton v. Whiteside, 239 U. S. 144, ante, 186, 36 Sup. Ct. Rep. 97.

[2] Mr. Justice McKenna delivered the opinion of the court:

Appeal from a judgment dismissing a petition for habeas corpus and remanding petitioner to the custody of the Commissioner of Immigration for the Port of San Francisco, in whose custody he was, pending petitioner's deportation.

A summary of the petition made by the district court is as follows:

"Petitioner Chin Fong, who had been a resident of the United States for a numb of years, departed for China in Novem

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NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

1912; that before he left he applied for a pre-investigation as to his status as a merchant, and a certificate was denied him on the ground that his original entry into this country was surreptitious; that notwithstanding this denial the petitioner left the country, and is now endeavoring to be-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his claim; that notwithstanding these facts he has been denied admission and ordered deported on the same ground that his pre-investigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge, or commissioner." [213 Fed. 288.]

A demurrer was interposed to the petition, which was sustained, the court saying: "Had the petitioner been content to remain in this country, he could have been deported only after a hearing before a justice, judge, or commissioner. But as he left the country voluntarily, and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found [3] that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines, in the case of a Chinese applying to enter, from that of one already in this country whom it is sought to deport, under the exclusion laws."

The decision of the court is contested and it is asserted (1) that the petition was sufficient to entitle petitioner to a discharge; (2) that the Commissioner of Immigration and Secretary of Labor could not require a greater and different degree of proof than that specified in § 2 of the act of Congress of May 5, 1892, entitled, "An Act to Prohibit the Coming of Chinese Persons into the United States" [27 Stat. at L. 25, chap. 60, Comp. Stat. 1913, § 4315]; (3) that petitioner furnished the degree of proof required by the law; (4) that the rights guaranteed petitioner under the treaty between the United States and China concerning immigration, November 17, 1880 [22 Stat. at L. 826], were unduly and unlawfully infringed; and (5) that the decision of the Commissioner was against the law and was an abuse of discretion.

The appeal is direct from the district court, and can only be sustained against the motion of the United States to dismiss for want of jurisdiction in this court if there is a substantial question under the Constitution of the United States or a treaty made under their authority, § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215] permitting an appeal from a district court when a constitutional question is involved and in any case "in which . . . the validity or construction of any treaty made under its [United States] authority is drawn in question."

It will be observed that appellant based his right to land solely on the ground that he had been a merchant in the United States before his departure to China, and that, therefore, it was not competent for the immigration officers to inquire or determine whether his original entry into the United States was open or surreptitious and his stay therein legal or illegal. "The principal proposition that [4] we desire to maintain," counsel say, "and which has apparently been ignored by the Department of Labor, is that when Congress has definitely fixed the tests and qualifications attendant upon the determination of a given act, it is not within the power of an administrative officer to add to or subtract from the congressional rule." The case of Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517, is cited. For the "congressional rule" counsel refer to § 2 of the act of November 3, 1893 (28 Stat. at L. 7, chap. 14, Comp. Stat. 1913, § 4324), which reads as follows:

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

It is contended that the section requires proof by a Chinaman seeking entrance into the United States of two facts only—(1) that he had been a merchant for one year before his departure, and (2) that during such time he had not engaged in manual labor except such as was necessary in the conduct of his business as such merchant. These were the only conditions of the right to enter, it is contended, and it was an irrelevant inquiry whether he "originally entered as a laborer or even surreptitiously." And in emphasis counsel say: "The

manner of entry was entirely ignored by Congress."

These being the conditions, it is hence asserted that if the Department of Labor may superadd one qualification, it may another, "until the law becomes entirely unrecognizable." So far manifestly there is nothing but an appeal to the statute, but the treaty is attempted to be invoked [5] by the following: "Such a course [the addition to the qualifications of the statute] would be in plain derogation of the treaty obligations between the United States and China, allowing to Chinese merchants freedom of egress and ingress in the manner permitted to citizens of the most favored nations, the essential fact by law and treaty being merely that of mercantile status."

No provision of the treaty is cited from which the contention is an applicable deduction, nor are we disposed to quote and comment on the entire treaty in answer to the contention. See 22 Stat. at L. 826; also Lau Ow Bew v. United States, supra. The "merchant" defined by it does not include petitioner. It was the definition of the status acquired in China, not acquired in the United States, and, having been acquired in China, gave access to the United States, and after access freedom of movement as citizens of the most favored nations. And this privilege was given as well to Chinese laborers then (1880) in the United States.

We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty, and that the rights of petitioner can rest only upon the statutes regulating Chinese immigration. So concluding, we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal, and whether he could acquire by either a status which the immigration officers were without power to disregard.

Dismissed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

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[6] THOMAS KELLY, Appt.,
v.
ELVIN J. GRIFFIN, Jailer of Lake County, Illinois, and John J. Bradley, United States Marshal for the Northern District of Illinois.

(See S. C. Reporter's ed. 6–15.)

Habeas corpus — extradition — illegal arrest — release and rearrest.

1. The omission of any formal act of release and rearrest of a person arrested by the local municipal police without a warrant, upon a telegram from the authorities of the foreign government seeking his extradition, furnishes no ground for his discharge on habeas corpus from detention under an extradition warrant subsequently issued by the United States commissioner, no matter how illegal such arrest may have been.

[For other cases, see Habeas Corpus, II. b, in Digest Sup. Ct. 1908.]

Habeas corpus — extradition — sufficiency of complaint.

2. A complaint in foreign extradition proceedings charging perjury is not insufficient on habeas corpus, where the alleged false statements were in fact material, because, under the law of the demanding government, some possible false statements may be perjury that, by reason of their immateriality, would not constitute that offense under the law of the surrendering state.

[For other cases, see Habeas Corpus, II. b, in Digest Sup. Ct. 1908.]

Habeas corpus — extradition — presumptions.

3. The regularity of proceedings before a foreign legislative committee engaged in investigating frauds in the construction of government buildings will be presumed when inquiring on habeas corpus into a detention to await extradition on the charge of perjury before such committee, in view of the nature and purpose of the investigation, and the fact that the accused appeared before it without objection.

[For other cases, see Habeas Corpus, II. b, in Digest Sup. Ct. 1908.]

Habeas corpus — extradition — sufficiency of complaint — false pretenses.

4. A complaint in foreign extradition proceedings charging the obtaining of money from the demanding government by false representations in bills or progress estimates as to the amounts of material used in extra work on government buildings is sufficient on habeas corpus, although the amounts demanded by the bills were paid, not upon the bills, but upon vouchers com-

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NOTE.—On habeas corpus to review extradition proceedings—see notes to State v. Jackson, 1 L.R.A. 373; Ex parte Davis, 12 L.R.A.(N.S.) 225; Com. ex. rel. Flower v. Superintendent of County Prison, 21 L.R.A.(N.S.) 939; Wisener v. Burrell, 34 L.R.A.(N.S.) 755; and Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464.

As to what papers are necessary to obtain surrender of fugitive from another state—see note to Ex parte Hart, 28 L.R.A. 804.

On the right of court of asylum state to examine in interstate extradition proceedings the sufficiency of papers charging the offense for which the return of the fugitive is demanded—see note to Re Waterman, 11 L.R.A.(N.S.) 424.

On the right to try returned fugitive for crime other than that for which he is extradited—see note to Re Flack, 47 L.R.A. (N.S.) 807.

ing from the department of public works, and although the government architect who certified the bills was not deceived, where the person who made out the certificates relied upon the bills in good faith, and without the bills the payments would not have been made.

[For other cases, see Habeas Corpus, II. b, in Digest Sup. Ct. 1908.]

Habeas corpus — extradition — presumption.

5. The Federal courts will assume, when inquiring on habeas corpus into the holding of a person for extradition to Canada, that the Canadian government will respect the convention between the United States and Great Britain, and will not try the accused upon other charges than those upon which the extradition was allowed.

[For other cases, see Habeas Corpus, II. b; Extradition, V., in Digest Sup. Ct. 1908.]

[No. 777.]

Argued April 6 and 7, 1916. Decided April 17, 1916.

APPEAL from the District Court of the United States for the Northern District of Illinois to review an order refusing to discharge on habeas corpus a person in custody under an extradition warrant. Affirmed.

The facts are stated in the opinion.

Mr. John S. Miller argued the cause, and, with Messrs. Edward Osgood Brown and Pierce Butler, filed a brief for appellant:

Appellant's arrest and detention without warrant were unlawful.

Ex parte Cohen, 8 Can. Crim. Cas. 312; Re Dickey, 8 Can. Crim. Cas. 318; State v. Shelton, 79 N. C. 605; Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166; Scott v. Eldridge, 154 Mass. 25, 12 L.R.A. 379, 27 N. E. 677; Harris v. Louisville, N. O. & T. R. Co. 35 Fed. 116; Kurtz v. Moffitt, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148.

He could not lawfully be turned over by the Chicago police officers to, or be lawfully taken from them by, the United States marshal. He should have been set at liberty from such illegal arrest and detention before he could be lawfully arrested on the commissioner's warrant.

Ex parte Cohen, 8 Can. Crim. Cas. 312; Hooper v. Lane, 6 H. L. Cas. 443; Mandeville v. Guernsey, 51 Barb. 99.

The enactment by the Parliament of the Dominion of Canada of a statute which gives to a different moral offense, which is not a crime in Illinois, or in the United States, or at common law, the name of a crime mentioned in an extradition treaty with Great Britain, does not bring such different moral offense within the provisions *of the treaty.*

Not only must an offense be named in the treaty as extraditable, it must also be considered a crime in both the demanding and surrendering country.

Wright v. Henkel, 190 U. S. 58, 47 L. ed. 951, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386.

If extradited for "perjury," the petitioner may be tried and condemned in Canada without proof, or in the face of disproof, of that which constitutes "perjury" in the United States. It is impossible to extradite for "perjury" from the United States to Canada and avoid this situation. Extradition from the United States to Canada for this alleged crime is therefore not permissible.

United States v. Rauscher, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222.

The tribunal must have had jurisdiction of the cause in which the oath was administered, and Manitoba assembly committee lacked that jurisdiction.

Pankey v. People, 2 Ill. 80; Maynard v. People, 135 Ill. 416, 25 N. E. 740; Hereford v. People, 197 Ill. 222, 64 N. E. 310.

The complaints and the competent evidence before the commissioner did not show probable cause that appellant was guilty of the crime of obtaining money by false pretenses.

Jackson v. People, 126 Ill. 139, 18 N. E. 286; Moore v. People, 190 Ill. 333, 60 N. E. 535.

Messrs. Almon W. Bulkley and Henry B. F. Macfarland argued the cause, and, with Mr. Clair E. More, filed a brief for appellees:

A treaty of this character is executory, and the duty to perform is imposed upon the executive, not the judicial, department.

Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

Habeas corpus is to determine whether a prisoner is lawfully detained.

Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

If the committing magistrate has jurisdiction, the offense charged is within the treaty, and the magistrate has before him competent legal evidence, his decision will not be reviewed on habeas corpus.

Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Ornelas v. Ruiz, 161 U. S. 502, 508, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; Yordi v. Nolte, 215 U. S. 227, 54 L. ed. 170, 30 Sup. Ct. Rep. 90; Nishimura Ekiu v.

United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; McNamara v. Henkel, 226 U. S. 520, 57 L. ed. 330, 33 Sup. Ct. Rep. 146; Ex parte Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

A preliminary complaint on information and belief is not unlawful.

Yordi v. Nolte, 215 U. S. 227, 54 L. ed. 170, 30 Sup. Ct. Rep. 90.

It is immaterial how the commissioner obtains jurisdiction of the person.

Wright v. Henkel, 190 U. S. 40, 47 L. ed. 948, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; Nishimura Ekiu v. United States, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; Iasigi v. Van de Carr, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; Re Macdonnell, 11 Blatchf. 170, Fed. Cas. No. 8,772; Kelley v. Thomas, 81 Mass. 192; Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; Mahon v. Justice, 127 U. S. 712, 32 L. ed. 287, 8 Sup. Ct. Rep. 1204; Ker v. Illinois, 119 U. S. 437, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

It is not material what the Canadian statute of perjury is, if the perjury charged comes within the terms of the treaty and United States law.

Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98, 12 Am. Crim. Rep. 366; Re Oteiza y Cortes, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Bryant v. United States, 167 U. S. 104, 42 L. ed. 94, 17 Sup. Ct. Rep. 744; Benson v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Ornelas v. Ruiz, 161 U. S. 502-508, 40 L. ed. 787-789, 16 Sup. Ct. Rep. 689.

The Canadian Code is the equivalent of Illinois and United States statutes regarding perjury.

22 Am. & Eng. Enc. Law, 684; 2 Whart. Crim. Law, 9th ed. § 1244; United States v. Landsberg, 23 Fed. 585, 4 Am. Crim. Rep. 474; Reg. v. Overton, 2 Moody C. C. 263, Car. & M. 655; State v. Rosenberg, 88 Vt. 223, 92 Atl. 145; Dilcher v. State, 39 Ohio St. 134.

The regularity of appointment or procedure of the public accounts committee of the Manitoba legislative assembly is not material in this proceeding.

Maynard v. People, 135 Ill. 416, 25 N. E. 740; Greene v. People, 182 Ill. 278, 55 N. E. 341.

The alleged defect was waived by Kelly's appearing and testifying without objection or protest.

Maynard v. People, 135 Ill. 416, 25 N. E. 740.

Whether anyone was deceived, or relied on alleged false pretenses, is a question of fact not reviewable here.

McNamara v. Henkel, 226 U. S. 520, 57 L. ed. 330, 33 Sup. Ct. Rep. 146; Thomas v. People, 113 Ill. 531, 5 Am. Crim. Rep. 127; Keyes v. People, 197 Ill. 641, 64 N. E. 730; People v. Goodhart, 248 Ill. 373, 94 N. E. 148.

Embezzlement, larceny, receiving money knowing it to have been embezzled, stolen, or fraudulently obtained, is within the treaty, and is a crime in both countries.

United States v. Greene, 146 Fed. 766; Greene v. United States, 85 C. C. A. 251, 154 Fed. 401, 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. Rep. 261.

Mr. Justice **Holmes** delivered the opinion of the court:

The appellant was held for extradition to Canada, and petitioned for and obtained a writ of habeas corpus. After a hearing upon the returns to the writ and to a writ of certiorari issued to the commissioner by whose warrant the [12] petitioner was detained, the district judge discharged the writ. An appeal was allowed and several objections have been pressed to the proceeding, which we will take up in turn. The matter arises out of frauds in the construction of the new Parliament buildings at Winnipeg, in which Kelly, the contractor, and a number of public men, are alleged to have been involved.

First it is said that jurisdiction of the appellant's person has not been obtained legally. On October 1, 1915, he was arrested without a warrant, on a telegram from Winnipeg. The next day a complaint was made before the commissioner by the British Vice Consul General in Chicago upon information and belief, a warrant was issued, and the petitioner was turned over to the United States marshal by the Chicago police. On October 15 a new complaint was filed by the British Consul General, a new warrant was placed in the hands of the marshal, and the former complaint was dismissed. Wright v. Henkel, 190 U. S. 40, 42, 44, 63, 47 L. ed. 948, 949, 956, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386. The contention is that the original arrest was illegal, and that the appellant was entitled to be set at liberty before the warrant of October 2 or that of October 15 could be executed with effect.

But, however illegal the arrest by the Chicago police, it does not follow that the taking of the appellant's body by the marshal under the warrant of October 2 was void. The action of the officers of the state or city did not affect the jurisdiction of the commissioner of the United States. Furthermore, the order dismissing the complaint of October 2 was that the appellant be discharged forthwith from custody; so that,

on the face of the record, it would seem that before being held under the present warrant the appellant had the moment of freedom which he contends was his right. It is urged that the Canadian authorities are trying to take advantage of their own wrong. But the appellant came within reach of the commissioner's warrant by his own choice, and the most that can be said [13] is that the effective exercise of authority was made easier by what had been done. It was not even argued that the appellant was entitled to a chance to escape before either of the warrants could be executed. This proceeding is not a fox hunt. But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form. We are of opinion that, in the circumstances of this case as we have stated them, the omission of a formal act of release and a subsequent arrest, if they were omitted, furnishes no ground for discharging the appellant upon habeas corpus. All the intimations and decisions of this court indicate that the detention of the appellant cannot be declared void. Pettibone v. Nichols, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; Iasigi v. Van de Carr, 166 U. S. 391, 393, 394, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; Nishimura Ekiu v. United States, 142 U. S. 651, 662, 35 L. ed. 1146, 1150, 12 Sup. Ct. Rep. 336. If we were satisfied that a different rule would be applied by the final authority in Great Britain, other questions would arise. Charlton v. Kelly, 229 U. S. 447, 57 L. ed. 1274, 46 L.R.A.(N.S.) 397, 33 Sup. Ct. Rep. 945. But we are not convinced by anything that we read in Hooper v. Lane, 6 H. L. Cas. 443, 27 L. J. Q. B. N. S. 75, 3 Jur. N. S. 1026, 6 Week. Rep. 146, that a different rule would be applied, and we think it unnecessary to discuss the differences in detail.

The complaint of October 15 charges perjury, obtaining money by false pretenses, and, conjointly, stealing or embezzling and unlawfully receiving money and other property of the King which had been embezzled, stolen, or fraudulently obtained by means of a conspiracy as set forth. The perjury alleged is swearing falsely to the proportion of cement sand and broken stone put into the caissons of the new Parliament buildings at Winnipeg, in a judicial proceeding before the public accounts committee of the legislative assembly of the province of Manitoba, the appellant knowing his statements to be false. It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, § 170, [14] defines perjury as covering false evidence in a judicial proceeding, "whether such evidence is material or not." As to this it is enough to say that the assertions charged here were material in a high degree, and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois. "It is enough if the particular variety was criminal in both jurisdictions." Wright v. Henkel, 190 U. S. 40, 60, 61, 47 L. ed. 948, 955, 956, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386. There is no attempt to go beyond the principle common to both places in the present case. It is objected further that although the above committee was authorized to examine witnesses upon oath, it was only in "such matters and things as may be referred to them by the House." But even if there were not some evidence and a finding (Ornelas v. Ruiz, 161 U. S. 502, 509, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689), the nature of the investigation, the purposes for which the committee was appointed, and the fact that the appellant appeared before it without objection, would warrant a presumption of regularity in a summary proceeding like this.

The plan for the foundations of the buildings was changed from piling called for by the written contract to caissons filled with concrete, and the false representations alleged concerning the amount of concrete, lumber, iron rings, and bolts used in the extra work. They consisted in bills or "progress estimates" addressed to the provincial government for "labor and material supplied," setting forth the amount of each item thus stated to have been supplied. It is objected that the amounts demanded by the bills were paid not upon the bills, but upon vouchers coming from the department of public works, and that the provincial architect who certified the bills was not deceived. The person who made out the certificates relied upon the bills in good faith, and it appears that without the bills the payments would not have been made. The fact that there were other steps necessary in addition [15] to sending in a false account, or that other conspirators co-operated in the fraud, does not affect the result that, on the evidence, Kelly obtained the money from the provincial government by fraudulent representations to which he was a party, and that his false statement was the foundation upon which the government was deceived.

The last charge, stealing or embezzling and receiving money fraudulently obtained, needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined,

but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois. There may be a doubt whether the appellant, if a party to the fraud, received the money of the government directly from it, or through a third hand, so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable, in view of the finding. We assume, of course, that the government in Canada will respect the convention between the United States and Great Britain, and will not try the appellant upon other charges than those upon which the extradition is allowed. Therefore we do not think it necessary to require a modification of the complaint before the order discharging the writ of habeas corpus is affirmed.

Final order affirmed.

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[16] E. C. OSBORNE, Receiver of the Chattanooga Southern Railroad Company,

v.

JENNIE B. GRAY.

(See S. C. Reporter's ed. 16–21.)

Error to state court — scope of review — local law.

1. The question whether the declaration in an action against a railway company for the wrongful killing of an employee permitted a recovery at common law is one of local law in the absence of any showing bringing the injury within the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and is, therefore, not open for review in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2070–2226, in Digest Sup. Ct. 1908.]

Evidence — judicial notice to supply record.

2. The Federal Supreme Court cannot supply the lack of any evidence in the record showing the interstate character of the employment of a railway employee, killed while carrying out his instructions to deliver at Chattanooga, Tennessee, three carloads of peaches cut out of a passenger train from the south at a suburb of that city, by taking judicial notice that the fruit cars came from without the state, notwithstanding the nearness of Chattanooga and its suburb to the Georgia line.

[For other cases, see Evidence, I., in Digest Sup. Ct. 1908.]

[No. 373.]

Argued April 3, 1916. Decided April 17, 1916.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals of that state, reversing a judgment of the Circuit Court of Hamilton County in favor of defendants, rendered on a second trial of an action for the death of a railway employee, and reinstating a judgment of that court in favor of plaintiff, rendered at the first trial. Affirmed.

See same case below in Court of Civil Appeals, 5 Tenn. C. C. A. 519.

The facts are stated in the opinion.

Mr. William L. Frierson argued the cause, and, with Mr. Lewis M. Coleman, filed a brief for plaintiff in error:

The writ of error rests upon the claim, asserted by us, that the state court, in deciding that the Federal employers' liability act does not apply to a given state of facts shown (1) in the declaration and (2) in the proof, has failed to properly apply that act, and has thus deprived plaintiff in error of the right to be shielded from responsibility to anyone except a personal representative of deceased. This clearly presents a Federal question.

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 856; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481.

The question involved being clearly a Federal question, the motion to dismiss cannot be sustained unless the right asserted is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous.

Seaboard Air Line R. Co. v. Padgett, supra.

Where it appears either in the declaration or in the proof that the accident occurred in interstate commerce, the act of Congress controls, and, in case of death, a widow cannot recover in her own name.

Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider when reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On judicial notice, generally—see note to Olive v. State, 4 L.R.A. 33.

The view expressed by the state court that only the second count was amended is not conclusive on this court.

Newport Light Co. v. Newport, 151 U. S. 537, 38 L. ed. 262, 14 Sup. Ct. Rep. 429; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 595, 41 L. ed. 566, 17 Sup. Ct. Rep. 198; Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; Vandalia R. Co. v. Indiana, 207 U. S. 367, 52 L. ed. 248, 28 Sup. Ct. Rep. 130.

The trial court was bound to know judicially, and this court will know, that the Chattanooga Southern Railroad extends from Chattanooga to the Georgia state line, and then through the state of Georgia and to Gadsden in Alabama; that Chattanooga is only about 4 or 5 miles from the Georgia state line, and its suburb of Alton Park, immediately south of it, is almost on the state line.

Peyroux v. Howard, 7 Pet. 324, 8 L. ed. 700; United States v. La Vengeance, 3 Dall. 297, 1 L. ed. 610; United States v. Lawton, 5 How. 26, 12 L. ed. 34; Watts v. Lindsey, 7 Wheat. 162, 5 L. ed. 424; McNitt v. Turner, 16 Wall. 352, 21 L. ed. 341; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 561, 14 L. ed. 267; United States v. Thornton, 160 U. S. 658, 659, 40 L. ed. 572, 16 Sup. Ct. Rep. 415; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270; Schollenberger v. Pennsylvania, 171 U. S. 9, 10, 43 L. ed. 52, 53, 18 Sup. Ct. Rep. 757; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Nicol v. Ames, 173 U. S. 516, 517, 43 L. ed. 792, 19 Sup. Ct. Rep. 522; Gibson v. Stevens, 8 How. 399, 12 L. ed. 1129; Brown v. Spillman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 174 U. S. 674, 43 L. ed. 1130, 19 Sup. Ct. Rep. 827; Black Diamond Coal Min. Co. v. Excelsior Coal Co. 156 U. S. 611, 39 L. ed. 553, 15 Sup. Ct. Rep. 482; Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501; Greenl. Ev. 15th ed. § 6; Thorson v. Peterson, 9 Fed. 517; Gilbert v. Moline Water Power & Mfg. Co. 19 Iowa, 319; Coover v. Davenport, 1 Heisk. 368, 2 Am. Rep. 706; St. Louis, I. M. & S. R. Co. v. Magness, 68 Ark. 289, 57 S. W. 933; Perry v. State, 113 Ga. 938, 39 S. E. 315; Harvey v. Territory, 11 Okla. 156, 65 Pac. 837; Harvey v. Wayne, 72 Me. 430; Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594; Bond v. Perkins, 4 Heisk. 364; Bruson v. Clark, 151 Ill. 495, 38 N. E. 252; Pearce v. Langfit, 101 Pa. 507, 47 Am. Rep. 737; Blumenthal v. Pacific Meat Co. 12 Wash. 332, 41 Pac. 47; Seigbert v. Stiles, 39 Wis. 533; Chamberlayne, Ev. 741; Hobbs v. Memphis & C. R. Co. 9 Heisk. 874; State v. Missouri P. R. Co. 212 Mo. 677, 111 S. W. 500; Gulf, C. & S. F. R. Co. v. State, 72 Tex. 404, 1 L.R.A. 849, 2 Inters. Com. Rep. 335, 13 Am. St. Rep. 815, 10 S. W. 81; 16 Cyc. 861; Miller v. Texas & N. O. R. Co. 83 Tex. 518, 18 S. W. 954; Smitha v. Flournoy, 47 Ala. 345.

Mr. B. E. Tatum argued the cause, and, with Messrs. P. H. Thach, Felix D. Lynch, George W. Chamlee, and Joe V. Williams, filed a brief for defendant in error:

There is no Federal question involved in this record. The points involved are questions of (1) fact passed upon adversely to the plaintiff in error by the three courts of Tennessee, which is conclusive here (Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Miedreich v. Lauenstein, 232 U. S. 236, 58 L. ed. 584, 34 Sup. Ct. Rep. 309, and (2) the interpretation of pleadings and the effect of amendments of pleadings, which are also binding upon this court.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265.

The petition for a writ of error, and assignment of errors accompanying the same, should be dismissed for the reason that neither of them shows that any title, right, privilege, or immunity now claimed by the plaintiff in error was especially set up or claimed in any of the courts of Tennessee, and hence this court has no jurisdiction of the cause (Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790); and the assignment of errors accompanying the petition for a writ of error should be dismissed for the reason that said assignment of errors nowhere alleges that in any of the decrees in the courts of Tennessee the plaintiff in error was denied any title, right, privilege, or immunity claimed under the Federal Constitution or any Federal statute, it being the duty of the plaintiff in error, under the practice in Tennessee and in this court, to especially assign this as error in order to give this court jurisdiction.

Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. ed. 127, 35 Sup. Ct. Rep. 21; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; D. B. Loveman Co. v. Bayless, 128 Tenn. 318, 160 S. W. 841, Ann. Cas.

1915C, 187; Michaels v. Post, 21 Wall. 398, 22 L. ed. 520.

The practice of claiming damages based on common-law negligence in one count, and damages based on a violation of the Federal employers' liability act in another count, is recognized and approved by this court.

Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

A writ of error will not lie where a state decision is sustainable on non-Federal grounds; hence, where the record shows a Federal and a non-Federal question, and the case was disposed of below on the latter, this court will not take jurisdiction.

Allen v. Arguimbau, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. ed. 1108, 25 Sup. Ct. Rep. 750; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; Hale v. Lewis, 181 U. S. 474, 45 L. ed. 960, 21 Sup. Ct. Rep. 677.

In Tennessee, where there are two or more counts in a declaration on the same cause of action, a general verdict in favor of the plaintiff will be sustained if there is evidence to sustain the allegations of any count.

Shepherd v. Staten, 5 Heisk. 82.

There is no question of law involved in the case, and the case having been brought here manifestly for delay, the judgment of the supreme court of Tennessee should be affirmed, with 10 per cent as damages added.

Texas & P. R. Co. v. Prater, 229 U. S. 177, 57 L. ed. 1139, 33 Sup. Ct. Rep. 637.

Distances, locations, and matters of a similar nature, may be judicially known to the court, but they are not judicially known in order to give the court jurisdiction.

Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; Thayer, Ev. chap. VII, p. 281.

Until the contrary is alleged or shown, it will be presumed, in an action for injuries to a railroad employee through the negligence of his employer in the use or operation of its railway within the state, that he was engaged in intrastate commerce, and that he is seeking a remedy under the laws of the state.

Erie R. Co. v. Welsh, 89 Ohio St. 81, 105 N. E. 189; Bradbury v. Chicago, R. I. & P. R. Co. 149 Iowa, 63, 40 L.R.A.(N.S.) 684, 128 N. W. 1; Chicago, R. I. & P. R. Co. v. McBee, — Okla. —, 145 Pac. 331.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought, in the year 1908, by Jennie B. Gray to recover damages for the death of her husband, who was employed in the operation of the railroad of which the plaintiff in error and another were receivers. The original declaration sought recovery for negligence, at common law, and did not allege that the deceased was injured while engaged in interstate commerce. The plaintiff was permitted to file an additional count, and this was subsequently amended so as to allege the interstate character of the employment of the deceased at the time of his injury. The action was first tried in November, 1912; the jury rendered a verdict in favor of the plaintiff of $10,000 and judgment was entered accordingly. Thereupon, the trial judge granted a new trial upon the ground that he had erred in his instructions [19] to the jury with respect to the burden of proof. At the second trial, in 1913, a verdict was directed for the defendants (the plaintiffs in error) and judgment in their favor was entered. The court of civil appeals reversed this judgment and reinstated the judgment entered upon the verdict at the first trial. The court of civil appeals did not consider the record of the second trial, but was of the opinion that the verdict first rendered in favor of the plaintiff should not have been set aside. This decision was affirmed by the supreme court of the state, without opinion.

The plaintiff in error presents for our consideration these assignments of error: (1) That the court erred in not holding that both counts of the declaration stated a case controlled by the Federal employers' liability act, and that, therefore, the widow could not recover in a suit begun in her own name; and (2) that the court erred in not holding that the evidence on the first trial made a case within the Federal act.

In support of the first assignment, it is insisted that the amendment inserting the allegation that the injury was sustained while the decedent was engaged in interstate commerce amended both counts of the declaration. The state court treated it as an amendment of the second count, and thus the declaration on which the case was tried was deemed to contain two counts, "one under the common law of Tennessee and the other charging negligence under the employers' liability act." From a Federal standpoint, the question is not important, for if it had been shown that the injury had been received in interstate commerce, the defendants would have been entitled to insist upon the applicable Federal law as the exclusive measure of their liability, and they would not have lost this right merely because the plaintiff had seen fit to present the claim "in an alternative way," by means of separate counts. Wabash R. Co. v. Hayes, 234 [20] U. S. 86, 90, 58 L. ed. 1226, 1230, 34 Sup. Ct. Rep. 729, 6 N.

C. C. A. 224. And in the absence of a showing bringing the injury within the Federal act, the question whether the declaration permitted a recovery at common law was a state question.

It was distinctly stated by the court of civil appeals that if the proof showed "that the deceased was engaged in interstate commerce when he was injured," the court would "be compelled to hold that the trial judge was not in error in setting aside the verdict." But it was found that there was no basis in the evidence for such a conclusion, and the second assignment of error challenges this ruling. The court of civil appeals thus stated the facts:

"The proof indicates that the deceased came into Alton Park on a passenger train, and, as a part of this train, there were three cars loaded with peaches. These cars were taken out of the passenger train at Alton Park, when the train went on to the Chattanooga depot. After these fruit cars were taken out of the passenger train, the deceased was directed by one of his superiors to have them re-iced and then taken to Cravens and delivered to the N., C. & St. L. Railroad Company. The proof does not show that the passenger train on which the deceased came into Alton Park, and a part of which the fruit cars were, came from another state, and in fact fails to show where it came from. The proof likewise fails to show how far through or into what part of Tennessee the railroad of defendant company is located, and to what point it operates trains. . . . The fruit cars which he was ordered to take and deliver to the Nashville road, so far as his record discloses, were taken out of a passenger train in Alton Park. The proof does not indicate where they came from, whether from another state, or whether they were picked up in Tennessee. . . . We do not know where the passenger train came from, nor where these fruit cars come from; all we do know is, they were [21] cut out of the passenger train at Alton Park, and the deceased was ordered to take them down into Chattanooga and deliver them to the N., C. & St. L. Railroad Company. That being true, the deceased and these cars were engaged in intrastate commerce when he received his fatal injury, and not in interstate commerce." [5 Tenn. C. C. A. 524.]

The evidence has not been printed, but by stipulation between the parties it is agreed that the testimony also showed that the passenger train in question had left Chattanooga at 7 o'clock in the morning of the day of the accident, and that it had come into Alton Park from the south, on its return trip, late in the afternoon. But this still leaves undisclosed the origin and destination of the cars in the movement of which the decedent was employed.

It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the state. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may assume to know without evidence. The state court, with its intimate knowledge of the local situation, thought that such an assumption on its part would be wholly unwarranted and we cannot say that it erred in this view. The fact that Chattanooga and its suburb, Alton Park, were near the state line, did not establish that the cars had crossed it. The defendants knew the actual movement of the cars, and, failing to inform the court upon this point, cannot complain that they have been deprived of a Federal right.

Judgment affirmed.

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[22] G. & C. MERRIAM COMPANY, Appt.,
v.
ARTHUR J. SAALFIELD, Saalfield Publishing Company, and George W. Ogilvie.

(See S. C. Reporter's ed. 22-33.)

Appeal — from district court — jurisdiction below.

1. The jurisdiction of a Federal district court as a Federal court is so involved as to sustain a direct appeal to the Federal Supreme Court, under the Judicial Code, § 238, in orders quashing service of process against a nonresident by substituted service upon persons said to represent him within the district, and setting aside all proceedings based thereon.

[For other cases, see Appeal and Error, 908-911, in Digest Sup. Ct. 1908.]

Note.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 46 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

On the conclusiveness of a judgment as between plaintiff and one not a party nor privy, who voluntarily conducted the defense—see note to Ludy v. Larsen, 37 L.R.A.(N.S.) 957.

As to validity of personal judgments rendered upon constructive service of process—see note to Moyer v. Bucks, 16 L.R.A. 231.

As to what service of process is sufficient, generally, to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

Judgment — res judicata — parties — participation in defense — final decree.

2. A decree may not be *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself.

[For other cases, see Judgment, 775–780, in Digest Sup. Ct. 1908.]

Judgment — necessity of service of process — nonresident — ancillary proceeding.

3. A supplemental bill interposed for the purpose of obtaining a decree *in personam* against a nonresident upon the ground that by his participation in the defense of the original action he had made himself an actual, though not a nominal, party, and was, therefore, under the doctrine of *res judicata*, bound by the decree therein, is an original proceeding as against him, not a dependent and ancillary one, and jurisdiction thereof cannot be exerted upon mere notice to him without service of original process within the district.

[For other cases, see Judgment, III. c, 1; Courts, V. c, 9, in Digest Sup. Ct. 1908.]

[No. 178.]

Argued January 14 and 17, 1916. Decided April 17, 1916.

APPEAL from the District Court of the United States for the Northern District of Ohio to review orders quashing the service of process against a nonresident by substituted service, and setting aside all proceedings based thereon. Affirmed.

The facts are stated in the opinion.

Mr. William B. Hale argued the cause, and, with Mr. James A. Ford, filed a brief for appellant:

Ogilvie was privy to the original suit, and was an actual, although not an ostensible, party thereto, in such a real sense that the decree will be *res judicata* against him.

Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 549, 551, 31 L. ed. 199, 201, 8 Sup. Ct. Rep. 210; G. & C. Merriam Co. v. Saalfield, 111 C. C. A. 517, 190 Fed. 932, 117 C. C. A. 245, 198 Fed. 371; Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. ed. 129, 134; Robbins v. Chicago, 4 Wall. 657, 672, 18 L. ed. 427, 430; Rumford Chemical Works v. Hygienic Chemical Co. 215 U. S. 156, 54 L. ed. 137, 30 Sup. Ct. Rep. 45; Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875; David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980; Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 922; Empire State Nail Co. v. American Solid Leather Button Co. 71 Fed. 588; Claflin v. Fletcher, 7 Fed. 851; Bank of Commerce v. Louisville, 88 Fed. 398; Castle v. Noyes, 14 N. Y. 329; Carey v. Roosevelt, 91 Fed. 567, 83 Fed. 242; Theller v. Hershey, 89 Fed. 575; Tootle v. Coleman, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41.

If the actual defense of a suit by one interested therein, but not named as a party, becomes known to the plaintiff at any time before the final decree, both parties will be bound by it as *res judicata*.

Eagle Mfg. Co. v. Miller, 41 Fed. 357.

The district court for the northern district of Ohio, eastern division, has jurisdiction notwithstanding Ogilvie resides in the southern district of New York, because: (a) He submitted to the jurisdiction, and waived objections, by voluntarily coming in and defending the suit.

Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Re Keasbey & M. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273.

And (b) the supplemental bill is a dependent and ancillary proceeding.

Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 609, 633, 17 L. ed. 886, 895; Johnson v. Christian, 125 U. S. 642, 31 L. ed. 820, 8 Sup. Ct. Rep. 989, 1135; Dewey v. West Fairmont Gas Coal Co. 123 U. S. 329, 31 L. ed. 179, 8 Sup. Ct. Rep. 148; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Loy v. Alston, 96 C. C. A. 578, 172 Fed. 94; 2 Street, Fed. Eq. Pr. §§ 1228, 1238; O'Connor v. O'Connor, 146 Fed. 994; G. & C. Merriam Co. v. Saalfield, 111 C. C. A. 517, 190 Fed. 932; Western Teleph. Mfg. Co. v. American Electric Co. 141 Fed. 998.

Substituted service, or mere actual notice, is sufficient to subject a party to the jurisdiction of the court in any ancillary proceeding, and sufficient service was had in this case.

1 Street, Fed. Eq. Pr. pp. 382, 386, 388; Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 633, 634, 17 L. ed. 895; Dunn v. Clarke, 8 Pet. 1, 3, 8 L. ed. 845, 846; Gregory v. Pike, 25 C. C. A. 48, 50 U. S. App. 4, 79 Fed. 521; Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 64; Abraham v. North German F. Ins. Co. 3 L.R.A. 188, 37 Fed. 731; Crellin v. Ely, 13 Fed. 420; Cortes Co. v. Thannhauser, 9 Fed. 226; Maitland v. Gibson, 79 Fed. 136; Kelley v. T. L. Smith Co. 116 C. C. A. 240, 196 Fed. 466.

Ogilvie's affidavit in opposition to the motion for an injunction upon the supplemental bill argues the case upon the merits, and subjects him to the jurisdiction of the court.

Ames v. Freeman, 83 Kan. 585, 112 Pac. 160; Livingston v. Gibbons, 4 Johns. Ch. 94; Cooley v. Lawrence, 12 How. Pr. 176; Duncan v. Wickliffe, 4 Met. (Ky.) 118; Commercial State Bank v. Rowley, 2 Neb. (Unof.) 645, 89 N. W. 766.

Mr. Wade H. Ellis argued the cause, and, with Mr. Challen B. Ellis, filed a brief for appellees:

This case was not appealable to this court direct from the district court, and this appeal should be dismissed.

Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208.

The theory that the estoppel of Ogilvie, if any, could be used to take the place of his being made a party of record, and be the basis of a judgment against him in the case, is fallacious and unsupported by any authority.

Bidwell v. Toledo Consol. Street R. Co. 72 Fed. 10.

The facts shown would not constitute even an estoppel against Ogilvie if properly sued in a subsequent case.

Bank of Commerce v. Louisville, 88 Fed. 398; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286; Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875.

Nothing is added to the right of the complainant by the so-called substituted service.

Smith v. Woolfolk, 115 U. S. 148, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177.

Mr. Justice Pitney delivered the opinion of the court:

This is a direct appeal from the district court under § 238, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215], upon the sole question of the jurisdiction [24] of that court to make and enforce a final decree *in personam* against appellee George W. Ogilvie. The decree was founded upon a supplemental bill making Ogilvie a party to a suit already pending, and upon substituted service of process on persons said to represent him as attorneys in the state of Ohio, he being a citizen and resident of the state of New York, and not having been personally served.

The facts are as follows: In December, 1908, appellant filed its original bill against Saalfield in the then circuit court of the United States for the northern district of Ohio, for relief against unfair competition in the business of publishing and selling dictionaries. Saalfield was duly served with process, appeared, and made defense. The circuit court having dismissed the bill, the circuit court of appeals reversed the decree (111 C. C. A. 517, 190 Fed. 927, 117 C. C. A. 245, 198 Fed. 369), and remanded the cause, with direction for an injunction and an accounting in conformity with its opinion. The district court made a decree in accordance with the mandate September 11, 1912, with an order of reference for the accounting. Thereafter and on December 16, 1912, the supplemental bill was filed, setting up in substance that since the entry of the decree of September 11 complainant had discovered, and it charged the fact to be, that Ogilvie had from the beginning actively conducted, controlled, and directed the defense of the suit, having selected, retained, and paid, as solicitors and counsel for defendant Saalfield, the firm of Weed, Miller, & Nason, of Cleveland, Ohio, and Mr. George F. Bean, of Boston, Massachusetts, who, in pursuance of said retainer, appeared on behalf of Saalfield, but acted for and under instructions of Ogilvie; that in fact Ogilvie was the proprietor of the dictionaries involved in the suit, which were published and sold for his benefit and profit by Saalfield under a contract providing for the payment of royalties to Ogilvie; that pending the suit Saalfield had [25] transferred and assigned to the Saalfield Publishing Company, a corporation, his business of publishing and selling the dictionaries; that the company, as successor of and claiming through and under Saalfield, was bound by all the proceedings in the suit, and that it was then carrying on the business, under contract with Ogilvie; and that, by reason of the facts mentioned, Ogilvie had made himself privy to the suit, and an actual though not a nominal party thereto, and was bound by the proceedings and decree therein. Appropriate relief was prayed against Saalfield, the Saalfield Publishing Company, and Ogilvie.

Upon the filing of the supplemental bill and an affidavit setting forth that Ogilvie was a nonresident of the northern district of Ohio, and that, as alleged in the supplemental bill, the firm of Weed, Miller, & Nason, of Cleveland, and George F. Bean, of Boston, Massachusetts, who had appeared respectively as solicitors and counsel for defendant Saalfield in the defense of the suit, were in fact retained and employed by Ogilvie for that purpose, and paid by him and acted under his instructions and directions, complainant moved for and

obtained an order authorizing substituted service of process against Ogilvie, to be made within the district upon the Cleveland attorneys, and in the district of Massachusetts upon George F. Bean. Service was made accordingly, and the process returned; and it appearing from an affidavit made by defendant Ogilvie, and filed in the cause on February 22, 1913, that he had had actual notice of the supplemental bill, an interlocutory decree *pro confesso* was entered, and this was followed, on October 16, 1913, by a final decree for the recovery against him of profits amounting, with interest, to $81,312.78, besides costs. Thereafter Ogilvie, by solicitors, appearing specially for the purpose, moved to quash the service of the writ of subpœna issued against him, and to set aside all proceedings based thereon. The district court, having heard testimony, granted the [26] motion, and at the same time denied a petition filed by complainant for enforcement of the final decree against Ogilvie; and from final orders entered for carrying into effect this decision, complainant has appealed to this court.

There is a motion to dismiss, based upon the familiar ground that the "jurisdiction of the court" referred to in § 238, Judicial Code, means its jurisdiction as a Federal court, and not its general jurisdiction as a judicial tribunal; the insistence being that the contention of complainant below presented no more than a general question of procedure in equity, and not one peculiar to the district court as a Federal court. But the distinction referred to bears upon the nature of the jurisdiction exercised or refused to be exercised after a valid service of process upon the defendant, and does not affect the question whether the court has acquired jurisdiction over the person, which is the one here involved. This question may be reviewed on direct appeal. Shepard v. Adams, 168 U. S. 618, 623, 42 L. ed. 602, 603, 18 Sup. Ct. Rep. 214; Remington v. Central P. R. Co. 198 U. S. 95, 99, 49 L. ed. 959, 963, 25 Sup. Ct. Rep. 577; Board of Trade v. Hammond Elevator Co. 198 U. S. 424, 434, 49 L. ed. 1111, 1116, 25 Sup. Ct. Rep. 740; Commercial Mut. Acci. Co. v. Davis, 213 U. S. 245, 256, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 440, 54 L. ed. 272, 275, 30 Sup. Ct. Rep. 125; Herndon-Carter Co. v. James N. Norris, Son & Co. 224 U. S. 496, 498, 56 L. ed. 857, 858, 32 Sup. Ct. Rep. 550. In Bache v. Hunt, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547, the decision that was held not reviewable on direct appeal was rendered upon a plea to the jurisdiction of the court over the subject-matter. In Courtney v. Pradt, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208, the suit had been removed from a Kentucky state court to the United States circuit court, where Pradt filed a special demurrer, assigning as causes that the court had no jurisdiction of the person or of the subject-matter. The court dismissed the suit for want of jurisdiction, and it appeared from its opinion that this was done because Pradt, who was sued as executor, was appointed as such in Wisconsin, and a suit against a Wisconsin [27] executor could not be maintained in the Kentucky state court, nor in the Federal court. The question of jurisdiction was not certified to this court, and the appeal was therefore dismissed. These cases are plainly distinguishable. The present motion to dismiss must be denied.

Appellant's case upon the merits is rested upon the theory that Ogilvie was privy to the original suit against Saalfield, and an actual though not an ostensible party thereto, in such a real sense that the final decree therein would be *res judicata* against him; that the district court had jurisdiction to entertain the suit as against him notwithstanding he resided outside the district, because by voluntarily coming in and defending for Saalfield, he had submitted to the jurisdiction and waived the objection, and because the supplemental bill was a dependent and ancillary proceeding, and therefore properly brought in the district wherein the original proceeding was pending; and, finally, that because of its being an ancillary proceeding, substituted service upon the solicitors representing Ogilvie in the original proceeding was sufficient to subject him to the jurisdiction for the purposes of the supplemental bill. There is a faint attempt to sustain the jurisdiction on the theory that Ogilvie's affidavit, filed February 22, 1913, as mentioned in the interlocutory decree *pro confesso*, amounted to a general appearance, because it was submitted in opposition to a motion for injunction on the supplemental bill, and because it "argued the case upon the merits." This may be overruled at once. The affidavit shows on its face that it was to be used only as evidence for defendants Saalfield and the Publishing Company, and was not to be construed as an appearance by Ogilvie.

The district court, while raising some question whether the solicitors and counsel who had appeared for Saalfield at Ogilvie's expense had not concluded their services in [28] Ogilvie's behalf prior to the filing of the supplemental bill, yet rested its decision substantially upon the ground that complainant did not know that Ogilvie had any connection with Saalfield or the Se-

field Publishing Company until after the making of the decree of September 11, 1912, upon the going down of the mandate from the circuit court of appeals; and that for this reason Ogilvie could not have taken advantage of that decree had it been adverse to complainant, and therefore was not estopped by it, since estoppels must be mutual.

In so holding, the court applied the doctrine that has been laid down in a number of cases, that a third party does not become bound by a decree because of his participation in the defense unless his conduct in that regard was open and avowed or otherwise known to the opposite party, so that the latter would have been concluded by an adverse judgment. See Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166, 173; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286, 288. We need not consider the soundness of the doctrine, for appellant does not question it, insisting only that it is not applicable here because Ogilvie's control of the defense made in Saalfield's name became known to appellant during the progress of the suit, and before final decree; it being contended that the decree of September 11, 1912, was interlocutory, and not final.

But it is familiar law that only a final judgment is *res judicata* as between the parties. And it is evident that a decree cannot be *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself. Hence, if the decree of September 11 was not final as between appellant and Saalfield, it cannot be *res judicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is [29] found to be this: that upon the theory that Ogilvie would be estopped by a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles.

But, assuming for argument's sake that the decree was final, and that Ogilvie was fully estopped by it because of having taken charge and exercised control of Saalfield's defense through solicitors and counsel retained and paid by himself; and assuming that their employment had not been terminated at the time the supplemental bill was filed,—the question of the sufficiency of the proceedings taken by way of substituted service to bring Ogilvie within the jurisdiction of the court still remains, and this depends upon whether the supplemental bill is a dependent and ancillary proceeding, jurisdiction of which follows jurisdiction of the original cause, and may be exerted upon mere notice to the party, without service or original process within the district. It seems to be thought that because Ogilvie was identified in interest with the defendant in the original suit, and had and exercised the right to make defense and control the proceedings and appeal from the decree, he may be treated for all purposes as an actual party to the record. But this by no means follows. The doctrine of *res judicata* furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action. Obviously, the rule for decision applies only when the subsequent action has been brought. So far as the supplemental bill seeks to bring in Ogilvie as a new party and obtain relief against him, it is not, in any proper sense, dependent upon or ancillary to the original suit against Saalfield. It is not analogous to a suit for an injunction against the prosecution of a previous suit or the enforcement of a judgment therein. It has not [30] for its object some further dealing with the same subject-matter. Ogilvie is not in the position of one who, pending a suit about property, has acquired an interest in the subject-matter. The object of the original bill was to obtain an injunction and recover profits from Saalfield; that of the supplemental bill is to obtain an injunction and an accounting of profits against Ogilvie respecting the same transactions. But the merits are not to be adjudicated against him until he is brought into court, and as against him the supplemental bill is an original, not an ancillary, proceeding. In Dunn v. Clarke, 8 Pet. 1, 8 L. ed. 845, one Graham had recovered a judgment at law in an action of ejectment against the complainants, Clarke and others, in the United States circuit court, jurisdiction depending upon diversity of citizenship. Graham having died, the defendant, Dunn, held the land recovered in trust under his will. Clarke and others filed their bill in the same court, praying for an injunction against the judgment and for a decree that the land in controversy be reconveyed. All the complainants and defendants were residents of the same state (Ohio). This court said: "No doubt is entertained by the court that jurisdiction of the case may be sustained, so far as to stay execution on the judgment at law against Dunn. He is the representative of Graham; and although he is a citizen of Ohio, yet this fact,

under the circumstances, will not deprive this court of an equitable control over the judgment. But beyond this, the decree of this court cannot extend. Of the action at law, the circuit court had jurisdiction; and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. If Graham had lived, the circuit court might have issued an injunction to his judgment at law, without a personal service of process, except on his counsel; and as Dunn is his representative, the court may do the same thing, as against him. The injunction [31] bill is not considered an original bill between the same parties, as at law: but, if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised by this or the circuit court." So far as it shows the distinction between an original bill and one that is not to be so considered, the case is in point upon the present question. The reference to "privies" must be taken in connection with the subject-matter, which in that case was the ownership of land.

No case to which we are referred, nor any other that we have found,[1] goes to the extent of sustaining as an ancillary proceeding a bill interposed for the purpose of obtaining a decree *in personam* against a party upon the ground that he had participated in the defense of a previous action against another party so as to become bound upon the doctrine of *res judicata*. Kelley v. T. L. Smith Co. (C. C. A. 7th) 117 C. C. A. 240, 196 Fed. 466, is referred to. In that case Kelley, a citizen of New York, and McConnell, a citizen of Illinois, had commenced an action in a Wisconsin state court to compel the secretary of the Smith [32] Company to transfer certain shares of stock standing in Kelley's name to McConnell, as his assignee. A firm of Milwaukee attorneys brought the action, and an attorney connected with that firm was in possession of the certificate as agent of McConnell. Thereupon the company and its secretary filed in the United States circuit court a bill asserting that the equitable title to the shares was involved in a suit already pending in that court, to which the company was a party defendant; that thus different parties, in different courts, were insisting that complainants transfer the same shares to each, and if complainants should comply with the demand of either they would be unable to transfer the shares to the other if so ordered by a court decree, and that they had no interest in the shares, and were willing to transfer them to the party found to be the owner. On the showing that Kelley and McConnell were not to be found in the district, and that the stock certificates was within the district, in the hands of their attorneys and agent having authority to assert and preserve their rights, the court ordered the subpœna and the notice of application for an interlocutory injunction to be served, and they were served, upon said attorneys and agent. The circuit court overruled a demurrer, and the court of appeals sustained this decree, not, however, upon the ground that the suit was an ancillary proceeding in aid of the court's jurisdiction in a pending suit, but upon the ground that, as an independent and original bill, it presented a subject cognizable in a circuit court of the United States, and that although jurisdiction *in personam* could not be acquired by service of process under equity rule 13, because of the absence of the defendants, substituted service was permissible under the then equity rule 90, by analogy to the English practice. Without intimating any view as to the correctness of this reasoning, it is sufficient to say that the decision has no pertinency to the question here presented.

[33] Upon these grounds, we are of opinion that substituted service of process

[1] See Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. 2 Wall. 609, 633, 17 L. ed. 886, 895; Freeman v. Howe, 24 How. 450, 460, 16 L. ed. 749, 752; Krippendorf v. Hyde, 110 U. S. 276, 285, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27; Clarke v. Mathewson, 12 Pet. 164, 171, 9 L. ed. 1041, 1043; Webb v. Barnwall, 116 U. S. 193, 197, 29 L. ed. 595, 596, 6 Sup. Ct. Rep. 350; Covell v. Heyman, 111 U. S. 176, 179, 28 L. ed. 390, 391, 4 Sup. Ct. Rep. 355; Dewey v. West Fairmont Gas Coal Co. 123 U. S. 320, 333, 31 L. ed. 179, 181, 8 Sup. Ct. Rep. 148; Gumbel v. Pitkin, 124 U. S. 131, 144, 31 L. ed. 374, 378, 8 Sup. Ct. Rep. 379; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 201, 34 L. ed. 625, 635, 11 Sup. Ct. Rep. 61; Byers v. McAuley, 149 U. S. 608, 614, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; Root v. Woolworth, 150 U. S. 401, 413, 37 L. ed. 1123, 1126, 14 Sup. Ct. Rep. 136; White v. Ewing, 159 U. S. 36, 39, 40 L. ed. 67, 68, 15 Sup. Ct. Rep. 1018; Carey v. Houston & T. C. R. Co. 161 U. S. 115, 130, 40 L. ed. 638, 643, 16 Sup. Ct. Rep. 537; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182; Cortes Co. v. Thannhauser, 20 Blatchf. 59, 9 Fed. 226; Crellin v. Ely, 7 Sawy. 532, 13 Fed. 420; Abraham v. North German F. Ins. Co. 3 L.R.A. 188, 37 Fed. 731; Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80.

against Ogilvie was inadmissible, and that the District Court did not err in quashing the service and setting aside the proceedings based thereon, nor in refusing appellant's petition for enforcement of the decree against him.

Final orders affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
A. R. RIGSBY.

(See S. C. Reporter's ed. 33–43.)

Master and servant — safety appliances — defective ladder — employee not coupling or uncoupling cars.

1. A switchman in the employ of an interstate railway company who was injured through a defect in a hand hold or grab iron forming one of the rungs of a ladder on a box car which he was descending after having set a brake operated from the roof of such car is within the protection afforded by the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), as amended by the act of April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), § 2, which commands that all cars requiring secure ladders shall be equipped with them.

[For other cases, see Master and Servant, II. a, 2, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — employee not engaged in interstate commerce.

2. An employee of an interstate railway company, though not himself engaged in interstate commerce, is within the protection of the Federal safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), which impliedly create a private right of action in favor of an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars used upon a highway of interstate commerce.

[For other cases, see Master and Servant, II. a, 2, in Digest Sup. Ct. 1908.]

Commerce — power of Congress — safety appliances.

3. Congress could, under the commerce clause of the Federal Constitution, create, as it did by the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), a liability on the part of an interstate railway company to an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars used upon a highway of interstate commerce, even though the injured employee was not himself engaged in interstate commerce.

[For other cases, see Commerce, 26–36, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances moving car for repairs.

4. The liability of an interstate railway company under the Federal safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), to an employee injured through a violation of the commands of those statutes that certain safety appliances be installed upon railway cars used upon a highway of interstate commerce, exists, although the employee when injured was engaged in taking the defective car to the shops for repairs.

[For other cases, see Master and Servant, II. a, 2, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — negligence.

5. Interstate railway companies are charged with an absolute and unqualified duty, irrespective of any question of negligence, to maintain in proper condition the safety appliances which, under the acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), must be installed on railway cars used on a highway of interstate commerce.

[For other cases, see Master and Servant, II. a, 2, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — assumption of risk.

6. The railway employee's knowledge of the defect does not bar his suit to recover damages for injuries attributable to the railway company's violation of the commands of the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and April 14, 1910 (36 Stat. at L. 298, chap. 160, Comp. Stat. 1913, § 8617), since by § 8 of the earliest act an employee injured by any car in use contrary to its provisions is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge, and by § 5 of the latest act the provisions of the earliest act are made applicable to it, with a qualification that does not affect remedial actions by employees.

[For other cases, see Master and Servant, II. b, 4, in Digest Sup. Ct. 1908.]

[No. 523.]

NOTE.—On duty and liability under Federal and state safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

Argued February 21, 1916. Decided April 17, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Texas in favor of plaintiff in an action for damages based upon the Federal safety appliance acts. Affirmed.

See same case below, 138 C. C. A. 51, 222 Fed. 221.

The facts are stated in the opinion.

Mr. F. H. Prendergast argued the cause and filed a brief for plaintiff in error:

To recover, Rigby must bring himself under the safety appliance act and under the employers' liability act. Both the car and the man must be engaged in interstate commerce.

Illinois C. R. Co. v. Behrens, 233 U. S. 474, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Pederson v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153; Southern R. Co. v. United States, 222 U. S. 27, 56 L. ed. 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

The car was not under the safety appliance act, because it had been withdrawn from all service for several weeks.

Southern R. Co. v. United States, 222 U. S. 27, 56 L. ed. 75, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Southern R. Co. v. Snyder, 124 C. C. A. 60, 205 Fed. 870.

The car was not under the safety appliance act because it was not being used at the time in any character of commerce, but was being taken from the railroad yard into the shops to be repaired.

Illinois C. R. Co. v. Behrens, 233 U. S. 474, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Southern R. Co. v. Snyder, supra.

Rigsby was not under the protection of the safety appliance act because he was not at the time engaged in interstate commerce.

Boyle v. Pennsylvania R. Co. 221 Fed. 455; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 490, 52 L. ed. 305, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. Behrens, 233 U. S. 474, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Second Employers' Liability Cases (Mondou v. New York & N. H. R. Co.) 223 U. S. 51, 56 L. ed. 346, 32 Sup. Ct. Rep. 169; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153.

Rigsby was not under the protection of the safety appliance act, because at the time he was injured he was not coupling or uncoupling cars.

Bishop, Non-Contract Law, 446; The Eugene F. Moran v. New York C. & H. R. Co. 212 U. S. 472, 53 L. ed. 603, 29 Sup. Ct. Rep. 339; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 490, 52 L. ed. 305, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York & N. H. R. Co.) 223 U. S. 51, 56 L. ed. 346, 32 Sup. Ct. Rep. 169; Potter's Dwarr. Stat. & Constitutions, 128, 140; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785; Shearm. & Redf. Neg. § 8; Williams v. Chicago & A. R. Co. 135 Ill. 491, 11 L.R.A. 352, 25 Am. St. Rep. 397, 26 N. E. 661.

There was no common-law negligence giving Rigsby a right to recover damages.

Flanagan v. Chicago & N. W. R. Co. 45 Wis. 98, 50 Wis. 462, 7 N. W. 337; Watson v. Houston & T. C. R. Co. 58 Tex. 439

Mr. S. P. Jones argued the cause and filed a brief for defendant in error:

The car from which defendant in error fell was in use on an interstate highway, and the injury was caused by a defective safety appliance.

Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Johnson v. Southern P. Co. 196 U. S. 13, 49 L. ed. 367, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Southern R. Co. v. United States, 222 U. S. 23, 56 L. ed. 73, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

The safety appliance laws give a cause of action to employees injured by defects while a car is in use on an interstate highway, though the employee is not engaged at the time in interstate commerce.

Southern R. Co. v. United States, supra; United States v. Chicago, B. & Q. R. Co. 237 U. S. 410, 59 L. ed. 1023, 35 Sup. Ct. Rep. 634; United States v. Erie R. Co. 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621.

Congress has the power to give to employees of an interstate highway, who are not at the time engaging in interstate commerce, a right of recovery for a failure of the railway company to equip the cars that are being used on the interstate highway with safety appliances.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed.

1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Great Northern R. Co. v. Otos, 239 U. S. 349, ante, 322, 36 Sup. Ct. Rep. 124.

[36] Mr. Justice Pitney delivered the opinion of the court:

The defendant in error, Rigsby, while in the employ of plaintiff in error as a switchman in its yard at Marshall, Texas, was engaged, with others of the yard crew, in taking some "bad order" cars to the shops there to be repaired. The switch engine and crew went upon a spur track, hauled out three cars, and switched them upon the main line, intending to go back upon the spur track for others, to be taken with the three to the shops, which were on the opposite side of the main line from the spur track. Rigsby, in the course of his duties, rode upon the top of one of the cars (a box car) in order to set the brakes and stop them and hold them upon the main line. He did this, and while descending from the car to return to the spur track he fell, owing to a defect in one of the hand holds or grab irons that formed the rungs of the ladder, and sustained personal injuries. This car had been out of service and waiting on the spur track for some days, perhaps a month. The occurrence took place September 4, 1912. In an action for damages, based upon the Federal Safety Appliance acts,[1] the above facts appeared without dispute, and it was admitted that the main line of defendant's railroad was in daily use for the passage of freight and passenger trains in interstate commerce. The trial court instructed the jury, as matter of law, that they should return a verdict in favor of plaintiff, the only question submitted to them being the amount of the damages. The railway company excepted to this charge, and requested certain specific instructions based upon the theory that the car was out of service and marked "bad order," which was notice to Rigsby of its condition; that there was no evidence that the condition of the car had resulted from any [37] negligence of defendant; that it was at the time being taken to the shop for repairs; and that for these reasons plaintiff could not recover. The instructions were refused, and exceptions taken. The resulting judgment was affirmed by the circuit court of appeals, 138 C. C. A. 51, 222 Fed. 221.

It is insisted that Rigsby was not within the protection of the act because he was not coupling or uncoupling cars at the time he was injured. The reference is to § 4 of the act of March 2, 1893, which requires "secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." This action was not based upon that provision, however, but upon § 2 of the amendment of 1910, which declares: "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders." There can be no question that a box car having a hand brake operated from the roof requires also a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the especial protection of employees engaged in duties such as that which plaintiff was performing.

It is earnestly insisted that Rigsby was not under the protection of the safety appliance acts because, at the time he was injured, he was not engaged in interstate commerce. By § 1 of the 1903 amendment its provisions and requirements and those of the act of 1893 were made to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," subject to an exception not now pertinent. And by § 5 of the 1910 amendment the provisions of the previous acts [38] were made to apply to that act, with a qualification that does not affect the present case. In Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, which was an action to recover penalties for a violation of the acts with respect to cars some of which were moved in intrastate traffic, and not in connection with any car or cars used in interstate commerce, but upon a railroad which was a part of a through highway for interstate traffic, it was held that the 1903 amendment enlarged the scope of the original act so as to embrace all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not. The question whether the legislation as thus construed was within the power of Congress under the commerce clause was answered in the affirmative, the court saying (p. 27): "Speaking only of railroads which are high-

[1] Act of March 2, 1893, chap. 196, 27 Stat. at L. 531, Comp. Stat. 1913, § 8605; amendatory act of March 2, 1903, chap. 976, 32 Stat. at L. 943, Comp. Stat. 1913, § 8613; supplementary act of April 14, 1910, chap. 160, 36 Stat. at L. 298, Comp. Stat. 1913, § 8617.

ways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others."

It is argued that the authority of that case goes no further than to sustain the penal provisions of the act, [39] and does not uphold a right of action by an employee injured through a violation of its provisions, unless he was engaged in interstate commerce. That the scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged, is plain. The title of the act, repeated in that of each supplement, is general: "An Act to Promote the Safety of Employees and Travelers," etc.; and in the proviso to § 4 of the supplement of 1910 there is a reservation as to "liability in any remedial action for the death or injury of any railroad employee." None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the employers' liability act, has never been doubted. (See Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 8, 51 L. ed. 681, 684, 27 Sup. Ct. Rep. 407, 220 U. S. 590, 592, 55 L. ed. 596, 598, 31 Sup. Ct. Rep. 561; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 284, 295, 52 L. ed. 1061, 1063, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 466; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Cleveland, C. C. & St. L. R. Co. v. Baker, 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224; Denver & R. G. R. Co. v. Arrighi, 63 C. C. A. 649, 129 Fed. 347; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Chicago Junction R. Co. v. King, 94 C. C. A. 652, 169 Fed. 372.) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, "Action upon Statute" (F), in these words: "So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (*Per* Holt, Ch. J., Anonymous, 6 Mod. 26, 27.) This is but an application of the maxim, [40] *Ubi jus ibi remedium.* See 3 Bl. Com. 51, 123; Couch v. Steel, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170. The inference of a private right of action in the present instance is rendered irresistible by the provision of § 8 of the act of 1893 that an employee injured by any car, etc., in use contrary to the act, shall not be deemed to have assumed the risk, and by the language above cited from the proviso in § 4 of the 1910 act.

Plaintiff's injury was directly attributable to a defect in an appliance which, by the 1910 amendment, was required to be secure, and the act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce. In Illinois C. R. Co. v. Behrens, 233 U. S. 473, 477, 58 L. ed. 1051, 1054, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163, the court said, *arguendo*, with reference to this topic: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." Judicial expressions in previous cases were referred to, and the decision in Employers'

Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, was distinguished because the act of June 11, 1906 [34 Stat. at L. 232, chap. 3073], there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce for any injury to any employee, even though his employment had no relation whatever to interstate commerce.

[41] The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad order" cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track, plaintiff's right of action might be sustained.

But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the act in its remedial aspect as broad an application as was accorded to its penal provisions in Southern R. Co. v. United States, supra. In addition to what has been quoted from the opinions in that case and the Behrens Case the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the states, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. Southern R. Co. v. Railroad Commission, 236 U. S. 439, 59 L. ed. 661, 35 Sup. Ct. Rep. 304. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the states to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences [42] that follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the states is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce,—a discrimination certainly not required by anything in the Constitution,—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several states, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the act as a regulation of commerce between the states that it is within the constitutional grant of authority over that subject.

It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company, [43] and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employee who had notice of its bad condition, and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in Great Northern R. Co. v. Otos, 239 U. S. 349, 351, ante, 322, 323, 36 Sup. Ct. Rep. 124, where it was pointed out that although § 4 of the act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. The question whether the defective condition of the

ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 295, 52 L. ed. 1061, 1068, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 575, 55 L. ed. 582, 588, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 586, 55 L. ed. 590, 595, 31 Sup. Ct. Rep. 617.

Of course, the employee's knowledge of the defect does not bar his suit, for by § 8 of the act of 1893 an employee injured by any car in use contrary to the provisions of the act is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge; and by § 5 of the act of 1910 the provisions of the 1893 act are made applicable to it, with a qualification that does not affect remedial actions by employees.

The Circuit Court of Appeals correctly disposed of the case, and its judgment is affirmed.

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[44] ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Plff. in Err.,
v.
FAJARDO SUGAR COMPANY.

(See S. C. Reporter's ed. 44–47.)

Porto Rico — immunity from suit — consent.

Any right of Porto Rico to invoke immunity from suit without its consent to defeat the jurisdiction of a Federal court of an action against the treasurer of Porto Rico to recover back a tax wrongfully assessed was lost, where the treasurer, appearing by the attorney general of Porto Rico, made full answer to the original complaint, a day for trial was fixed by stipulation, amended and supplemental complaints were filed and appropriately answered, and the court's jurisdiction was first challenged by a motion to dismiss eight months after the action was begun.

[No. 280.]

Argued March 13 and 14, 1916. Decided April 17, 1916.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment for the recovery back of a tax wrongfully assessed. Affirmed.

See same case below, 6 Porto Rico Fed. Rep. 224.

The facts are stated in the opinion.

Mr. Samuel T. Ansell argued the cause, and, with Messrs. Howard L. Kern and Lewis W. Call, filed a brief for plaintiff in error:

Jurisdiction of this suit and of the defendant was not conferred by the appearance and answer of the attorney general and the treasurer of Porto Rico, for consent of the sovereign to suit can be granted, and exemption from suit waived, only by the act of the legislature.

Minnesota v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650; Reid v. United States, 211 U. S. 529, 53 L. ed. 313, 29 Sup. Ct. Rep. 171; Adams v. Bradley, 5 Sawy. 217, Fed. Cas. No. 48; New Orleans & C. R. Co. v. New Orleans, 34 La. Ann. 433; Case v. Terrell, 11 Wall. 199, 202, 20 L. ed. 134, 135; Carr v. United States, 98 U. S. 433, 438, 25 L. ed. 209, 211; United States v. Lee, 106 U. S. 196, 205, 27 L. ed. 171, 176, 1 Sup. Ct. Rep. 240; Stanley v. Schwalby, 162 U. S. 255, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754; Northern Bank v. Stone, 88 Fed. 413.

Mr. Lorenzo D. Armstrong argued the cause, and, with Mr. Joseph W. Murphy, filed a brief for defendant in error:

Assuming that the statutory consent of Porto Rico to be sued was impliedly limited to suits brought in the insular courts, the various appearances and answers to the merits of the attorney general and the treasurer of Porto Rico, and their failure to object to the jurisdiction of the Federal court for over eight months, constituted a waiver of that implied limitation.

Porto Rico v. Ramos, 232 U. S. 627, 58 L. ed. 763, 34 Sup. Ct. Rep. 461; Porto Rico v. Emmanuel, 235 U. S. 251, 59 L. ed. 215, 35 Sup. Ct. Rep. 33.

Mr. Justice McReynolds delivered the opinion of the court:

Taxes for the fiscal year 1911–1912, amounting to $7,038, were assessed against defendant in error on account of certain personal property, and were paid under protest. Purporting to proceed under act No. 35, Laws of Porto Rico, 1911 (copied in margin),[1] and claiming the assessment [47] was wholly illegal, the Sugar Company brought this suit to recover the sum so paid. In due season the treasurer of Porto Rico, appearing by its attorney general, made full answer to the original complaint; a day for

[1] Section 1. That in all cases in which an officer charged by law with the collection of revenue due the government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he con-

trial was fixed by stipulation; an amended and also a supplemental complaint were filed and appropriately answered. Eight months after institution of the action the court's jurisdiction was first challenged by motion to dismiss, and thereafter the point was persistently urged. The company recovered judgment for amount claimed (6 Porto Rico Fed. Rep. 224); and the cause has been argued here by counsel.

It is not now seriously maintained that the tax was lawfully demanded—in effect, the contrary is conceded.

A reversal of the district court's action is asked upon the theory that the proceeding is against Porto Rico, a government of sovereign attributes, which has only consented to be sued in its own courts. Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352. Whatever might have been the merit of this position if promptly asserted and adhered to, we hold, following the principles announced in Porto Rico v. Ramos, 232 U. S. 627, 58 L. ed. 763, 34 Sup. Ct. Rep. 461, that having solemnly appeared and taken the other steps above narrated, plaintiff in error could not thereafter deny the court's jurisdiction. Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 284, 50 L. ed. 477, 483, 26 Sup. Ct. Rep. 252. The judgment is affirmed.

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[48] ABRAM ROSENBERGER, Plff. in Err.,
v.
PACIFIC EXPRESS COMPANY.

(See S. C. Reporter's ed. 48–55.)

Commerce — state regulation — intoxicating liquors — C. O. D. shipments.

1. As applied to interstate C. O. D. shipments a prohibitive state license tax upon each place of business or agency of every express company where intoxicating liquors are delivered and the price collected on C. O. D. shipments imposes a direct burden upon interstate commerce, contrary to U. S. Const. art. 1, § 8, and one which is not permitted by the Wilson act of August 8, 1890 (26 Stat. at L. 313, chap. 728, Comp. Stat. 1913, § 8738), subjecting to state control interstate shipments of intoxicating liquors upon arrival in the state.

[For other cases, see Commerce, IV. b, 2, in Digest Sup. Ct. 1908.]

Statutes — retroactive operation — intoxicating liquors — C. O. D. shipments.

2. Retroactive operation may not indirectly be given to U. S. Penal Code, § 239, prohibiting C. O. D. shipments of intoxicating liquors, by using that statute as an instrument of interpretation from which to deduce the conclusion that, contrary to the previous decisions of the Federal Supreme Court, the power of a state to prohibit shipments of intoxicating liquors under C. O. D. contracts existed before the enactment of such statute.

[For other cases, see Statutes, II. v, in Digest Sup. Ct. 1908.]

Trover — conversion by express company — refusal to carry out C. O. D. shipments.

3. The wrongful refusal of an express company to carry out its C. O. D. shipment contracts will support, in Missouri, an action in conversion by the consignor for the value of the shipments.

[For other cases, see Trover, in Digest Sup. Ct. 1908.]

[No. 249.]

Argued March 8, 1916. Decided April 24, 1916.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which reversed a judgment of the Circuit

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ceives the same to be unjust or illegal, or against any statute, pay the same under protest.

Sec. 2. Be it further enacted, that upon his making such payment, the officer or collector shall pay such revenue into the treasury of Porto Rico, giving notice at the time of the payment to the treasurer, that the same was paid under protest.

Sec. 3. Be it further enacted, that the party paying said revenue under protest, may, at any time within thirty days after making said payment, and not longer thereafter, sue the said treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the government for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded, and thereupon the treasurer shall repay the sum, which payment shall be made in preference to other claims on the treasury. Either party to said suit shall have the right of appeal to the supreme court.

Sec. 4. Be it further enacted that there shall be no other remedy in any case of the collection of revenue or attempt to collect revenue illegally.

Sec. 5. Be it further enacted that no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

Sec. 6. . . .

Sec. 7. . . . [Rev. Stat. & Codes 1911, p. 564, note.]

Court of Jackson County, in that state, in favor of plaintiff in an action of conversion. Reversed and remanded for further proceedings.

See same case below, 258 Mo. 97, 167 S. W. 429.

The facts are stated in the opinion.

Messrs. J. J. Vineyard and A. F. Smith argued the cause, and, with Mr. Frank F. Rozzelle, filed a brief for plaintiff in error:

Liquor is an article of commerce, and is entitled to the same protection under the commerce clause of the Federal Constitution as any other commodity in the absence of an act of Congress to the contrary.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189.

The Wilson act of August, 1890, which was the only Federal law at the time the cause of action in question arose tending to regulate interstate commerce in liquor, goes no further than to subject an interstate shipment of liquor to state regulation after it has been delivered to the consignee, and while still in the original package. The effect of this act was merely to do away with the original-package doctrine and the rights incident thereto.

Rhodes v. Iowa, 170 U. S. 412, 427, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664; Louisville & N. R. Co. v. F. W. Cook Brewing Co. supra.

The contracts whereby the defendant undertook to carry the liquor in question from Kansas City, Missouri, to various points in the state of Texas, and to collect the purchase price thereof from the consignees, were in reference to and formed an integral part of interstate commerce transactions, and the state of Texas was without legal power to impose burdens on or to prevent the performance of such contracts.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 507, 510, 31 L. ed. 714, 715, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 121, 34 L. ed. 128, 136, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, supra; Welton v. Missouri, 91 U. S. 275, 283, 23 L. ed. 347, 350; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; Rossi v. Pennsylvania, 238 U. S. 62, 59 L. ed. 1201, 35 Sup. Ct. Rep. 677.

Liquor shipped from one state, where the order is accepted, to another state, C. O. D., is a sale made in the state from which the goods are shipped, and not the state in which goods are received.

American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; State v. Rosenberger, 212 Mo. 648, 20 L.R.A. (N.S.) 284, 126 Am. St. Rep. 580, 111 S. W. 509.

C. O. D. contracts for the shipment of liquors from one state to another pursuant to bona fide orders accepted in the state where the liquor is delivered to the carrier are within the protection of the commerce clause of the Federal Constitution, independently of whether such contracts are imposed on a carrier as a common-law duty or are voluntarily assumed.

Heymann v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Dozier v. Alabama, 218 U. S. 124, 54 L. ed. 965, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229.

The Texas act, being unconstitutional in so far as it applied to interstate commerce, afforded the defendant no excuse for its

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NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

As to state licenses or taxes, generally, as affecting commerce—see notes to Rothermel v. Meyerle, 9 L.R.A. 366; American Fertilizing Co. v. Board of Agriculture, 11 L.R.A. 179; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 217; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311; and Pittsburg & S. Coal Co. v. Bates, 39 L. ed. U. S. 538.

As to retroactive operation of statutes, generally,—see notes to Otoe County v. Baldwin, 28 L. ed. U. S. 331; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

On the action of public authorities under police power as defense to carrier for delay or nondelivery of freight—see notes to Alabama & V. R. Co. v. Tirelli Bros. 21 L.R.A.(N.S.) 731; and Southern Exp. Co. v. Sotille Bros. 28 L.R.A.(N.S.) 139.

On refusal of carrier to deliver goods as conversion—see note to O'Donnell v. Canadian P. R. Co. 50 L.R.A.(N.S.) 1172.

failure to perform its contracts to ship and collect.

Hopkins v. Clemson Agri. College, 221 U. S. 636, 644, 646, 55 L. ed. 890, 894, 895, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; Williams v. Atchison, T. & S. F. R. Co. 233 Mo. 681, 136 S. W. 304; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

Mr. I. N. Watson argued the cause, and, with Mr. J. L. Minnis, filed a brief for defendant in error:

While intoxicating liquors are recognized as a legitimate subject of interstate commerce, yet such liquors do not have the same rights which attach to the shipments of other commodities.

Crowley v. Christensen, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13; Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733; Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238, 175 Mass. 156, 78 Am. St. Rep. 483, 55 N. E. 895.

There is no common-law duty devolving upon a common carrier to act as a collecting agent for the consignor.

Hutchinson, Carr. 3d ed. §§ 726, 728, 729; United States Exp. Co. v. Keefer, 59 Ind. 263; 4 Elliott, Railroads, § 1530; 12 Am. & Eng. Enc. Law, 2d ed. p. 533; Cox v. Columbus & W. R. Co. 91 Ala. 392, 8 So. 824; Adams Exp. Co. v. Com. 124 Ky. 160, 5 L.R.A.(N.S.) 630, 92 S. W. 932; Moore, Carr. § 31; Hale, Bailm. & Carr. p. 451; McNichol v. Pacific Exp. Co. 12 Mo. App. 401; Fowler Commission Co. v. Chicago, R. I. & P. R. Co. 98 Mo. App. 210, 71 S. W. 1077; Danciger v. Pacific Exp. Co. 154 Fed. 379.

The essential elements of interstate commerce, which are under the exclusive control of Congress, are intercourse and traffic, including in these terms navigation and the transportation of persons and property, and the purchase, sale, and exchange of commodities.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; License Cases, 5 How. 504-509, 12 L. ed. 256-258; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 572, 30 L. ed. 244, 249, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Heyman v. Southern R. Co. 203 U. S. 277, 51 L. ed. 181, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130.

Taking the act of Congress of March 4th, 1909, and the interstate commerce act and the Wilson act, as those acts are construed by this court, it is clear that the legitimate transportation of intoxicating liquors protected by those acts is the transportation and delivery of such commodity to the consignee; and that the collection of the purchase price was not a part of the transportation of such commodity. If we are right in this contention, then the regulation or prohibition of such act did not belong to Congress exclusively, but, in the absence of congressional legislation on that subject, the states were free to act until Congress assumed control over such matter.

Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160.

In all the cases cited by the plaintiff in error, the statutes of the state prohibited the sale and transportation of liquor into the state, and the statutes did not pretend to regulate the conduct of any agent acting for the consignor within the state.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606.

This record shows that the system used in selling intoxicating liquors by the plaintiff in error herein was a plain evasion of both the laws of the state of Texas and the state of Missouri.

Rich Hill v. Coleman, 63 Mo. App. 615; State v. Heard, 64 Mo. App. 334; State v. Quinn, 170 Mo. 176, 70 S. W. 1117; State v. Hughes, 24 Mo. 147; Tanner v. Bugg, 74 Mo. App. 196; St. Louis v. Tielkemeyer, 223 Mo. 143, 125 S. W. 1123.

Mr. Chief Justice White delivered the opinion of the court:

On the taking effect in Texas on the 12th day of February, 1907, of a law imposing a state license tax of $5,000 annually on each place of business or agency of every express company where intoxicating liquors were delivered and the price collected on C. O. D. shipments, and by which law one half of the amount of the state license was in addition authorized to be imposed by every county or municipality, the Express Company, the defendant in error, discontinued at all its agencies in Texas all such business. As a result the company sent back to Kansas City, Missouri, the pack-

ages of intoxicating liquor which it had received under C. O. D. shipments made to various places in Texas from Kansas City by Rosenberger, the plaintiff in error, and tendered them to him, conditioned on his payment of the return carriage charges. Rosenberger refused to accept the offer, and brought this suit to recover the value of the merchandise, on the ground that the failure to carry out the shipments was a conversion. The trial court, holding the Texas act was repugnant to the commerce clause of the Constitution of the United States, and afforded no justification to the Express Company for refusing to carry out the shipments, awarded the relief sought. And the object of this writ of error is to obtain a reversal of a final judgment of the court below, reversing [50] the trial court, and rejecting the claim on the ground that the Texas license law was not repugnant to the commerce clause, and afforded ample authority to the Express Company for refusing to complete the interstate shipments in question. 258 Mo. 97, 167 S. W. 429.

Passing minor contentions whose want of merit will be hereafter demonstrated, it is clear that the issue is this: Was the state license law, if applied to C. O. D. interstate commerce shipments, repugnant to the commerce clause of the Constitution? It is certain that this question, in view of the date of the law and of the shipments involved, must be determined in the light of the operation of the commerce clause as affected by the power conferred upon the states by what is usually known as the Wilson law (act of August 8, 1890, chap. 728, 26 Stat. at L. 313, Comp. Stat. 1913, § 8738), and wholly unaffected by § 239 of the Penal Code enacted by Congress March 4, 1909 [35 Stat. at L. 1136, chap. 321, Comp. Stat. 1913, § 10,409] prohibiting the shipment of intoxicating liquors under C. O. D. contracts, and also without reference to the act of Congress known as the Webb-Kenyon law of March 1, 1913 (chap. 90, 37 Stat. at L. 699, Comp. Stat. 1913, § 8739).

Thus limited, as it is not controverted and indeed is indisputable that the provisions of the statute placed a direct burden on the shipments with which it dealt, and in fact were prohibitive of such shipments, it follows that error was committed in holding that the statute was not repugnant to the Constitution of the United States in so far as it applied to interstate C. O. D. shipments, for the following reasons: (a) Because it is settled from the beginning, and too elementary to require anything but statement, that, speaking generally, the states are without power to directly burden interstate commerce, and that commodities moving in such commerce only become subject to the control of the states or to the power on their part to directly burden after the termination of the interstate movement; that is, after the arrival and delivery of the commodities and their sale in the original packages; and that this rule is [51] as applicable to the movement of intoxicating liquors as to any other commodities. (b) Because the Wilson act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would; that is, after delivery, but before sale in the original packages. (c) Because the power in interstate commerce shipments to make C. O. D. agreements, that is, agreements on delivery of the commodity shipped to collect and remit the price, is incidental to the right to make such shipments, and the commodities when so shipped do not come under the authority of the state to which the commodities are shipped under such agreements until arrival and delivery, and therefore any attempt on the part of the state to directly burden or prohibit such contracts, or prevent the fulfilment of the same, necessarily comes within the general rule and is repugnant to the Constitution of the United States.

These propositions in substance have been by necessary implication or by direct decision so authoritatively and repeatedly determined, as shown by the cases cited in the margin,[1] that there is no necessity for going further. But in view of the fact that the court below held the statute to be not repugnant to the commerce clause, not because it overlooked the rulings of this court referred to, but because it considered them distinguishable or inapposite to this case for reasons deemed by it to be conclusive, there being some difference of opinion on

[1] Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Heyman v. Southern R. Co. 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 Ann. Cas. 1130; Adams Exp Co. v. Kentucky, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; Louisville & N. R. Co. v. F. W. Cook Brewing Co. 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; Kirmeyer v. Kansas, 236 U. S. 568, 59 L. ed. 721, 35 Sup. Ct. Rep. 419; Rossi v. Pennsylvania, 238 U. S. 62, 59 L. ed. 1201, 35 Sup. Ct. Rep. 677; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606.

the subject in the court below, we briefly refer to those reasons.

[52] It was said that the shipment of commodities contains two elements; one, the obligation arising from the duty of the carrier to receive and carry without express contract; and the other, such obligation as arises from contracts made concerning the shipment, not embraced in the duty which rested by law upon the carrier in the absence of contract, the latter being illustrated by C. O. D. contracts. These two classes of obligations, it was pointed out, arising from different sources, were controlled by a consideration of the source whence they sprang; the one, the duty independent of contract, being commerce, and the other, the duty depending upon express contract, in a sense independent of commerce, being governed by the law controlling contracts; that is to say, the one being controlled by the commerce clause and the other by the law of the state. And from these generalizations it was concluded that however complete and efficacious was the control of the Constitution of the United States over the obligation resulting from shipments in the proper sense, it was clear that the power of the state was complete over the other class of obligations, those arising from distinct contracts, and hence the act imposing the burden on the contract to collect on delivery did not reach over into the domain of shipment, was independent of the same, and therefore was not repugnant to the commerce clause. But we think it is a sufficient answer to say that the reasoning referred to rests upon a misconception of the elementary notion of interstate commerce as inculcated and upheld from the beginning, and as enforced in a line of decisions of this court beginning with the very birth of the Constitution, and which in its fundamental aspect has undergone no change or suffered no deviation: that is, that the interstate commerce which is subject to the control of Congress embraces the widest freedom, including, as a matter of course, the right to make all contracts having a proper relation to the subject. Indeed, it must be at once apparent that if [53] the reasoning we are considering were to be entertained, the plenary power of Congress to legislate as to interstate commerce would be at an end, and the limitations preventing state legislation directly burdening interstate commerce would no longer obtain, and the freedom of interstate commerce which has been enjoyed by all the states would disappear. But to state these general considerations is indeed superfluous, since in one of the previous cases which we have cited (American Exp. Co. v. Iowa, 196 U. S. 133, 143, 144, 49 L. ed. 417, 422, 423, 25 Sup. Ct. Rep. 182) substantially the identical contention which we have just disposed of was relied upon and its unsoundness was expressly pointed out and the destructive consequences which would arise from its adoption stated.

The minor contentions to which we previously referred are these:

1. That although it be that § 239 of the Penal Code has no retroactive operation, it should be used as an instrument of interpretation from which to deduce the conclusion that the power of a state to prohibit shipments of intoxicating liquors in interstate commerce under C. O. D. contracts existed at the time here in question. But this by indirection simply seeks to cause the act of Congress to retroactively apply by reasoning which, if acceded to, would require it to be said that all the previous decisions of this court dealing with the subject before the Penal Code was enacted were wrong, and that, in addition, the enactment of § 239 was wholly unnecessary.

2. That even although there was a wrongful refusal of the Express Company to carry out the shipments, its doing so was a mere violation of contract, giving a right to sue in damages, but not for conversion. We see nothing in the record to indicate that this contention was urged in the trial court or in the court below. But, passing this consideration, in view of our previous action rejecting a motion to dismiss, the question is foreclosed. But again, [54] even if this be put out of view, the proposition is without merit under the controlling state law. Rice v. Indianapolis & St. L. R. Co. 3 Mo. App. 27; Loeffler v. Keokuk Northern Line Packet Co. 7 Mo. App. 185; Danciger Bros. v. American Exp. Co. 172 Mo. App. 391, 158 S. W. 466.

3. That this case is taken out of the settled rule to which we have referred, and is controlled by the ruling in Delamater v. South Dakota, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 Ann. Cas. 733. But the proposition presupposes that the decision in that case overruled the many decisions sustaining the rule without the slightest indication of a purpose to do so. It proceeds upon an obvious misconception of the Delamater case, which, instead of disregarding the construction put upon the Wilson act and the many cases dealing with the subject, was, on the contrary, but an application in a new form of the additional power which that act gave. In other words, the case but held that, inasmuch as Congress, by virtue of its regulating authority, had caused shipments of intoxicating liquors in interstate commerce to become subject to state authority after arrival and before sale in the original packages, the exer-

tion by the state of its authority to prevent the carrying on in the state of the business of soliciting purchases of liquor to be shipped from other states was lawful as a mere exertion of police power, not constituting a direct burden upon interstate commerce, since such a regulation was within the scope of the remedial authority conferred by Congress by virtue of the Wilson act.

And the contention just stated leads to a reference to suggestions which we deem to be wholly irrelevant to the issue for decision, made both in the opinion of the court below and in the argument at bar concerning possible abuses committed as the result of C. O. D. shipments of intoxicating liquors into states where the use of such liquor is prohibited, such as the unreasonable detention of such liquors before delivery, the ultimate delivery to a [55] person who had not ordered the same, the transfer to others by the ostensible person to whom the shipment was seemingly made, etc., etc. We say irrelevant suggestions because we are considering here not whether a state statute enacting reasonable regulations to prevent abuses under C. O. D. shipments would be a direct burden upon interstate commerce, but are only called upon to determine whether a statute is repugnant to the commerce clause which expressly asserts the power of the state to forbid all C. O. D. interstate commerce shipments of intoxicating liquors without reference to abuse of any kind or nature in the manner in which said contracts are carried out.

It follows from what we have said that the court below erred, and that its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MENASHA PAPER COMPANY, Plff. in Err.,
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 55-63.)

Carriers — duty to furnish cars — embargo — removal without notice — demurrage.

1. A so-called embargo by which a railway company, at the request of a paper company owning and operating a private sidetrack, refused to furnish cars to shippers for interstate consignments to such paper company, which the latter, under contracts with the shippers, was under an obligation to receive, and did in fact receive, violates the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), requiring railway companies to provide and furnish transportation to shippers upon reasonable request therefor, and such embargo could be removed by the railway company without notice to the paper company, although such action produced a congestion of cars beyond the ability of the paper company to handle on its sidetrack in the usual way, and thus rendered the paper company liable to demurrage charges.

[For other cases, see Carriers, III; Commerce, III. j, in Digest Sup. Ct. 1908.]

Carriers — demurrage — when sidetrack is full.

2. A private switch track is "full" within the meaning of a provision in the carrier's rules relating to car service and demurrage charges that "the delivery of cars to private tracks shall be considered to have been made either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars would have made delivery had the condition of such tracks permitted," where, although such switch track would hold more cars, there were upon it all the cars that the consignee, as it used the track, could handle and unload, and the consignee did not ask for more.

Error to state court — Federal question — demurrage.

3. A Federal question which will sustain a writ of error from the Federal Supreme Court to a state court was involved in a decision of the latter court that a so-called embargo by which a railway company, at the request of a paper company owning and operating a private sidetrack, refused to furnish cars to shippers for interstate consignments to such paper company which the latter, under contracts with the shippers, was under an obligation to receive, and did in fact receive, violates the provision of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), requiring railway companies to provide and furnish transportation to shippers upon reasonable request therefor, and that such embargo could be removed by the railway company without notice to the paper company, although such action produced a congestion of cars beyond the ability of the paper company to handle on its sidetrack in the usual

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NOTE.—On duty of carrier to furnish cars independently of contract—see notes to Houston, E. & W. T. R. Co. v. Campbell, 43 L.R.A. 225; Di Giorgio Importing & S. S. Co. v. Pennsylvania R. Co. 8 L.R.A.(N.S.) 108; and Illinois C. R. Co. v. River & R. Coal & Coke Co. 44 L.R.A.(N.S.) 643.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the

way, and thus rendered the paper company liable to demurrage charges.

[For other cases, see Appeal and Error, 1393-1430, 1751–1797, in Digest Sup. Ct. 1908.]

[No. 696.]

Argued April 3, 1916. Decided April 24, 1916.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the Circuit Court of Winnebago County, in that state, in favor of a railway company in an action for demurrage. Affirmed.

See same case below, 159 Wis. 508, 149 N. W. 751.

The facts are stated in the opinion.

Mr. **Felix J. Streyckmans** argued the cause and filed a brief for plaintiff in error:

Under the interstate commerce act railroads cannot collect for any service not specifically set forth in the carrier's published tariffs, and tariffs and schedules must plainly show what the charges are for.

Peale, Peacock & Kerr v. Central R. Co. 18 Inters. Com. Rep. 33; Porter v. St Louis & S. F. R. Co. 15 Inters. Com. Rep. 4; Colorado Fuel & I. Co. v. Southern P. Co. 6 I. C. C. Rep. 519; Barnes, Interstate Transportation, pp. 712, 714; H. B. Pitts & Son v. St. Louis & S. F. R. Co. 10 Inters. Com. Rep. 690; Newton Gum. Co. v. Chicago, B. & Q. R. Co. 16 Inters. Com. Rep. 346; Ohio Shippers' Asso. v. Ann Arbor R. Co. decision by Ohio R. Commission, Report 1907, p. 15; Crescent Coal & Min. Co. v. Baltimore & O. R. Co. 20 Inters. Com. Rep. 569; United States v. Denver & R. G. R. Co. 18 Inters. Com. Rep. 7; Germain Co. v. New Orleans & N. E. R. Co. 17 Inters. Com. Rep. 26; Beekman Lumber Co. v. Louisiana R. & Nav. Co. 19 Inters. Com. Rep. 347.

The rules relied on in this case did not permit the charging of car service until the side track was filled to its capacity.

United States v. Denver & R. G. R. Co. 18 Inters. Com. Rep. 7; New Orleans & N. E. R. Co. v. George, 82 Miss. 710, 35 So. 193.

Decisions of the Interstate Commerce Commission must be followed by the courts.

United States v. Erie R. Co. 209 Fed. 285; Interstate Commerce Commission v. Chicago, R. I. & P. R. Co. 218 U. S. 88, 110, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651.

No delivery is effected where switching is unperformed.

Crescent Coal & Min. Co. v. Baltimore & R. Co. 20 Inters. Com. Rep. 569; New York, N. H. & H. R. Co. v. Porter, 220 Mass. 547, 108 N. E. 499.

Lifting the so-called embargo made the carrier responsible for the accumulation of cars.

Schulz Co. v. Chicago, M. & St. P. R. Co. 20 Inters. Com. Rep. 405.

A car service charge is, as a general rule, only to be made either after delivery or after notice of delivery.

Hutchinson, Carr. §§ 859, 968; Elliott, Railroads, §§ 200a, 1567.

Demurrage rules promulgated by a carrier must be construed most favorably to the shipper.

Staten Island Rapid Transit R. Co. v. Marshall, 136 App. Div. 571, 121 N. Y. Supp. 82.

This court has jurisdiction to review a decision of the state court construing a Federal statute, to wit, the act to regulate commerce, that act governing charges for demurrage on interstate traffic.

Gimbel Bros. v. Barrett, 215 Fed. 1004; Hite v. Central R. Co. 96 C. C. A. 326, 171 Fed. 370.

Though a state court has no jurisdiction to affect a filed and published rate for demurrage on an interstate shipment, it may in a proper action find that such rate was charged for a greater length of time than that to which it was truthfully applicable, and give judgment for the amount so overpaid.

Chesapeake & O. R. Co. v. Rogers, — W. Va. —, 84 S. E. 248.

Mr. **Louis Quarles** argued the cause, and, with Messrs. Willet M. Spooner and George Lines, filed a brief for defendant in error:

Jurisdiction is given to this court only when the decision of the state court is against the right, privilege, or immunity set up under the Constitution or laws of the United States.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Sauer v. New York, 206 U. S. 536, 546, 51 L. ed. 1176, 1181, 27 Sup. Ct. Rep. 686; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30.

The Federal questions do not appear on the record to have been especially set up and claimed in the court below.

De Lamar's Nevada Gold Min. Co. v.

Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be *raised and* decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613.

An attempt to raise a Federal question in a petition for rehearing is too late.

Bushnell v. Crooke Min. & Smelting Co. 148 U. S. 690, 37 L. ed. 613, 13 Sup. Ct. Rep. 771; Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

The decision of the lower court does not deny any right that was asserted by plaintiff in error under the laws of the United States. The action is based on a tariff fair on its face, and no attempt has been made to challenge its validity, the sole question arising being its application to the facts in the case.

Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Illinois C. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 59 L. ed. 1306, 35 Sup. Ct. Rep. 760.

The fact that plaintiff and defendant make adverse claims under a law of the United States does not of itself present a Federal question.

De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

That demurrage under facts similar to those in the case at bar could be assessed at destination has been held by this court, and the assertion to the contrary is too frivolous to support the writ of error.

Berwind-White Coal Min. Co. v. Chicago & E. R. Co. 235 U. S. 371, 375, 59 L. ed. 275, 276, 35 Sup. Ct. Rep. 131.

Where the highest court of a state decides a question on a non-Federal ground, its decision will not be reversed, even though it may have also decided erroneously upon a Federal question, but in such a case this court will dismiss the writ of error.

Eustis v. Bolles, 150 U. S. 361, 370, 37 L. ed. 1111, 1113, 14 Sup. Ct. Rep. 131; Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Castillo v. McConnico, 168 U. S. 674, 679, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

The question whether the demurrage was assessed at destination is a question of fact, and this court has no jurisdiction to go behind the findings of fact approved by the state supreme court.

Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Dower v. Richards, 151 U. S. 658, 672, 38 L. ed. 305, 310, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704.

Cars are at destination when they are waiting in the yard because of the inability of the consignee to receive them on its siding.

New Orleans & N. E. R. Co. v. George, 82 Miss. 711, 35 So. 193.

Where cars are consigned for loading on a vessel for export, destination does not mean the pier at which the vessel loads, but the railroad yards adjacent thereto, and demurrage is collectable on cars waiting in those yards.

Hite v. Central R. Co. 96 C. C. A. 326, 171 Fed. 370.

A contract to maintain an embargo against a particular shipper is contrary to § 1 of the Hepburn act, being the act of June 30, 1906.

Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 268, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 133, 59 L. ed. 867, 873, 35 Sup. Ct. Rep. 484.

There can be no lawful discrimination in demurrage charges any more than there can be in freight charges.

Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; St. Louis, I. M. & S. R. Co. v. Edwards, 227 U. S. 265, 57 L. ed. 506, 33 Sup. Ct. Rep. 262; Hampton v. St. Louis, I. M. & S. R. Co. 227 U. S. 456, 57 L. ed. 596, 33 Sup. Ct. Rep. 263; Michie v. New York, N. H. & H. R. Co. 151 Fed. 694; United States v. Philadelphia & R. R. Co. 184 Fed. 543; United States v. Bethlehem Steel Co. 184 Fed. 546; United States v. Lehigh R. Co. 184 Fed. 546, 110 C. C. A. 513, 188 Fed. 879; L. W. Blinn Lumber Co. v. Southern P. Co. 18 Inters. Com. Rep. 430; Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Peale, Peacock & Kerr v. Central R. Co. 18 Inters. Com. Rep. 34; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628.

Where a situation is once shown to exist, the presumption is that such situation continues unless evidence be introduced to the contrary.

Laughlin v. Chicago & N. W. R. Co. 28 Wis. 204, 9 Am. Rep. 493; Wallace v. Pereles, 109 Wis. 316, 53 L.R.A. 644, 83 Am. St. Rep. 898, 85 N. W. 371; State ex rel. Coffey v. Chittenden, 112 Wis. 569, 88 N. W. 597; Friend v. Yahr, 126 Wis. 291, 1 L.R.A.(N.S.) 891, 110 Am. St. Rep. 924, 104 N. W. 997.

A carrier may maintain an embargo

where necessary to enable it to operate as a common carrier, but cannot contract to maintain an embargo as a special favor.

Barnes, Interstate Transportation, § 356; Pennsylvania R. Co. v. Puritan Coal Min. Co. 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; Peet v. Chicago & N. W. R. Co. 20 Wis. 594, 91 Am. Dec. 446; S. S. Daish & Sons v. Cleveland, A. & C. R. Co. 9 Inters. Com. Rep. 513; Great Western R. Co. v. Burns, 60 Ill. 287; Bussey v. Memphis & L. R. Co. 13 Fed. 330; Petersen v. Case, 21 Fed. 890; Houston & S. C. R. Co. v. Smith, 63 Tex. 322; American Tie & Timber Co. v. Kansas City Southern R. Co. 99 C. C. A. 44, 175 Fed. 28; E. L. Rogers & Co. v. Philadelphia & R. R. Co. 12 Inters. Com. Rep. 309.

Mr. Justice McKenna delivered the opinion of the court:

Action for demurrage on cars in interstate and intrastate commerce, the grounds of recovery being set forth in separate counts.

After trial judgment was entered for the railway company in the sum of $1,374.63 and $49.60 costs, being, in all, the sum of $1,424.23.

The judgment was affirmed by the supreme court of the state.

[57] There is no dispute about the facts. The railway company operates a railroad at Menasha, Wisconsin, and elsewhere. The paper company is a corporation and has a place of business adjoining the railroad of the railway company, and operated, for the purpose of unloading the cars delivered to it, a sidetrack which was contiguous to its mill and connected with the tracks of the railway company. A delay of forty-eight hours was allowed for unloading; after that time a demurrage charge of $1 per car per day was provided by the rules of the railway company.

The sidetrack could accommodate about seven cars, but had an actual capacity, as used during the times with which the action is concerned, of three or four cars, or possibly of five. As the paper company used the sidetrack, more cars could not have been placed upon it and unloaded than were actually placed upon it and unloaded, that is, about two or three cars a day.

Notice of the arrival of each car was given and acknowledged by telephone, and the railway company held the cars for unloading either at Menasha station, or afterwards at Snell's siding, 8 miles south of Menasha. The paper company did not ask for them sooner than shown in the complaint because it could not handle any more cars than it did. And there was neither inability nor refusal on the part of the railway company to so place the cars when so ordered.

On March 14, 1908, the railway company, at the request of the paper company, notified its agents in Wisconsin and Michigan "until further advised" to discontinue to furnish equipment to load with bolts (logs less than 8 feet in length) for the paper company. This arrangement, called an "embargo," did not run out until the close of the year, and did not by its terms cover logs, nor was it modified afterwards to cover logs. The embargo was raised at the paper company's request as to a certain [58] number of cars, but was applied again, and bolts were shipped in violation thereof and without any notice from the railway company to the paper company of the intention to ship the same, resulting in the arrival of cars in great numbers on certain days.

From these facts it was concluded by the referee, to whom the case was referred, the trial court, and the supreme court that the paper company was estopped from urging any defense other than the existence of the embargo, and that the embargo was "illegal, contrary to public policy, and void." The latter conclusion the court based on the Hepburn act (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563) and certain sections of the Wisconsin laws.

The case is in short compass. The first cause of action was for intrastate demurrage on logs; the second cause of action was for interstate demurrage on logs and bolts. The so-called embargo is applicable only to the bolts. The supreme court disposed of it, as we have seen, on the ground that it was opposed to the policy of the Federal and state laws, and justified the railway company in removing it. And the court found that there was no agreement that notice should be given of its removal. The removal of the embargo undoubtedly produced a congestion of cars beyond the ability of the paper company to handle on its sidetrack in its usual way.

Two questions arise on the embargo: (1) Was it a violation of the Hepburn act? (2) If so, could the railway company recover on account of the congestion of cars resulting from its removal? That act requires railroad companies to provide and furnish transportation to shippers upon reasonable request therefor, and to exact this duty of the railway company was the right of the shippers of the bolts to the paper company. Chicago, R. I. & P. R. Co. v. Hardwick Farmers' Elevator Co. 226 U. S. 426, 57 L. ed. 284, 46 L.R.A.(N.S.) 203, 33 Sup. Ct. Rep. 174. This is not denied by the paper company, nor did that company refuse [59] to receive the cars. It is an inference from this that the paper com-

pany recognized it was under contract obligations to the shippers to receive the bolts; indeed, the whole case supposes it. It is alleged that "between the 3d of June, 1908, and the 20th of July, 1908, both dates included, plaintiff [the railway company], as the last carrier, carried and delivered in interstate commerce certain freight in carload" lots (meaning the bolts). There is no denial that they were so carried. If the shippers had a right to send the bolts, necessarily the railway company was under a duty to transport them. The contention of the paper company, therefore, is tantamount to saying that the railway company performed its duty at the sacrifice of its rights. We are unable to concur in this view. The railway company violated its duty when it agreed to the embargo; it returned to its duty when it removed the embargo, and the rights which it exercised were those which it would have had if there had been no agreement between it and the paper company. The paper company had a direct remedy if it had been under no obligation to receive the bolts; it could have peremptorily notified the shippers not to send them, and such notice, under the circumstances, was an obvious course. It could not be protected from their receipt nor relieved from the obligation of their receipt by an agreement with the railway company against the duty which the law devolved upon the latter company. This duty it was deemed necessary to impose. It is positive and should be kept clear from agreements with others than the shippers which in effect stipulate for its violation. And this is the basis of our decision. If the paper company was under no obligation to receive the bolts from the shippers of them, it undoubtedly had the right to effectually notify the railway company not to receive them for shipment on its account except as it should direct. But, as we have seen, it received the cars, and this, we have said, was a recognition of the rights of [60] the shippers. The cars did not arrive all at once, and a protest made at the first delivery of cars would have notified the railway company that the paper company was under no obligations to the shippers. And this certainly was the more imperative, as the railway company was the last carrier, the shipments originating on other roads.

It seems that in the state court the paper company did not contend so much against the raising of the embargo as against the failure to give notice of it, with the consequence, it was asserted and is asserted here, of the "dumping of a large number of cars" on the paper company "and causing the accrual of the alleged demurrage sued for." But the contention is based upon the legality of the embargo, it being tantamount, it is insisted, to a consignee refusing freight consigned to it, or the designation of those from whom it would receive freight. It, however, gave no notice to its consignors; it undertook to put the railway between itself and them, casting upon the railway company the hazard of the violation of its obligations, it having the ability to perform them and the shippers having the right to demand performance of them. It, besides, received the cars without protest or comment, and made no provision for their disposition. The finding is "that defendant did not order cars placed for unloading sooner than as shown in Exhibits B and C, attached to the complaint, because, practically, defendant could not handle any more cars than it did, and hence did not ask for them." This finding applies, of course, to the placing of cars on the paper company's sidetrack. What other accommodation and arrangements it could have made does not appear from the findings, but it was testified that the paper company, if the cars had been delivered to it, could have obtained space for unloading them. The company, however, made no demand for such delivery and the referee found that the railway company "notified the defendant [paper company] upon each arrival [61] by telephone, giving the car numbers, and, according to custom, with only occasional exceptions, the plaintiff held the cars until defendant notified it to place them upon the sidetrack for unloading." And the referee also found that there was no delinquency on the part of the railway company nor insufficiency of terminal facilities.

The next contention of the paper company (it is the first discussed) is that "under the commerce act railroads cannot collect for any service not 'specifically set forth in the carrier's published tariffs,' and tariffs and schedules must plainly show what the charges are for." These conditions, it is urged, were not satisfied by the rules of the company and the circumstances presented in this case.

The rules of the company were as follows:

"Rule 4. Cars which are stopped in transit or held by orders of shippers or consignee for reconsignment to points beyond, for change of load, for amended instructions, for change in billing, milling, shelling, cleaning, etc., or on account of improper, unsafe, or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to car service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all car service must be collected, or billed as advances when cars go forward.

"Rule 5. . . .

"Section B. Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees or for the payment of freight charges after the notice mailed or otherwise given, or for the surrender of bills of lading.

"Section C. The delivery of cars to private tracks shall be considered to have been made, either when such cars have been placed on the tracks designated, or, if such track or tracks be full, when the road offering the cars [62] would have made delivery had the condition of such tracks permitted."

It is somewhat difficult to state succinctly the argument of counsel by which he attempted to give pertinency to the contention based on these rules. We have seen that the sidetrack of the paper company could accommodate about seven cars, but, as the company used the track, it could handle only two or three cars a day, and hence it did not ask for more. The supreme court of the state, therefore, decided that the railway company had complied with its obligation to the paper company by complying with such demand, and was entitled to charge for demurrage. And, answering the contention of the paper company (repeated here), the court said the railway "was not obliged to do a vain and useless thing by putting seven cars upon the track at one time, and thus prevent the practical handling or unloading of any cars thereon by appellant [paper company], contrary to its orders." [159 Wis. 514, 149 N. W. 751.] The court, by such holding, counsel says, decided that "the rules must have a reasonable construction." And, further: "This is the crux of the decision, and it is absolutely in opposition to all of the decisions of the Interstate Commerce Commission and of the courts, and of the spirit and intent of the act to regulate commerce." In other words, counsel insists that there should have been an actual filling of the tracks, even though this would have prevented their use, and have been contrary to the directions of the company, the basis of the contention being "that the rules must be strictly construed, and that there must be 'definite tariff authority' for the charges made." And the conclusion, it is asserted, is supported by all authorities, judicial, administrative, and legislative. Rigorously applying the test that the exact letter of the statute must be observed, counsel goes so far as to assert that there was an imperative duty upon the railway company to so fill the tracks, and this without orders. And contesting the proposition, [63] decided by the supreme court of the state, that *cars arriving* at Menasha or Snell's siding had reached their destination, counsel says: "It was the duty of the railroad to keep the sidetrack filled to its physical capacity before it could hold the cars 'at the nearest available point.' To hold otherwise would leave it dependent upon the judgment of the officers of the railroad as to how much unloading the consignee could do, and would therefore result in discrimination and special privileges prohibited by the act to regulate commerce." And further: "The carrier was derelict in its duty when it failed to fill the sidetrack to its capacity, as it had not completed its duty as a common carrier until it had placed the cars on the sidetrack of the plaintiff in error."

We are unable to concur in counsel's construction of the rules, or to hold that it has any such formidable support as he assigns to it. And we content ourselves with the bare assertion, not even pausing to review counsel's chief reliance, that is, United States v. Denver & R. G. R. Co. 18 Interst. Com. Rep. 7. The case has not the breadth given to it. If it had, we should be unable to follow it.

A motion has been made to dismiss, but it is apparent from our discussion that a Federal question was presented in the case and decided by the court. The motion, therefore, must be overruled, and the judgment affirmed.

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[64] UNITED STATES, Plff. in Err.,
v.
NEW SOUTH FARM & HOME COMPANY, Charles H. Seig, Ben Levin, et al.

(See S. C. Reporter's ed. 64-73.)

Appeal — review by government in criminal case — jurisdiction.

1. The construction of the Federal Criminal Code, § 215, making criminal the use of the mails in the execution of a

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NOTE.—Review by Federal government in criminal case.

This note supplements one on the same question appended to the report of United States v. Stevenson in 54 L. ed. U. S. 153.

The criminal appeals act of March 2, 1907, was not repealed by the Judicial Code of March 3, 1911, since the former act is not mentioned among the statutes expressly repealed by § 297 of the Code, is not superseded by any other regulations of the matter, and is a special provision. United States v. Winslow, 227 U. S. 202, 57 L. ed. 481, 33 Sup. Ct. Rep. 253.

Jurisdiction.

The judgment actually entered below,

scheme to defraud, is involved, so as to sustain a writ of error from the Federal Supreme Court, in a decision of a district court by which a demurrer to an indictment charging violations of this section was sustained on the ground that allegations of the employment of false representations in furtherance of a plan to sell real estate did not constitute a scheme to defraud, punishable under that section, if the land to be sold was worth the purchase price asked.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Postoffice — use of mails to defraud.

2. Persons employing, in furtherance of a plan to sell 10-acre farms, false representations as to climate, fertility, crops, advantages, prospective improvements, etc., have engaged in a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," within the meaning of the Federal Criminal Code, § 215, making criminal the use of the mails in the execution of such scheme, although the lands to be sold may be worth as much as the purchase price asked.

[For other cases, see Postoffice, VI., in Digest Sup. Ct. 1908.]

[No. 808.]

Argued April 7, 1916. Decided April 24, 1916.

IN ERROR to the District Court of the United States for the Southern District of Florida to review a judgment sustain-

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and not the terms of a stipulation of counsel, previously made and filed, controls the Federal Supreme Court in determining whether such judgment is reviewable on writ of error under the act of March 2, 1907, as one "sustaining a special plea in bar when the defendant has not been put in jeopardy." United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209.

A judgment of a Federal district court purporting to dismiss an indictment upon the ground that the statute of limitations was a bar to the prosecution is one sustaining a special plea in bar within the meaning of the act of March 2, 1907, governing the right of the government to a review in a criminal case, although the plea of the statute of limitations, filed and heard by consent and stipulation, was denominated a plea in abatement. Ibid.

A judgment of a Federal district court in a criminal prosecution of an express company under the act to regulate commerce, sustaining a motion to quash service, which the court treated as a demurrer to the indictment, and dismissing the case because the express company is not a corporation, but is a joint stock association, is reviewable in the Federal Supreme Court under the act of March 2, 1907, as a decision setting aside the indictment, based upon the construction of the statute upon which the indictment is founded. United States v. Adams Exp. Co. 229 U. S. 381, 57 L. ed. 1237, 33 Sup. Ct. Rep. 878.

A judgment of a Federal circuit court sustaining a demurrer to certain counts in an indictment charging violations of the anti-trust act of July 2, 1890, upon the ground that the acts charged are not within the condemnation of that statute, is based upon a construction of such statute within the meaning of the act of March 2, 1907, governing the right of the government to a review in a criminal case. United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

A decision of a Federal district court sustaining a demurrer to an indictment upon the ground that the acts charged did not fall within the condemnation of the statute on which the indictment is founded is based upon the construction of such statute, so as to be reviewable in the Federal Supreme Court. United States v. Birdsall, 233 U. S. 223, 58 L. ed. 930, 34 Sup. Ct. Rep. 512.

A decision of a Federal district court, sustaining a demurrer to an indictment charging a conspiracy to defraud the United States by unlawfully increasing the gross postoffice receipts on which the postmaster's salary is to be based, and a conspiracy to make a false return for the purpose of fraudulently increasing such compensation, is based upon the construction of the statutes on which the indictment is founded, and is therefore within the appellate jurisdiction of the Supreme Court, where the district court distinctly ruled that such indictment was sufficient in its technical or formal details, and, although giving special prominence to certain regulations of the Postmaster General, considered the effect of the Federal statutes independently of such regulations upon the sufficiency and legality of the postmaster's return, a construction of the statutes being necessary to determine the validity of the regulations. United States v. Foster, 233 U. S. 515, 58 L. ed. 1074, 34 Sup. Ct. Rep. 666.

The meaning of the statute on which, as a matter of law, the indictment is founded, may be misconstrued within the meaning of the act of March 2, 1907, allowing a direct writ of error from the Federal Supreme Court to a judgment of a district court, sustaining a demurrer to an indictment when based upon the "construction of the statute upon which the indictment was founded," not only by misinterpreting the language of such statute, but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms. United States v. Nixon, 235 U. S. 231, 59 L. ed. 207, 35 Sup. Ct. Rep. 49.

The decision of a Federal district court quashing as "bad in law" certain counts of an indictment purporting to charge violations of U. S. Rev. Stat. § 5209, Comp. Stat. 1913, § 9772, is not reviewable in the Federal Supreme Court under the act of March

ing a demurrer to an indictment charging the use of the mails to defraud. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause and filed a brief for plaintiff in error:

U. S. Crim. Code, § 215, may be violated though the property to be sold under the scheme is worth the price to be demanded.

Durland v. United States, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; Harris v. Rosenberger, 13 L.R.A. (N.S.) 762, 76 C. C. A. 225, 145 Fed. 449; O'Hara v. United States, 64 C. C. A. 81, 129 Fed. 551; Colburn v. United States, 139 C. C. A. 136, 223 Fed. 590; Wilson v. United States, 111 C. C. A. 231, 190 Fed. 427; United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19.

Mr. W. Knox Haynes argued the cause and filed a brief for defendants in error:

The right given to the United States to obtain a direct review by this court of the rulings of the lower court does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore, in the exercise of the court's power to review this record, it must accept the construction of the indictment made by the lower court, and test its construction of the statute in that respect, starting with the premises that the supposed false representations are in

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2, 1907, as based upon the construction of the statute on which the indictment was founded, since such ruling may as well have rested upon the opinion of the court as to the mere insufficiency of the indictment. United States v. Carter, 231 U. S. 492, 58 L. ed. 330, 34 Sup. Ct. Rep. 173.

A decision of a Federal district court on demurrer, that the averments of an indictment charging violations of the anti-trust act of July 2, 1890, were not sufficient to connect the individual defendants with the offense charged, is a construction of the indictment, and may not be reviewed in the Federal Supreme Court at the instance of the government. United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 57 L. ed. 742, 33 Sup. Ct. Rep. 443.

A judgment of a Federal district court sustaining a demurrer to an indictment under the Criminal Code of March 4, 1909, § 215, for placing a letter in the postoffice for delivery by the postoffice establishment for the purpose of executing a scheme to defraud, cannot be reviewed in the Supreme Court by writ of error, where it does not appear from the record upon what ground the court below acted. United States v. Moist, 231 U. S. 701, 58 L. ed. 444, 34 Sup. Ct. Rep. 255.

The Federal Supreme Court will not examine the entire record in order to resolve in favor of its appellate jurisdiction a doubt as to whether a ruling of a district court, quashing certain counts of an indictment as "bad in law," was based upon a construction of the statute on which the indictment was founded, within the meaning of the criminal appeals act of March 2, 1907, or was rested upon the mere insufficiency of the indictment. United States v. Carter, 231 U. S. 492, 58 L. ed. 330, 34 Sup. Ct. Rep. 173.

Scope of review.

The district court's construction of the indictment must be accepted by the Federal Supreme Court when reviewing, under the act of March 2, 1907, a judgment sustaining a demurrer to certain counts in the indictment, which is based upon the construction of the Federal statute upon which the indictment is founded. United States v. Winslow, 227 U. S. 202, 57 L. ed. 481, 33 Sup. Ct. Rep. 253.

The Federal Supreme Court, when reviewing, under the criminal appeals act of March 2, 1907, the judgment of a Federal circuit court whose ruling sustaining a demurrer to certain counts in an indictment charging violations of the anti-trust act of July 2, 1890, was based upon the construction of that statute, must accept the circuit court's construction of the counts of the indictment, and can consider only whether the decision that the acts charged are not condemned as criminal by the statute is based upon an erroneous construction of that statute. United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141.

The Federal Supreme Court, when reviewing, under the act of March 2, 1907, the act of the trial court, sustaining a plea in bar of the statute of limitations to an indictment charging a continuing conspiracy, is not concerned with the technical sufficiency or redundancy of the indictment, or even with any consideration of the nature of the overt acts alleged. United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209.

The question presented for decision on direct writ of error to a circuit court from judgments sustaining demurrers to indictments under the act to regulate commerce of June 29, 1906, making it a misdemeanor for a shipper knowingly to solicit, accept, or receive a rebate or concession whereby property is transported in interstate commerce at a less rate than that named in the tariffs "published and filed" by the carrier, on the ground that the indictments did not allege that the schedules and tariffs claimed to have been violated were posted in the manner required by law, is whether compliance with the requirements of the act as to posting of tariffs is essential to bring a tariff within the descriptive terms of the act. United States v. Miller, 223 U. S. 599, 56 L. ed. 568, 32 Sup. Ct. Rep. 323.

reality merely permissible puffing or trade talk, and that the indictment is consistent with the hypothesis that defendants were legitimately, and not fraudulently, engaged in the enterprise mentioned in the indictment.

United States v. Keitel, 211 U. S. 370, 398, 53 L. ed. 230, 244, 29 Sup. Ct. Rep. 123; United States v. Biggs, 211 U. S. 507, 53 L. ed. 305, 29 Sup. Ct. Rep. 181; United States v. Patten, 226 U. S. 525, 535, 57 L. ed. 333, 338, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; United States v. Carter, 231 U. S. 492, 58 L. ed. 330, 34 Sup. Ct. Rep. 173; United States v. Moist, 231 U. S. 701, 58 L. ed. 444, 34 Sup. Ct. Rep. 255; United States v. Pacific & A. R. & Nav. Co. 228 U. S. 87, 108, 57 L. ed. 742, 749, 33 Sup. Ct. Rep. 443.

Mere puffing or exaggeration of qualities, usefulness, opportunities, or values of an article of commerce, where the purchaser gets the article intended to be purchased, and the value of the article is measured by the price paid, does not constitute the false representations, promises, etc., denounced by the statute.

Faulkner v. United States, 85 C. C. A. 204, 157 Fed. 841; Harrison v. United States, 119 C. C. A. 78, 200 Fed. 665; Reynolds v. Palmer, 21 Fed. 435; United States v. Staples, 45 Fed. 195; Blair v. Laflin, 127 Mass. 518.

No averment of such special intent to defraud is contained in the indictment, and the court below, in construing the indictment, has held that, for aught that appears in the indictment, the defendants were engaged legitimately (which precludes fraudulent intent) in the sale of the lands, and has thereby construed the indictment as failing to charge such special intent to defraud, and as being therefore insufficient.

Durland v. United States, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; United States v. Durland, 65 Fed. 408; United States v. Stickle, 15 Fed. 803; Horman v. United States, 53 C. C. A. 570, 116 Fed. 350; Rudd v. United States, 97 C. C. A. 462, 173 Fed. 912; Hibbard v. United States, 96 C. C. A. 554, 172 Fed. 60, 18 Ann. Cas. 1040; United States v. Ried, 42 Fed. 137; Post v. United States, 70 L.R.A. 989, 67 C. C. A. 569, 135 Fed. 9; United States v. Wootten, 29 Fed. 704; United States v. Conrad, 156 Fed. 248; United States v. Hess, 124 U. S. 485, 31 L. ed. 517, 8 Sup. Ct. Rep. 571; Atchison, T. & S. F. R. Co. v. United States, 95 C. C. A. 446, 170 Fed. 250.

When an intent to defraud is a material element in an offense, an omission to aver such intent as an essential part of the specific scheme described renders the count insufficient, and consistent with the hypothesis of innocent intent.

United States v. Britton, 107 U. S. 655, 27 L. ed. 520, 27 Sup. Ct. Rep. 512; Evans v. United States, 153 U. S. 584, 594, 38 L. ed. 830, 834, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Fall v. United States, 126 C. C. A. 369, 209 Fed. 552; United States v. Post, 113 Fed. 852.

The statute neither defines nor denounces, but aims only to punish using the mails in effectuating what without it would still be schemes or artifices to defraud. If puffing and trade talk are permissible, and not fraudulent, aside from the statute, they do not become fraudulent by reason of the statute, nor is the construction of certain averments to be mere puffing a construction of the statute.

Stockton v. United States, 46 L.R.A. (N.S.) 936, 123 C. C. A. 530, 205 Fed. 462.

The representation by one who desires the erection of a building that the material can be produced for a certain amount, in order to induce another to contract to erect the building for a given price, will not sustain an action for deceit.

Emmerson v. Hutchinson, 63 Ill. App. 203.

Statements that a business can be bought at a bargain, that the place is a good one for business, that money could be made there, are mere expressions of opinion.

Danforth v. Cushing, 77 Me. 182.

An action for deceit will not lie for statements as to profits that can be made in the future.

Pedrick v. Porter, 5 Allen, 324.

Statements by the vendor of land as to the possibility of acquiring adjoining land, and as to the amount of crops that could be grown on the land, are mere expressions of opinion.

Mooney v. Miller, 102 Mass. 217.

A statement that lots will soon be very valuable, and will come into the market soon, and be worth $2,000 each, is a mere expression of opinion.

Lockwood v. Fitts, 90 Ala. 150, 7 So. 467.

A representation by a landowner that the land will produce a certain amount of hay and grapes is a mere matter of opinion.

Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

A statement by a vendor as to the title is a mere statement of opinion.

Atwood v. Chapman, 68 Me. 38, 28 Am. Rep. 5.

An honest expression of opinion by a vendor as to his title, though erroneous, is not fraud.

Fitzhugh v. Davis, 46 Ark. 337.

A general assertion of title to property

is not such a representation of fact as will be a basis for a charge of fraud

Ward v. Luneen, 25 Ill. App. 160.

An expression of opinion as to the effect of the contents of a deed of conveyance is not such fraud as will defeat a contract.

Hoyt v. Bradley, 27 Me. 242.

[65] Mr. Justice McKenna delivered the opinion of the court:

This writ of error is directed to a decision of the district court, sustaining a demurrer to an indictment, and is prosecuted under the criminal appeals act, it being contended by the government that the decision involved the construction of § 215 of the Criminal Code [35 Stat. at L. 1130, chap. 321, Comp. Stat. 1913, § 10,385]. The opposing contention is that the court passed only on the sufficiency of the indictment as a criminal pleading, and that, therefore, the writ of error should be dismissed. The contentions are repeated here, and make the issue. They necessarily require a consideration of the indictment. It is constituted of three counts. Their foundation is § 215, supra, which, so far as material, reads as follows: "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, . . . shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter, . . . circular, . . . or advertisement, . . . in any postoffice, . . . to be sent or delivered by the postoffice establishment of the United States, . . . " etc.

The section is a somewhat enlarged successor of § 5480, Revised Statutes, which provides: "If any person having devised . . . any scheme or artifice to defraud, . . . shall, in and for executing such scheme or artifice, or attempting so to do, place any letter . . . ," etc.

As showing a violation of § 215, the first count of the indictment charged the following facts, which we state narratively: The individual defendants are directors and stockholders of the New South Farm & Home Company, a corporation engaged in selling approximately 142,000 acres of land, referred to as the Burbank-Ocala colony and [66] the Florida-Palatka colony, situated in Putnam, Marion, and Clay counties, Florida. They devised a scheme to defraud certain persons, who were named, and other persons, of their money and property, with the intention to convert the same to the use and gain of the defendants and the corporation, by means of correspondence and communications through the postoffice establishment of the United States, and by means of oral and verbal communications, by offering to sell to such persons, and inducing them to purchase, certain 10-acre farms upon certain terms through false and fraudulent representations concerning the title, fertility, value, drainage, location, environs, and survey of the farms, and the improvements made or to be made thereon.

The representations were these: The lands and farms were not swampy; the largest ocean steamers operating between New York and Jacksonville could load at Palatka; a family could make enough on one farm during the first year to support itself and save money; three crops a year could be grown; every month in the year was a growing month, that is, some farm or truck product could be raised during each month of the year; the farms were surrounded with orange and citrus fruit groves and vegetable truck farms; the farms had fine roads running through them, were high and well drained, and, on the whole, like the lands of Kansas, Nebraska, Iowa, and Illinois; artesian wells were scattered about on the farms or "could be obtained by going down 100 feet;" the land was divided into 160-acre tracts; roads were being built around each 160-acre tract and each 10-acre farm would face on a road, and ditches were being dug so that each farm would be drained; many miles of fence had been erected and hundreds of homes and many schoolhouses had been built; the schoolhouses were more than comfortably filled with pupils, and more schools would have to be built to take care of the rapid growth of the colonists settling upon the farms; comfortable [67] hotels had been built upon the lands and farms and improvements of all kinds were going forward at a wonderful rate; lumber was cheap and homes could be built without nearly so great expense as in most places in Florida and at about one-half of the expense the same would cost in the North; the Title Guarantee Company of Jacksonville, Florida, would guarantee the title, with which company the New South Farm & Home Company had made arrangements so that purchasers might know that their investments were safe; the farms were cut over and ready to go upon at once, and there were no timber leases upon the lands; the defendants were not land brokers or speculators; the New South Farm & Home Company owned the land outright, the title having been approved by the best attorneys, and anyone buying a farm could depend upon securing a clear title, as the company was selling something it owned itself; the farms were free from mosquitoes, malaria, and insects of all kinds and were below the frost line; the company had secured telephone connections with Palatka

and with local exchanges at other places (they are named) which would place every farm "in direct touch with the community at all times;" the lands and farms were located high and dry and in a section well drained; hundreds of people had settled on them and at the little city of Burbank the lands and farms had increased—doubled, trebled, and quadrupled—in price, and the same was true of the lands owned by the company at Silver City, and a thousand settlers were on the lands who could sell them at a large profit; land selling at $30 an acre woud be worth in two years $200 and $300 per acre; well-stocked stores and factories were located upon the lands, and they were the best located and the most fertile lands in America, and Luther Burbank had been arranged with for "the exclusive right for the production of certain of his farm products;" there would be installed a Burbank producing [68] station on the lands and farms, and the purchasers of the latter would share in the profits of the station, the director of which would be available for the needs of the purchasers; one could get out of a Pullman car on the farms, use a long distance telephone, have the daily paper, rural free delivery, and all the comforts of home.

There were other representations of fact, and, to give emphasis to those which we have enumerated, it was charged that the pictures in the publications sent out by the defendants represented the true conditions to be seen on the farms.

All of the representations were explicitly repeated and charged to be false; that defendants well knew them to be so, and intended by them to deceive the persons to be defrauded, and to induce such persons to part with their money and property in the purchase of the farms.

That the representations were made and communicated by the defendants to the persons intended to be defrauded through and by means of oral statements, circulars, maps, advertisements, photographs, etc., so worded, drawn, constructed, presented, and expressed as to deceive; but all too voluminous to be set forth in the indictment, where fore the grand jurors omitted them.

That the defendants deposited in the United States mail at Jacksonville and Palatka, in the southern district of Florida, certain publications known as "The New Florida" and "Ten Acres and Freedom" and certain other letters, prints, pamphlets, magazines, and publications containing the false representations set out above, which were addressed to the person intended to be defrauded, and on which legal United States postage had been paid.

The second count charged the defendants with entering into a conspiracy to commit the offense described in the first count, and repeated its allegations and representations, varied only to meet the difference in the crime [69] charged. In other words, there were allegations which charged that the conspiracy was to be accomplished by the representations enumerated in the first count, that they were false and known to be so, and made with the same fraudulent purpose, and to be accomplished by the use of the United States mails. Two letters from the company, signed by defendant Seig as president, were set out in the indictment.

The third count was also like the first in its general charges and designated by name the persons that were intended to be defrauded. The same representations were charged to have been made "by publishing and causing and procuring to be published divers prints, papers, pamphlets, booklets, circulars, and divers advertisements." The falsity of the representations was declared, and that the scheme of fraud was to be accomplished by the use of the United States mails. A letter was quoted.

The defendants demurred to the indictment. The demurrer is a very voluminous document and practically defies condensation. It charges that the indictment does not, nor does any count of it, "aver and charge any offense against the United States," that each and every count thereof is insufficient, in that they do not, nor does either of them, aver the facts constituting a scheme to defraud; that each and every count is insufficient for repugnancy, uncertainty, ambiguity, and evasiveness; and that each and every count is insufficient for want of distinct and adequate specifications of the particulars wherein the several representations, called in the count false representations, were false.

The demurrer then attacks each count separately, and with much elaboration and with repetition of the allegations of the indictment sets out with particularity wherein no offense against the United States was charged.

The court sustained the demurrer, resting its decision [70] upon the second and third grounds of demurrer, which, we have seen, charged that neither the indictment nor any of its counts averred or charged an offense against the United States, or averred facts which constituted a scheme to defraud. It was said, "The scheme to defraud is alleged in the first and third counts, and the conspiracy count also sets out the same scheme. So that if the scheme to defraud set out in each of said counts is not such a scheme as is punishable under the law, the entire indictment must fail."

Describing the representations, the court

said they "are as to the quality of the land, climate, crops to be raised, advantages to be obtained, and promises of improvement, etc." And further: "There is no denial of the facts of the ownership of the lands, although there is a denial that all the titles were perfect. Nor is there denial that the land was worth fully as much as was to be obtained therefor. For aught that appears in the indictment, the lands to be obtained were worth fully as much as was to be paid by the parties purchasing; that the parties engaged in the sale were legitimately engaged in the sale of the lands."

The court regarded the business as legitimate, and held that the statute was not violated by puffing the qualities of the article sold in advertising it. In other words, as the court expressed it, "raising the expectations of the purchaser, but giving that purchaser value received for his money, but not fulfilling those expectations," was not an offense against the statute. And, further, the court said that the deduction from the authorities referred to by counsel "is that the scheme must be one to defraud the party, or, by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities, or value of an article of commerce, where the purchaser gets the article intended to be purchased, [71] and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."

We have made these excerpts from the opinion of the court the better to handle the contentions of the parties, which, as we have seen, are quite accurately opposed, the government asserting that the court construed the statute, and thereby justifying its appeal to this court; the defendants insisting the court construed only the indictment as a pleading, and that therefore this court is without jurisdiction.

We concur in the view of the government. The court, we think, construed the statute, and misapprehended its import. Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be expressed); that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has, but invents advantages and falsely asserts their existence, he transcends the limits of "puffing" and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces. Harris v. Rosenberger (C. C. A. 8th C.) 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449; O'Hara v. United States (C. C. A. 6th C.) 64 C. C. A. 81, 129 Fed. 551, 555; Colburn v. United States (C. C. A. 8th C.) 139 C. C. A. 136, 223 Fed. 590; Wilson v. United States (C. C. A. 2d C.) 111 C. C. A. 231, 190 Fed. 427. See also United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19. Especially is this true in the purchase of [72] small tracts for homes, and upon this, if the allegations of the indictment are true, the defendants touched every string of desire by false statements, and sounded every note that could excite and delude. We need not repeat the representations; and they were made graphic, it is alleged, by pictures and photographs.

Indeed, if it could be admitted that the article offered for sale and its price could be balanced, the one against the other, the price necessarily would be the expression of value, and be constituted of all the attributes of the article, intrinsic and extrinsic; and it needs no comment to show that a 10-acre farm with the character, environments, and facilities described, its price doubling, trebling, and quadrupling within a year, has a seduction more powerful than one not advancing in value, but, it may be, receding; that is, of swampy, not of highland, character, without fertility, hotels, roads, artesian wells, citrus groves, Pullman cars, steamship and other facilities which the literature of defendants describes and the indictment alleges.

We can entertain no doubt that those employing such representations, if they are false, have engaged in a scheme to defraud. The defendants did not seem to be afraid of repelling by excess, and extravagance was even used in a personal communication. In a letter which was set out in the indictment it was said: "Our settlers are arriving daily and occupying their farms. The land is being rapidly cleared, crops are being planted, houses erected, stores built, and, on the whole, it is impossible for us to set forth in a letter to you exactly how stupendous is the work that is going on there. Without a question of a doubt the Florida Palatka Colony is enjoying the greatest prosperity."

Against these considerations defendants contend that there was, notwithstanding, only a construction of the indictment; but

ask that, if we are of a different view, [73] the case be reversed only so far as the statute was construed, and remanded for action upon the other causes assigned for demurrer, involving, as they say, the sufficiency of the indictment as a criminal pleading. The difficulty is to indicate a distinction. We can only say we have no intention to control the District Court in its construction of the indictment, and we have no doubt the learned court will be able to adjust its action to this opinion. United States v. Portale, 235 U. S. 27, 31, 59 L. ed. 111, 112, 35 Sup. Ct. Rep. 1.

Reversed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

UNITED STATES, Plff. in Err.,
v.
ANGELINE LOMBARDO.

(See S. C. Reporter's ed. 73–79.)

Courts — venue of crime — continuing offense.

Violations of the provision of the act of June 25, 1910 (36 Stat. at L. 826, chap. 395, Comp. Stat. 1913 § 8817), making it a crime for the harborer of an alien woman for purposes of prostitution to fail to file with the Commissioner General of Immigration the statement concerning such woman called for by that section, are committed at Washington, District of Columbia, where that official has his office, and are not justiciable elsewhere on the theory that the failure to deposit the statement in the mail is the beginning of a continuing offense which, under the Judicial Code, § 42, may be prosecuted either in the district where begun or where completed, since mailing is not filing, within the meaning of the statute.

[For other cases, see Courts, V. c, 7, b, in Digest Sup. Ct. Rep. 1908.]

[No. 830.]

Submitted April 10, 1916. Decided April 24, 1916.

IN ERROR to the District Court of the United States for the Western District of Washington to review a judgment sustaining a demurrer to an indictment founded on the white slave trade act. Affirmed.

See same case below, 228 Fed. 980.

The facts are stated in the opinion.

Assistant Attorney General Wallace submitted the cause for plaintiff in error.

No brief was filed for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

Error under the criminal appeals act (34 Stat. at L. 1246, chap. 2564, Comp. Stat. 1913, § 1704) to review a decision of the district court for the western district of Washington (228 Fed. 980), sustaining a demurrer to an indictment founded on the "white slave traffic act" (36 Stat. at L. 826, chap. 395, Comp. Stat. 1913, § 8817).

Section 6 of that act provides that everyone "who shall keep, maintain, control, support or harbor in any house or place, for the purpose of prostitution, . . . any alien woman . . . within three years after she shall have entered the United States . . . shall file with the Commissioner General of Immigration a statement in writing setting forth the name of such alien woman, . . . the place at which she is kept, and all facts as to the date of her entry into the United States, the port through which she entered, her age, nationality, and parentage, and concerning her procuration to come to this country, within the knowledge of such person; and any person who shall fail within thirty days after such person shall commence to keep, etc. . . . any alien woman, . . . to file [75] such statement concerning such alien woman, . . . with the Commissioner General of Immigration, or who shall knowingly and wilfully state falsely, or fail to disclose in such statement any fact within his knowledge or belief with reference to the age, nationality, or parentage of any such alien woman, . . . or concerning her procuration to come to this country, shall be deemed guilty of a misdemeanor, etc., . . ."

The statement is not excused because it may have incriminating character, but it is provided that the person making it shall not be prosecuted or subjected to any penalty or forfeiture under any law of the United States for or on account of any transaction, matter, or thing concerning which he may truthfully report in such statement as required by the provisions of the act.

The indictment charged that one Jessie Milos, an alien woman and a citizen and subject of the Kingdom of Great Britain, had entered the United States in the month of May, 1914, and that Angeline Lombardo, knowing these facts, did, in a house in the city of Seattle, northern division of the western district of Washington, keep, maintain, control, and harbor Jessie Milos for

NOTE.—As to locality of crime committed through the agency of the mails or of carriers—see note to State v. Hudson, 19 L.R.A. 775.

the purpose of prostitution and for other immoral purposes, and unlawfully, knowingly, and wilfully failed to file with the Commissioner General of Immigration a statement in writing as required by the statute, or any statement concerning Jessie Milos.

It was alleged that the United States and Great Britain are parties to an agreement or project or arrangement for the suppression of the white slave traffic, adopted July 25, 1902.

There were two grounds of demurrer: (1) Section 6 of the white slave act is unconstitutional in that it contravenes rights guaranteed by the 4th and 5th Amendments to the Constitution of the United States. (2) The court was without jurisdiction of the subject-matter [76] as the prosecution is in contravention of rights guaranteed by the 6th Amendment.

The district court sustained the demurrer on both grounds. We, however, shall confine our decision to the second ground, as that attacked the jurisdiction of the court, in that the offense was not committed in the district in which the indictment was found. Passing on it the court said:

"The gist of the offense is the failure 'to file with the Commissioner General of Immigration' a statement, etc. By act of March 3, 1891, chap. 551, § 7, 26 Stat. at L. page 1085, Comp. Stat. 1913, § 954, as amended by act of March 2, 1895, chap. 177, 28 Stat. at L. page 780, Comp. Stat. 1913, § 955, the office of the Commissioner of Immigration was created and his office fixed at Washington, District of Columbia. The government contends that the offense was a continuing one and extended from this district to Washington, District of Columbia, and that the filing of the statement need not be at the office in Washington, but may be deposited in the postoffice of the United States, addressed to the Commissioner General, and this forwarding through the usual course of mail should be considered as 'filing,' and that the failure to post within thirty days would commence the offense, which would be continuous. This contention cannot be reconciled with the language employed in the act. The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word *'filum,'* and relates to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails. Gates v. State, 128 N. Y. 221, 28 N. E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier's [77] Law Dict.; Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223; Wescott v. Eccles, 3 Utah, 258, 2 Pac. 525; Re Von Borcke (D. C.) 94 Fed. 352; Mutual L. Ins. Co. v. Phinney, 22 C. C. A. 425, 48 U. S. App. 78, 76 Fed. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

The government in its argument here contests the views of the district court, repeats its contention that the offense was begun in the state of Washington, and relies on § 42 of the Judicial Code [36 Stat. at L. 1100, chap. 231, Comp. Stat. 1913, § 1024], substantially reproducing § 731 of the Revised Statutes. It provides as follows:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

The government also cites a number of cases which it urges support the application of the statute to the case at bar. We are unable so to regard the cases, or to give the statute the application contended for. Nor does the case call for elaborate discussion. Indeed, it would be difficult to add anything to the reasoning of Judge Netterer in the district court.

Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act, commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy.

It may be that where there is a general duty it may be considered as insistent both where the "actor" is and the "subject" is, to borrow the government's apt designations, [78] as in the case of the duty of a father to support his children; and if the duty have criminal sanction, it may be enforced in either place. The principle is not applicable where there is a place explicitly designated by law, as in § 6.

The government, however, contends that "with few exceptions every crime has continuity. But the law, being essentially practical, does not regard every crime as continuous for the purpose of jurisdiction. . . . For practical purposes it usually suffices to punish where the actor began, or

where the subject suffered the intended result."

If these propositions be granted we do not see that they carry us far in determining where a violation of § 6 is begun or completed, nor do we appreciate the criticism of the decision of the court below that it "failed to distinguish between the 'beginning' and the 'completion' of the offense; giving the words 'shall file,' etc., a meaning so narrow as to destroy the section." But this is assertion. A court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, whether to secure or preserve a right or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is satisfied by a deposit in the postoffice at some distant place. To so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files. We hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion. And would it not, besides, in particular cases, preclude the possibility of a conviction, putting evidence entirely in the hands of the defendant? [79] And there are other considerations. If depositing in the postoffice of the statement prescribed be required by the statute, it, of course, would satisfy the statute, but to what instant of time would it be referred and at what risk the time or delays of transportation?

There need not be a prolonged embarrassment in the prosecution of offenders, as the government fears. If § 6 is deemed defective it can be corrected by legislation.

Judgment affirmed.

WILLIAM N. McFARLAND, Supervisor of Public Accounts of the State of Louisiana and *Ex Officio* Inspector of Sugar Refining of the State of Louisiana, et al., Appts.,

v.

AMERICAN SUGAR REFINING COMPANY.

(See S. C. Reporter's ed. 79-87.)

Injunction — against enforcement of unconstitutional statute — clean hands.

1. Unlawful practices of a sugar refining company in the conduct of its business cannot defeat its right to maintain a bill in equity to restrain the threatened enforcement of La. Acts 1915, No. 10, regulating the business of sugar refining, which, it asserts, violates its rights under the Federal Constitution.

[For other cases, see Injunction, I. j; Equity, III., in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification — regulating sugar refining.

2. Defining the business of sugar refining as that of "any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it," as is done by § 15 of Louisiana Acts 1915, No. 10, which subjects to drastic regulation the business of sugar refining, renders the statute repugnant to the equal protection of the laws clause of U. S. Const., 14th Amend., as producing a classification which, if it does not confine itself to one particular concern, is at least arbitrary beyond possible justice.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — creating presumption of guilt.

3. A state cannot, consistently with the equal protection of the laws clause of U. S. Const., 14th Amend., create, as is attempted by Louisiana Acts 1915, No. 10, a presumption of participation in a forbidden monopoly or combination from the systematic payment in Louisiana by a person engaged in sugar refining within that state of a less price for sugar than he pays in any other state, nor a presumption that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute or the laws against monopolies.

[For other cases, see Constitutional Law, IV. a, 8, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

4. The unconstitutionality of the classification attempted in Louisiana Acts 1915, No. 10, regulating the business of sugar

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NOTE.—On the power of legislature to enact a prima facie rule of evidence for criminal cases—see note to Banks v. State, 2 L.R.A.(N.S.) 1007.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

Generally, on statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

On illegal trusts under modern anti-trust laws—see note to Whitwell v. Continental Tobacco Co. 64 L.R.A. 689.

refining, and of the provisions of that statute creating presumptions of guilt, requires that the act fall as a whole.
[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[No. 847.]

Argued April 11 and 12, 1916. Decided April 24, 1916.

APPEAL from the District Court of the United States for the Eastern District of Louisiana to review a decree enjoining the threatened enforcement of a state statute regulating the business of sugar refining. Affirmed.

See same case below, 229 Fed. 284.

The facts are stated in the opinion.

Messrs. Donelson Caffery and Harry Gamble argued the cause, and, with Mr. Daniel Wendling and Mr. Ruffin G. Pleasant, Attorney General of Louisiana, filed a brief for appellants:

Can one whose continuing conduct has necessitated the enactment of a police regulation come into equity to assail that regulation?

National Mercantile Co. v. Keating, 218 Fed. 479; Danciger v. Stone, 187 Fed. 853.

The hands of the complainant are unclean.

Danciger v. Stone, 187 Fed. 862; Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 725; McConnell v. Camors-McConnell Co. 152 Fed. 332; Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Bartle v. Nutt, 4 Pet. 184, 7 L. ed. 825; Pittsburgh, C. C. & St. L. R. Co. v. Crothersville, 59 Ind. 330, 64 N. E. 914.

For an injunction to issue in order that a monopolist may continue to ply his trade goes counter to every idea of justice.

Foster, Fed. Pr. 5th ed. § 285; Anonymous, Cary, 12; Hanauer v. Doane, 12 Wall. 349, 20 L. ed. 442.

Equity will not lend itself to a perpetuation of an unjust advantage.

16 Cyc. 148; Larschied v. Kittell, 142 Wis. 172, 125 N. W. 442, 20 Ann. Cas. 576; Sanders v. Cauley, 52 Tex. Civ. App. 261, 113 S. W. 560.

Equity is not bound by forms in passing on the question of unclean hands.

Chute v. Wisconsin Chemical Co. 185 Fed. 118; Creamer v. Bivert, 214 Mo. 473, 113 S. W. 1118; Moring v. Privott, 146 N. C. 558, 60 S. E. 509; United States v. Workingmen's Amalgamated Council, 26 L.R.A. 158, 4 Inters. Com. Rep. 831, 54 Fed. 994.

Sugar planters can be exempted from the regulation of sugar refining, under the equal *protection* clause of the Constitution.

St. John v. New York, 201 U. S. 633, 50 L. ed. 897, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Cox v. Texas, 202 U. S. 447, 50 L. ed. 1099, 26 Sup. Ct. Rep. 671; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

The rule of evidence is the same as that upheld in Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 59 L. ed. 645, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, establishing that, as to parties subject to the jurisdiction of the Interstate Commerce Commission, its findings should be prima facie evidence of the facts stated in the Commission's order. See also Jones v. Brim, 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282, 1 Am. Neg. Rep. 547.

It is reasonable to classify a prima facie monopolists, those who systematically pay less for a commodity in one state than in other states.

Central Lumber Co. v. South Dakota, 226 U. S. 159, 57 L. ed. 169, 33 Sup. Ct. Rep. 66; State ex rel. Young v. Standard Oil Co. 111 Minn. 85, 126 N. W. 527; State v. Fairmont Creamery Co. 153 Iowa, 702, 42 L.R.A.(N.S.) 821, 133 N. W. 895; German Alliance Ins. Co. v. Hale, 219 U. S. 307, 55 L. ed. 229, 31 Sup. Ct. Rep. 246; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66.

This classification was not arbitrary.

Central Lumber Co. v. South Dakota, 226 U. S. 159, 57 L. ed. 168, 33 Sup. Ct. Rep. 66; International Harvester Co. v. Missouri, 234 U. S. 199, 58 L. ed. 1276, 52 L.R.A. (N.S.) 525, 34 Sup. Ct. Rep. 859; Carroll v. Greenwich Ins. Co. 199 U. S. 401, 50 L. ed. 246, 26 Sup. Ct. Rep. 66; Bosley v. McLaughlin, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; Missouri P. R. Co. v. Omaha, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82; Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 Sup. Ct. Rep. 671; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 416, 58 L. ed. 1011, 1024, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; Hammond Packing Co. v. Montana, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596; Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599; Missouri, K. & T. R. Co. v. Cade, 233 U. S. 647, 58 L. ed. 1137, 34 Sup. Ct. Rep. 678;

Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Rosenthal v. New York, 226 U. S. 260, 57 L. ed. 212, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; Citizens' Teleph. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1207, 33 Sup. Ct. Rep. 833; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; King v. Mullins, 171 U. S. 404, 435, 43 L. ed. 214, 226, 18 Sup. Ct. Rep. 925; Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com Rep 56, 8 Sup. Ct. Rep. 1028; Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct Rep. 594; Baccus v. Louisiana, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; Mutual Loan Co. v. Martell, 222 U. S. 233, 56 L. ed. 178, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913B, 529; Miller v. Wilson, 236 U. S. 373, 59 L. ed. 628, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; Pullman Co. v. Knott, 235 U. S. 24, 59 L. ed. 110, 35 Sup. Ct. Rep. 2.

Act No. 10 should not be nullified if invalid in an unessential particular.

Lewis's Sutherland, Stat. Constr. 2d ed. § 296; Tiernan v. Rinker, 102 U. S. 123, 26 L. ed. 103; Guinn v. United States, 238 U. S. 347, 59 L. ed. 1340, L.R.A.1916A, 1124, 35 Sup. Ct. Rep. 926; Southern P. Co. v. Campbell, 230 U. S. 537, 57 L. ed. 1610, 33 Sup. Ct. Rep. 1027; Louisville & N. R. Co. v Garrett, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; Grand Trunk R. Co. v. Michigan R. Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493.

There is no denial of due process of law, or of the equal protection of the laws, in declaring the sugar refining business impressed with a public interest, and in regulating it by law.

Central Lumber Co. v. South Dakota, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Brass v. North Dakota, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; American Live Stock Commission Co. v. Chicago Live Stock Exch. 143 Ill. 210, 18 L.R.A. 200, 36 Am. St. Rep. 398, 32 N. E. 274; Ladd v. Southern Cotton Press & Mfg. Co. 53 Tex. 172; Ely, Monopolies & Trusts, p. 228; Van Hise, Concentration & Control; Montague, Trusts, p. 183; Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 561, 58 L. ed. 1470, 34 Sup. Ct. Rep. 956; Eddy, Combinations, §§ 1048, 1049; Columbian Athletic Club v. State, 143 Ind. 98, 28 L.R.A. 727, 52 Am. St. Rep. 407, 40 N. E. 914; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Leeper v. Texas, 139 U. S. 468, 35 L. ed. 227, 11 Sup. Ct. Rep. 577; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930.

Summary process is not violative of due process of law.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Standard Oil Co. v. Missouri, 224 U. S. 287, 56 L. ed. 769, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68; Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

A regulation providing that a public utility shall not be capriciously discontinued is valid.

Eddy, Combinations, § 1048; Montague, Trusts, p. 197.

A statute regulating a monopolized industry is not in conflict with a constitutional prohibition of monopolies.

Carroll v. Greenwich Ins. Co. 199 U. S. 246, 50 L. ed. 246, 26 Sup. Ct. Rep. 66.

Mr. James M. Beck argued the cause, and with Messrs. Joseph W. Carroll, George Denegre, Hugh C. Cage, and Frank L. Crawford, filed a brief for appellee:

The objection that complainant comes into court with unclean hands, and is thereby barred from asking relief from the enforcement of an unconstitutional statute, is novel and unsound.

Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 170; 1 Pom. Eq. Jur. §§ 397, 399; Shaver v. Heller & M. Co. 65 L.R.A. 878, 48 C. C. A. 48, 108 Fed. 834; Talbot v. Independent Order of Owls, 136 C. C. A. 268, 220 Fed. 662; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 164, 165, 52 L. ed. 714, 730, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 531, 48 L. ed. 1102, 1106, 24 Sup.

Ct. Rep. 756; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 662, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214.

Sugar refineries are not public utilities; the business of refining sugar is not affected with a public interest.

Cooley, Const. Lim. 6th ed. p. 736; Freund, Pol. Power, § 373, p. 381; Munn v. Illinois, 94 U. S. 139, 140, 24 L. ed. 89; People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 532, 533, 544, 549–551, 36 L. ed. 251, 252, 255, 257, 258, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Brass v. North Dakota, 153 U. S. 391, 404, 38 L. ed. 757, 761, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; Millett v. People, 117 Ill. 294, 57 Am. Rep. 873, 7 N. E. 631; German Alliance Co. v. Lewis, 233 U. S. 406, 407, 412, 414–416, 428, 429, 58 L. ed. 1019, 1020, 1022–1024, 1028, 1029, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

The statute denies to complainant the equal protection of the laws, and therein violates the 14th Amendment in that, while such act purports to regulate the business of sugar refining, it unreasonably exempts from such regulation certain classes of sugar refiners.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; International Harvester Co. v. Missouri, 234 U. S. 199, 215, 58 L. ed. 1276, 1283, 52 L.R.A.(N.S.) 525, 34 Sup. Ct. Rep. 859.

The exemption invalidates the entire act.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The act works a deprivation of the liberty and property of complainant, and a denial to it of the equal protection of the laws in creating an unreasonable presumption of guilt.

Re Opinion of Justices, 208 Mass. 619, 34 L.R.A.(N.S.) 771, 94 N. E. 1044.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought by a New Jersey corporation, the appellee, against the inspector of sugar refining, the governor, and the attorney general of Louisiana, to prevent the enforcement of act No. 10 of the extra session of the general assembly of that state for 1915. The grounds of relief are the commerce clause and the 14th Amendment of the Constitution of the United States.

The plaintiff was granted a preliminary injunction by three judges in the district court, and the defendants appealed. 229 Fed. 284.

A summary of the statute is as follows: The business of refining sugar is declared to be impressed with a public interest "by reason of the nature and by reason of the monopolization thereof," and on that footing the regulations are made. After providing for elaborate reports and inspection of books by the inspector, the act imposes for the benefit of the inspection fund a tax of ½ cent for every 350 pounds of granulated [81] sugar made. It then makes it unlawful to buy sugar on an *ex parte* test of quality, etc., and proceeds to authorize the inspector to make such reasonable regulations not only concerning that, but affecting any branch of the business of sugar refining, as he may deem proper and as may be conducive to the public interest, and to the prevention of monopoly in the business, or to the protection of the public from its consequences. Then come the provisions chiefly in issue here. By § 7 "any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of $500 a day for the period during which he is adjudged to have done so;" his license to do business in the state is to be revoked, and any foreign corporation (such as the plaintiff is) is to be ousted from the state and its property sold. If irreparable injury to the public interest is shown in such a case, the court may appoint a receiver at any stage of the proceedings, etc. By § 8, if shown by affidavit or otherwise, either *in limine* or after trial, that any refinery has been closed or kept idle for more than one year, it shall be presumed to have been done for the purpose of violating this act or the laws against monopoly, etc., and if the counter evidence does not rebut the presumption, the court shall order the owner to sell the refinery within six months, and, if that is not done, shall appoint a receiver to do it within twelve months. In computing the year of idleness any plant shall be treated as idle that has not been operating bona fide. By § 9 in suits for ouster, etc., upon showing by the state that the monopoly, etc., are detrimental to the public welfare, an injunction may be issued or a receiver appointed, after a hearing, subject to an appeal returnable [82] within five days, to be determined within forty days, etc. By § 10 a fine of from $50 to $2,-

500 a day is imposed for violations of the act not otherwise provided for, or of any of the regulations promulgated by the inspector. By § 11, in suits under the act, books, letters, and other documents, "or apparent copies thereof," of the defendant, shall be given effect as being what they purport to be and "as establishing the facts carried on their face" unless sufficiently rebutted, upon proof of their having been in the possession or control of the defendant; and any report of any legislative committee of the state, or of the Senate or House of Representatives of the United States, or of any bureau, department, or commission acting under the authority either of the state or of the Senate or the House of Representatives of the United States, and the records of any court of any state, or of the United States, are made prima facie evidence of the facts set forth therein, subject to rebuttal. In conclusion, by § 15 the business of refining sugar is defined to be "that of any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it."

Besides the allegations that bring the plaintiff within the purview of the act, the claims of the protection of the Constitution, and the invocation of the principle of Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, for equitable relief, the bill sets forth some facts that throw special light upon the case. First, for the bearing of § 8, it shows that formerly the plaintiff purchased a consolidated refinery called the Louisiana Refinery, increased its capacity to 2,500,000 pounds daily, and worked it until 1909. It then built at a cost of about six million dollars a new refinery at Chalmette, with a daily melting capacity of 3,000,000 pounds, since increased to 3,500,000. It then closed the Louisiana [83] Refinery, as it could not distribute from New Orleans more refined sugar than could be made at Chalmette. The machinery of the Louisiana Refinery is comparatively antiquated and could not be operated economically, although, in case of the destruction of the Chalmette plant, it could be used as a substitute at considerable expense and after some delay.

As to the presumption created from the systematic paying in Louisiana a less price for sugar than is paid in any other state, the bill alleges that the plaintiff purchases on an average less than one half of the Louisiana sugar crop, of which half over a third is shipped as bought, to the plaintiff's northern refineries, so that not much over 30 per cent is melted at Chalmette. In fact, only a comparatively small portion of the plaintiff's meltings in Louisiana is of sugar produced in Louisiana, the remainder having been imported. The chief port for the receipt of raw sugar imported is New York, at or near which there are seven large refineries now in operation. The Louisiana sugar customarily has been brought on the market in November and December, during which months it is pressed for sale in amounts far in excess of the requirements of all the refineries in the state. Purchasers therefore had either to ship a part north, or to store it, with consequent loss from deterioriation and in weight, interest, and cost of storage and insurance, and at the risk of a decline in the market. These elements necessarily affect the price, which cannot be higher than that in the ultimate market, less the cost of transportation, and which has been approximately that. Furthermore, the period of storage is a time when the market for raw sugar generally declines, and the price of refined sugar follows that of raw, to the refiner's loss.

Formerly a large part of the sugar manufactured in Louisiana by the plaintiff was sold in the Middle West and in Minnesota, Iowa, the Dakotas, etc., and it was to meet [84] that market that the Chalmette refinery was built. But the great and rapid increase in the production of beet sugar, which now forms one sixth of all the sugar consumed in the United States and is sold at prices below those of cane sugar, has driven the plaintiff out of those markets to a great extent. The result frequently has been that the plaintiff has derived little or no advantage from the purchase of Louisiana sugar, even when bought at a less price than that in New York on the same day.

The bill also shows fully that the plaintiff melts solely on its own account, so that its only contact with the public is as a buyer of raw and a seller of refined sugar, and its business is affected with a public interest not otherwise than as any other business is, according to its importance and size. It also shows that much the greater part of its Chalmette commerce, both in purchase and sale, is foreign or among the states. There are other allegations besides those that we have summed up, but enough has been stated to disclose the plaintiff's case.

The answer alleges that the plaintiff is a monopoly and combination in restraint of trade in buying, refining, and selling sugar throughout the United States, and completely controls the sugar trade in Louisiana, and sets forth a long series of letters thought to show efforts to obtain and keep such control. It obliquely intimates that the plaintiff can fix pri-

occasion even in the New York market, admitted to be the ruling one in the United States. It alleges that suits have been brought against the plaintiff by sugar planters, under the Sherman act [26 Stat. at L. 209, chap. 647, Comp. Stat. 1913, § 8820], for a total of near $200,000,000, and that after the exposure of the plaintiff's criminality in a suit by the United States that seems to have come to nothing, this law was passed. All of the foregoing, the main portion of the answer, is offered as ground for denying to the plaintiff any equitable relief.

In the alternative, if the plaintiff has a standing in [85] equity, the answer denies the plaintiff's explanation of the idleness of the Louisiana Refinery and avers that the statement that it buys less than half the Louisiana crop is deceptive, and that it buys 70 per cent of the raw sugar sold to refiners. It alleges that the shipping of raw sugar North is due to artificial conditions created by the plaintiff, and that but for them the whole would be "handled locally." It also alleges that the difference between the Louisiana and the New York price has been made less by the plaintiff since 1911, in order to prevent a repetition of the one successful combination made by the planters. Finally it alleges that the shipments to New York arrive when there is no sugar on hand, or when the first sugar from Cuba is coming in, and enable the plaintiff to influence downward the price of the Cuban sugar that it needs. Most of the allegations of the bill are denied, and it is said that the rush to sell in November and December would have found a market but for the plaintiff's wrongful deeds.

The answer is signed by the attorney general of the state; and if he were authorized to interpret the meaning of the other voice of the state heard in act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply, and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity, since it made the legislation necessary. If the connection were omitted, it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way.

[86] The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the district court: a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice, and a creation of presumptions and special powers against it that can have no foundation except the intent to destroy. As to the classification, if a powerful rival of the plaintiff should do no refining within the state, it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of any concern that does not buy and refine more sugar "than the aggregate of the sugar produced by it from cane grown and purchased by it," as easily might happen with a combination of planters, such as the answer gives us to understand has been attempted heretofore.

As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty upon proof [87] that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed.

Decree affirmed.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
R. P. WALL, as Administrator of the Estate of R. J. Wall, Deceased.

(See S. C. Reporter's ed. 87-98.)

Error to state court — Federal question — how raised.

1. The question whether proper effect was given to the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), and its amendments, in interpreting a stipulation in a bill of lading for an interstate shipment requiring notice of claims for damages to be given to the carrier's officers or station agents as excluding officers or station agents of connecting carriers,—is fairly presented, so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest state court adjudging the stipulation to be no defense to the initial carrier when sued for injuries to the shipment, being unreasonable and inoperative, because no officer or agent primarily employed by the initial carrier was accessible at destination, where a through bill of lading was issued under the Federal legislation, the pleadings show that its application was invoked, and in the answer, as also in the instructions given at the defendant carrier's request, there was a distinct assertion that notice was not given to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier, which means that the defendant was proceeding upon the theory that the stipulation, when read in connection with the Federal statutes, contemplated and recognized that notice to an officer or agent of the connecting carrier would suffice.

[For other cases, see Appeal and Error, 1168-1248, in Digest Sup. Ct. 1908.]

Carriers — notice of claim — connecting carriers.

2. Notice to an officer or station agent of the connecting carrier at final destination must be deemed to satisfy the requirement of a stipulation in a through bill of lading for an interstate shipment of cattle, issued by the initial carrier, that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, shall give notice in writing of his claim to some officer or station agent "of said company" before the cattle are removed from the place of destination or mingled with other stock, in view of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), under which the bill of lading was issued, making the connecting carrier the agent of the receiving carrier for the purpose of completing the transportation and delivering the property, and of a further stipulation in the bill of lading that its terms and conditions shall inure to the benefit of any connecting carrier over whose line the cattle shall pass.

[For other cases, see Carriers, II. b, 7, b; II. c, in Digest Sup. Ct. 1908.]

[No. 350.]

Argued December 1, 1915. Decided April 24, 1916.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a judgment of the District Court of Gallatin County, in that state, in favor of plaintiff in an action against an initial carrier for injuries to an interstate shipment of live stock. Reversed and remanded for further proceedings.

See same case below, 50 Mont. 122, 145 Pac. 291.

The facts are stated in the opinion.

Mr. Charles Donnelly argued the cause and filed a brief for plaintiff in error:

The court erred in holding that notice to an agent of the Burlington Company would not have been effective for any purpose.

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 648, 57 L. ed. 683, 686, 33 Sup. Ct. Rep. 391; Chicago, R. I. & G. R. Co. v. Linger, — Tex. Civ. App. —, 156 S. W. 298; Overton v. Chicago, R. I. & G. R. Co. — Tex. Civ. App. —, 160 S. W. 111; Galveston, H. & S. A. R. Co. v. Itule, — Tex. Civ. App. —, 172 S. W. 1123.

Considering the character of the shipment, and that it was being carried in midwinter from the Rocky mountains to Chicago, the requirement of the bill of lading respecting notice was surely not unreasonable, and the courts have almost uniformly said so.

St. Louis & S. F. R. Co. v. Zickafoose, 39 Okla. 302, 135 Pac. 406, 6 N. C. C. A. 717;

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

Atchison, T. & S. F. R. Co. v. Baldwin, 53 Colo. 416, 128 Pac. 449; Mobile & O. R. Co. v. Brownsville Livery & Live Stock Co. 123 Tenn. 298, 130 S. W. 788; Southern R. Co. v. Tollerson, 129 Ga. 647, 59 S. E. 799; Hatch v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 490, 107 N. W. 1087; Atchison, T. & S. F. R. Co. v. Coffin, 13 Ariz. 144, 108 Pac. 480; Central of Georgia R. Co. v. Henderson, 152 Ala. 203, 44 So. 542; McElvain v. St. Louis & S. F. R. Co. 151 Mo. App. 126, 131 S. W. 736; Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303.

Mr. **Thomas J. Walsh** argued the cause, and, with Mr. Walter Aitken, filed a brief for defendant in error:

The assignments of error, in the light of the record, present no Federal question in view of which the revisory power of this court can be invoked.

Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 47 L. ed. 598, 23 Sup. Ct. Rep. 382; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; Sayward v. Denny, 158 U. S. 489, 39 L. ed. 1065, 15 Sup. Ct. Rep. 975; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Chrisman v. Miller, 197 U. S. 313, 49 L. ed. 770, 25 Sup. Ct. Rep. 468; King v. West Virginia, 216 U. S. 92, 54 L. ed. 396, 30 Sup. Ct. Rep. 225; Clipper Min. Co. v. Eli Min. & Land Co. 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632; Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289.

The contentions upon which it is claimed a Federal question depends are so apparently unfounded as not to require further argument.

Parker v. McLain, 237 U. S. 469, 59 L. ed. 1051, 35 Sup. Ct. Rep. 632.

The proposition urged here was not raised by the record.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 291-308, 47 L. ed. 480-485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Adams v. Russell, 229 U. S. 353, 57 L. ed. 1224, 33 Sup. Ct. Rep. 846.

The case as to notice turned on a question of pleading.

4 Elliott, Railroads, 1512; Houtz v. Union P. R. Co. 33 Utah, 175, 17 L.R.A. (N.S.) 628, 93 Pac. 439; Missouri P. R. Co. v. Harris, 67 Tex. 166, 2 S. W. 574.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action to recover for injuries to cattle being transported in interstate commerce, the gravamen of the complaint being that the cattle were unreasonably delayed in transit, and consequently were greatly reduced in weight and emaciated in appearance.

The cattle were shipped in January, 1912, from Belgrade, Montana, to the Union Stock Yards at Chicago over two connecting railroads,—the Northern Pacific and the Burlington,—under a through bill of lading issued by the initial carrier. The shipment was at a reduced rate based upon the stipulations in the bill of lading. The rate and the bill of lading had been regularly established and put in force under the interstate commerce act and its amendments. One stipulation was to the effect that the shipper, as a condition precedent to his right to recover for any injury to the cattle while in transit, should give notice in writing of his claim to some officer or station agent "of said company" before the cattle were removed from the place of destination or mingled with other stock; and another was to the effect that the terms of the bill of lading should inure to the benefit of any connecting carrier over whose line the cattle should [89] pass in the course of their transportation. By an indorsement on the bill of lading the Burlington Company was designated as the connecting carrier. The shipment was accompanied by an attendant selected by the shipper and authorized to represent him in all matters pertaining to the general care and handling of the cattle. Upon reaching their destination the cattle were delivered by the Burlington Company to an agent of the shipper, and were sold, removed, and mingled with other stock before any notice was given of a claim for injury to them while in transit.

This action was brought against the initial carrier,—the Northern Pacific Company,—and the damages sought were for alleged injuries to the cattle while passing over both roads. In its answer the defendant set up the stipulations before named; insisted that they were established under the interstate commerce act, and that a Montana statute invalidating such stipulations was, as applied to bills of lading in interstate commerce, in conflict with the congressional enactment and void; alleged that no notice of any claim for injury to the cattle had been given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," until after the cattle had been removed from the place of destination and mingled with other stock, and claimed that by reason of the failure to give the stipulated notice the plaintiff was not entitled to recover. In his reply the plaintiff, while

expressly admitting that he had not complied with the stipulation relating to notice, denied that it was established or effective under the interstate commerce act, insisted that it was unreasonable and in contravention of the Montana statute, alleged that compliance with the stipulation had been waived by the defendant, and set forth at length and invoked the Carmack amendment to the interstate commerce act in support of the effort to recover from the initial carrier [90] for the injuries occurring while the cattle were on the line of the connecting carrier. Upon the trial, and after the evidence was concluded, the defendant moved for a directed verdict in its favor upon the ground that the contract embodied in the bill of lading was valid, that confessedly the notice "required by the contract" was not given, and that there was no evidence showing a waiver of the notice. The motion was denied upon the ground that, under the evidence, the question of waiver was for the jury, and an exception was reserved by the defendant. At its request the court, in charging the jury, said: "One of the defenses relied upon by the defendant is that no notice of claim for damages for loss or injury to the stock in question was given by the plaintiff to the defendant or to the connecting carrier, before the stock was removed from the place of destination or mingled with other stock. This provision of said contract is a reasonable one, binding upon the plaintiff, and, under the admissions in his reply, prevents him from recovering in this action, unless you find that . . . defendant expressly or impliedly by its conduct waived the giving of said notice in accordance with this provision of the contract." The jury, evidently resolving the question of waiver against the defendant, returned a verdict for the plaintiff, and the judgment thereon was affirmed by the supreme court of the state. 50 Mont. 122, 145 Pac. 291.

From what has been said it is apparent not only that the damages sought were for injuries occurring while the cattle were being transported in interstate commerce, but also that both parties relied upon the interstate commerce act and its amendments,—the plaintiff to sustain his right to recover for the injuries on the line of the connecting carrier, and the defendant to sustain its defense based upon the stipulations in the bill of lading. And it is plain that the trial court gave controlling effect to that act and its amendments, for otherwise the instruction [91] upholding the validity of the stipulation for notice could not have been given, in the presence of the Montana statute (Laws 1909, chap. 138) declaring such a stipulation void.

The supreme court, passing the question whether notice had been waived, interpreted the stipulation as requiring that the notice be given to an officer or station agent primarily employed by the Northern Pacific Company, and thereby excluding notice to an officer or station agent of the Burlington Company, and then held the stipulation unreasonable and inoperative because no officer or agent primarily employed by the Northern Pacific Company was accessible at the place of destination. Whether in so interpreting the stipulation that court gave proper effect to the interstate commerce act and its amendments is the Federal question pressed upon our attention, and we think it is fairly presented by the record. The shipment being interstate, that legislation was controlling; the through bill of lading was issued under it; the pleadings show that its application was invoked; and in the answer, as also in the instruction given at the defendant's request, there was a distinct assertion that notice was not given "to any officer or station agent of the defendant, or to any officer or station agent of the connecting carrier," which meant that the defendant was proceeding upon the theory that the stipulation, when read in connection with the Carmack amendment, contemplated and recognized that notice to an officer or agent of the connecting carrier—the Burlington Company—would suffice.

As this court often has held, the laws in force at the time and place of the making of a contract, and which affect its validity, performance, and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. Von Hoffman v. Quincy, 4 Wall. 535, 550, 18 L. ed. 408, 409; Walker v. Whitehead, 16 Wall. 314, 317, 21 L. ed. 357, 358; Edwards v. [92] Kearzey, 96 U. S. 595, 601, 24 L. ed. 793, 796. A bill of lading is a contract and within this rule. The Carmack amendment to the interstate commerce act (§ 7, chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for

the purpose of completing the transportation and delivering the property. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 196, 206, 55 L. ed. 167, 178, 182, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. ed. 516, 523, 32 Sup. Ct. Rep. 205. This bill of lading was issued under that statute and should be interpreted in the light of it. Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 593, ante, 453, 457, 36 Sup. Ct. Rep. 177. The shipment was to pass over both roads in reaching its destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock; that is, while it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose, and gives [93] due effect to the statute under which it was issued. True, the words "said company" in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including the provision that its terms and conditions "shall inure to the benefit of" any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is, in legal contemplation, the agent of the latter.

The act of March 4, 1915, chap. 176, 38 Stat. at L. 1196, altering the terms of the Carmack amendment, is without present bearing, because passed long after this shipment was made.

We are of opinion that the Supreme Court of the State failed to give proper effect to the Carmack amendment in interpreting the bill of lading, and that the judgment should be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

Mr. Justice McReynolds, dissenting:

For two reasons I am unable to agree with the opinion of the court.

First. If reiteration can establish a rule of law, it must be taken as settled that in causes coming here by writs of error from state courts of last resort we may not consider Federal questions not specially set up below. And further, that such a question comes too late if raised for the first time after final decision in the highest state court by petition for rehearing unless this was actually entertained. St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, 241, ante, 622, 624, 36 Sup. Ct. Rep. 274; McCorquodale v. Texas, 211 U. S. 432, 437, 53 L. ed. 269, 270, 29 Sup. Ct. Rep. 146.

[94] The following recitals are parts of the bill of lading:

Par. 6. "The said shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

Par. 9. "The terms, conditions and limitations hereby imposed shall inure to the benefit of each and every carrier, beyond the route of said company, to which the said property may come for purpose of transportation."

A rehearing was denied by the supreme court of Montana in this brief order: "Appellant's motion for a rehearing herein heretofore submitted is after due consideration by the court denied." An elaborate written argument filed there in support of the petition, and incorporated in the record, states:

"Appellant did not brief nor argue the reasonableness of the provisions of paragraph 6 of said contract from the view point considered by the court on page 3 to line 5 of page 7 of the opinion, for the reason that no such question was raised by the plaintiff in the court below. In fact, the only grounds upon which the defendant attacked said provisions of the contract in his answer was that it 'is unreasonable, unjust, burdensome, against the policy of the law, and contrary to the express provisions of chapter 138 of Session Laws of the state of Montana for 1909.' Not until his brief was filed in this court did such question appear in the case.

"In view of the provision of paragraph 9 of the contract, also of plaintiff's position in the court below, and of the fact

that the defendant company has always considered that a notice served upon 'some officer or station agent' of the connecting carrier at point of delivery, in the manner required by paragraph 6 of the contract, was a sufficient [95] notice to show a compliance with such provision in an action brought against the initial carrier, we did not consider the question as presented for the first time in respondent's brief of any importance, and did not even reply thereto in our oral argument.

"Under section 9 of said contract the terms and conditions thereof inure to the benefit of the connecting carrier. Therefore, such notice should be given to some officer or station agent of such carrier at point of delivery when damages are claimed.

"The importance of this is apparent when considered in connection with the Carmack amendment to the interstate commerce law."

The only ground for reversal now seriously relied upon is that the Carmack amendment (§ 7, chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592) made "the connecting carrier, and therefore its agents, the agents of the initial carrier," and consequently the court below wrongly held, because no officer or station agent primarily employed by Northern Pacific Railway was shown to have been in Chicago, paragraph 6 was unreasonable and inoperative, and notice to a Burlington agent would not have been effective for any purpose. I fail to find that this point was definitely raised at any stage prior to the application for rehearing; and counsel for the railroad below seem to have been equally unsuccessful. If they had already wittingly relied upon it, they would hardly have burdened their argument for rehearing with an excuse for failure so to do. Former opinions imperatively demand that the foundation for our jurisdiction be laid in plain view, and not around a corner, where only an esoteric eye can detect it. Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 487, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790.

Second. "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies [96] for the purpose, among others, of limiting and diminishing their common-law liabilities, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in delivering the opinion of the court in First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 679, 24 L. ed. 563, 565: 'Both reasonable and just that its own words should be construed most strongly against itself.'" Texas & P. R. Co. v. Reiss, 183 U. S. 621, 626, 46 L. ed. 358, 360, 22 Sup. Ct. Rep. 252.

Apparently the bill under consideration followed a form adopted before passage of the Carmack amendment, or at least before this was adequately understood. It is dated, "Belgrade, Montana, Station, January 2, 1912," purports to be an "agreement, made the day above stated, between the Northern Pacific Railway Company, hereinafter called the 'Company,' and R. J. Wall, hereinafter called the 'Shipper,'" and contains, in addition to paragraphs 6 and 9, copied above, the following ones:

Par. 7. "It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said Company unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said Company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

Par. 8. "The said Company shall not be liable for the nondelivery or loss of, nor for injuries suffered by, any of the stock beyond the line of its own railroad."

[97] Commenting on paragraph 6, the supreme court of Montana said (50 Mont. 127):

"If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington road would not have been effective for any purpose. The Company mentioned in paragraph 6 is defined by the preamble to the contract, to mean the 'Northern Pacific Railway Company.' Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal service was necessary, the shipper was required to hold the cattle

at the Union Stock Yards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings, or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed postpaid at Chicago, would have sufficed for a literal compliance with the terms of this provision. But in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the stock yards until the notice had been received and a reasonable time for inspection [98] had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle, would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul, and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago,—at a point where it has no road,—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact."

Manifestly its language has given rise to a very grave doubt; therefore I think the contract should be construed most strongly against the company and with a view to preserve shipper's rights. The construction placed upon paragraph 6 by the state supreme court, when sitting within surroundings designed to stimulate clear thinking, is diametrically opposed to the one now adopted. In such circumstances it appears to me hardly reasonable to say that a stockman at a wayside Montana station was bound instantly to apprehend the true interpretation, notwithstanding any mental quickening which he may have received from a "rough wind" and a modest thermometer pointing to only "7 or 8 degrees below zero."

I am authorized to say that Mr. Justice **McKenna** concurs in this dissent for the second reason stated.

[99] SAMUEL E. GIDNEY, Plff. in Err.,
v.
SIDNEY C. CHAPPEL and J. C. Scully.

(See S. C. Reporter's ed. 99-103.)

Appeal — from probate decree — effect of Arkansas laws in Indian Territory.

1. The union in a single court in the Indian Territory of the functions of the probate and circuit courts of Arkansas renders "locally inapplicable" the provisions of Mansf. (Ark.) Dig. 1884, §§ 6509, 6521, dealing with appeals from probate to circuit court, so that such provisions were not put in force in the Indian Territory by the act of Congress of May 2, 1890 (26 Stat. at L. 81, chap. 182), § 31, adopting and extending over the Indian Territory certain general laws of Arkansas "in force at the close of the session of the general assembly of that state of 1883, as published" in that volume, where "not locally inapplicable or in conflict with" that or some other act of Congress.

Territorial courts — jurisdiction — suit to avoid probate — extension of Arkansas laws over Indian Territory.

2. The adoption and extension over the Indian Territory of certain general laws of Arkansas "in force at the close of the session of the general assembly of that state of 1883, as published" in Mansf. (Ark.) Dig. 1884, which was effected by the act of Congress of May 2, 1890 (26 Stat. at L. 81, chap. 182), § 31, where such laws were "not locally inapplicable or in conflict with" that or some other act of Congress, must be deemed to have put in force in that territory the provisions of § 6525 of such Digest, relating to suits to avoid the probate of a will, although the supreme court of Arkansas in 1885 held that this latter statute had been repealed by certain provisions of the civil practice act of 1868, where, up to that decision the supreme court had been treating the statute as in force, and the particular provisions of the civil practice act which ultimately were regarded as effecting its repeal were not adopted by the act of Congress, being "locally inapplicable."

[For other cases, see Courts, III. a, 1, in Digest Sup. Ct. 1908.]

[No. 263.]

Submitted March 8, 1916. Decided April 24, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which, on a second appeal, affirmed a decree of the Superior Court of Muskogee County, in that state, in favor of plaintiff in a suit to set aside the probate of a will. Affirmed.

See same case below, first appeal, 38 Okla. 596, 134 Pac. 859; second appeal, 43 Okla. 267, 142 Pac. 755.

The facts are stated in the opinion.

Mr. **William T. Hutchings** submitted the cause for plaintiff in error.

Mr. **Napoleon B. Maxey** submitted the cause for defendants in error. Mr. Charles F. Runyan was on the brief.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was a suit to set aside a will probated in common form, and to avoid its probate. The suit was begun in the United States court for the Indian Territory, wherein the will had been probated, and was transferred to an Oklahoma court when that state was admitted into the Union. The plaintiff ultimately prevailed and the supreme court [**100**] of the state affirmed the judgment. 38 Okla. 596, 134 Pac. 859, 43 Okla. 267, 142 Pac. 755.

The Federal question in the case is whether certain statutes bearing upon such a suit were put in force in the Indian Territory by the act of May 2, 1890, chap. 182, § 31, 26 Stat. at L. 81, whereby Congress adopted and extended over the Indian Territory certain general laws of Arkansas "in force at the close of the session of the general assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest," where "not locally inapplicable or in conflict with" that or some other act of Congress. In Arkansas there were probate courts and courts of general jurisdiction designated as circuit courts, while for the Indian Territory only one court had been established at that time, and it was a court of general jurisdiction. In view of this the act declared that "the United States court in the Indian Territory herein referred to shall have and exercise the powers of courts of probate under said laws," and "wherever in said laws of Arkansas the courts of record of said state are mentioned the said court in the Indian Territory shall be substituted therefor."

Among the Arkansas laws enumerated in the act was chapter 155, containing sections numbered from 6490 to 6548. The section under which the will was probated declares:

"Sec. 6522. When any will shall be exhibited for probate, the court of probate . . . may and shall receive the probate thereof in common form, without summoning any party, and shall grant a certificate of probate, or, if the will be rejected, shall grant a certificate of rejection; . . ."

Other sections (6509 and 6521) provide for an appeal to the circuit court from an order of the probate court establishing or rejecting a will, and for bringing in parties and giving a hearing *de novo* upon the appeal. The sections under which the suit was brought read as follows:

[**101**] "Sec. 6523. Any person interested who, at the time of the final decision in the circuit court, resided out of this state, and was proceeded against by order of appearance only, without actual appearance, or being personally served with process, and any other person interested who was not a party to the proceedings by actual appearance, or being personally served with process, may, within three years after such final decision in the circuit court, by a bill in chancery, impeach the decision and have a retrial of the question of probate; and either party shall be entitled to a jury for the trial thereof. An infant, not a party, shall not be barred of such proceedings in chancery until twelve months after attaining full age."

"Sec. 6525. If any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and, by petition to the circuit court of the county in which such will was established or rejected, pray to have any such will rejected, if previously established, or proven, if previously rejected by the court of probate, it shall be the duty of the circuit court to direct an issue to try the validity of such will, which issue shall in all cases be tried by a jury."

As the functions of the probate and circuit courts in Arkansas were united in a single court in the Indian Territory, it seems plain, as was held by the supreme court of Oklahoma in this case, that the sections (6509 and 6521) dealing with appeals from the probate to the circuit court were not applicable to the conditions in the Indian Territory, and therefore were not adopted by the act of Congress. It hardly was intended that a court at all times presided over by a single judge should entertain appeals from its own decisions.

The contention advanced respecting § 6523 is that it related only to decisions of the circuit court upon appeals from the probate court, and was inapplicable where such an appeal could not be had, and therefore was not adopted. [**102**] This point was not considered in the opinion of the supreme court of Oklahoma, and it need not be decided here. However it might be resolved, the result in the present case would be the same.

The contention made respecting § 6525 is that it was not adopted, because not in force in Arkansas at the close of the session of the general assembly of 1883. The claim that it was not then in force is based upon a decision of the supreme court of Arkansas in 1885, holding that it was

impliedly repealed by the inclusion in the civil practice act of 1868, which was a later enactment, of certain provisions regulating appeals from the probate to the circuit court, and prescribing the effect to be given to the latter's decision upon such an appeal. Dowell v. Tucker, 46 Ark. 438. Of course, that decision was controlling in Arkansas, but it has little bearing upon the question here presented, and for these reasons: Section 6525 was published in 1884 in Mansfield's Digest as a general law "in force at the close of the general assembly of 1883" (see title page of that publication), and the supreme court of the state had been treating it as such (Tobin v. Jenkins, 29 Ark. 151; Janes v. Williams, 31 Ark. 175, 189; Jenkins v. Tobin, 31 Ark. 306, 308; Mitchell v. Rogers, 40 Ark. 91, 93-95). Besides, the particular provisions of the civil practice act which ultimately were regarded as effecting its implied repeal in Arkansas—they became §§ 6509 and 6521 of Mansfield's Digest—were not adopted by the act of Congress, because inapplicable to the conditions in the Indian Territory. In these circumstances we think the adopting act, rightly interpreted, put the section in force there. Separated, as it then was, from the restraining influence of the supposedly conflicting provisions of the civil practice act, it assumed its normal place among the other laws with which it was adopted. This conclusion is not opposed to our decisions in Adkins v. Arnold, 235 U. S. 417, 59 L. ed. 294, 35 Sup. Ct. Rep. 118, and Perryman v. Woodward, 238 U. S. 148, 59 L. ed. 1242, 35 Sup. Ct. Rep. 830, as [103] seems to be claimed by the plaintiff in error, but, on the contrary, is in accord with what actually was there decided.

Other questions are discussed in the briefs, but as they are not Federal, but essentially local, they cannot be re-examined by us.

Judgment affirmed.

DAVID LAMAR
v.
UNITED STATES.

(See S. C. Reporter's ed. 103-118.)

Election of remedies — choice of appellate court.

1. The circuit court of appeals may not require a plaintiff in error to elect, under penalty of dismissal in case of refusal, which of two writs of error to review a conviction in a Federal district court, one sued out directly from the Supreme Court, and the other out of the circuit court of appeals, he will pursue, since the exertion of the judicial power alone could determine which of the two writs was available, and even if the situation arising from the pendency of the two writs created doubt, the jurisdictional or other questions as to which the doubt existed could have been certified to the Supreme Court.

[For other cases, see Election of Remedies, III. in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — scope of review.

2. The Federal Supreme Court, having corrected on certiorari the error of a circuit court of appeals in dismissing a writ of error to review a conviction in a district court upon the refusal of plaintiff in error to elect whether he would pursue that writ or one sued out directly from the Supreme Court, will dispose of the case on the merits because of the serious doubt which may have arisen out of the giving by the district judge, for the purpose of the writ of error from the Supreme Court, of a certificate as to a jurisdictional question, although it was afterward established that there was no foundation whatever for allowing it, and because of the resulting complexity of the question as to whether the jurisdiction of the Supreme Court had not attached to the subject-matter and excluded the advisability, if not the power, of the court to certify to the Supreme Court the question which writ of error was paramount, when of necessity a certificate involving the solution of that question had already been made by the district judge.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

False personation — of Federal officer — Congressman.

3. A member of the House of Representatives of the Congress of the United States is an officer acting under the authority of the United States, within the meaning of U. S. Crim. Code, § 32, making criminal the false personation of such an officer with intent to defraud.

False personation — of Federal officer — unauthorized act.

4. Any overt act to carry out the fraudulent intent, whether or not it would have been legally authorized had the assumed capacity existed, falls within the condemnation of U. S. Crim. Code, § 32, providing for the criminal punishment of one who, with intent to defraud, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, and takes upon himself to act as such.

Appeal — prejudicial error — defective indictment.

5. An indictment charging the false personation of an officer of the United States, with intent to defraud, contrary to U. S. Crim. Code, § 32, cannot be held insufficient on writ of error to support a conviction thereunder, on the ground that it

NOTE.—On certiorari from Federal Supreme Court to circuit courts of appeals—see note to United States v. Dickinson, 53 L. ed. U. S. 711.

fails to describe the circumstances of the offense, where it clearly charges the illegal acts complained of, and the requisite fraudulent intent, states the date and place of the commission of the acts charged, and gives the name and official character of the officer whom the accused was charged with having falsely personated, and there is no suggestion of any want of knowledge of the crime which was charged, or of any surprise concerning the same, and there is no intimation that any request was made for a bill of particulars concerning the details of the offense charged.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Courts — territorial jurisdiction — right to be tried where offense was committed.

6. The assignment of a judge of one Federal district and circuit to duty in another district and circuit, conformably to the Judicial Code, § 18, as amended by the act of October 3, 1913 (38 Stat. at L. 203, chap. 18, Comp. Stat. 1913, § 985), does not virtually destroy the latter district by creating a new district whose boundaries are undefined, and thus violate the rights secured under U. S. Const., 6th Amend., to one tried before such judge for a criminal offense, by subjecting him to trial in a district not established when the offense with which he is charged was committed.

[For other cases, see Courts, V. c, 7, b, in Digest Sup. Ct. 1908.]

Constitutional law — separation of powers — legislative usurpation of executive power.

7. The power of appointment and confirmation vested by the Federal Constitution in the President and Senate is not usurped by the assignment, conformably to the Judicial Code, § 18, as amended by the act of October 3, 1913 (38 Stat. at L. 203, chap. 18, Comp. Stat. 1913, § 985), of a judge of one Federal district and circuit to duty in another district and circuit.

[For other cases, see Constitutional Law, III. a, 3, in Digest Sup. Ct. 1908.]

[No. 895.]

Argued April 4, 1916. Decided May 1, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which dismissed a writ of error to the District Court for the Southern District of New York to review a conviction in that court of a false personation of a Federal officer with intent to defraud. Affirmed.

See same case below, 141 C. C. A. 668, 227 Fed. 1019.

The facts are stated in the opinion.

Messrs. A. Leo Everett and Francis L. Kohlman argued the cause, and, with Mr. H. B. Walmsley, filed a brief for petitioner:

A Congressman is not an officer of the United States.

Bowen, Documents of Const.; Farrand, Records of Fed. Convention, vol. 1, p. 376, vol. 3, pp. 597–620; Blount's Case, Wharton St. Tri. 200; Story, Const. 1st ed. § 791; Tucker, Const. § 199; United States v. Germaine, 99 U. S. 508, 25 L. ed. 482; United States v. Mouat, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505; United States v. Smith, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595; Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; People ex rel. Kelly v. Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659, 23 Am. & Eng. Enc. Law, 2d ed. 322; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; H. Hackfield & Co. v. United States, 197 U. S. 442, 49 L. ed. 826, 25 Sup. Ct. Rep. 456; Martin v. United States, 93 C. C. A. 484, 168 Fed. 198; United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19; United States v. Ballard, 118 Fed. 757; Mackey v. Miller, 62 C. C. A. 139, 126 Fed. 161.

It was not charged or proven that the defendant pretended to act under the authority of the United States.

United States v. Curtain, 43 Fed. 433; United States v. Bradford, 53 Fed. 542; United States v. Taylor, 108 Fed. 621; United States v. Ballard, 118 Fed. 757; United States v. Brown, 119 Fed. 482; United States v. Farnham, 127 Fed. 478; Littell v. United States, 95 C. C. A. 148, 169 Fed. 620; United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19.

The indictment is defective in failing to describe the circumstances of the offense.

United States v. Carll, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; United States v. Hess, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; Keck v. United States, 172 U. S. 434, 43 L. ed. 505, 19 Sup. Ct. Rep. 254; Moore v. United States, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294, 10 Am. Crim. Rep. 283; Bartell v. United States, 227 U. S. 427, 57 L. ed. 583, 33 Sup. Ct. Rep. 383; Martin v. United States, 93 C. C. A. 484, 168 Fed. 198.

Solicitor General Davis argued the cause, and, with Mr. Robert Szold, filed a brief for respondent:

It is not necessary that defendant's pretense be to act lawfully under the authority of the United States.

Littell v. United States, 95 C. C. A. 148, 169 Fed. 620; United States v. Ballard, 118 Fed. 757; United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19.

The defendant's objection is not one of substance, but of form.

Evans v. United States, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19.

All substantial rights of defendant were observed.

Bartell v. United States, 227 U. S. 427, 57 L. ed. 583, 33 Sup. Ct. Rep. 383; Durland v. United States, 161 U. S. 306, 40 L. ed. 709, 16 Sup. Ct. Rep. 508.

Section 1025 of the Revised Statutes (Comp. Stat. 1913, § 1691) controls.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; Ledbetter v. United States, 170 U. S. 606, 42 L. ed. 1162, 18 Sup. Ct. Rep. 774.

Mr. Chief Justice White delivered the opinion of the court:

Charged in the trial court (southern district of New York) by an indictment containing two counts, with violating § 32 of the Penal Code [35 Stat. at L. 1095, chap. 321, Comp. Stat. 1913, § 10,196], the petitioner was convicted and on December 3d, 1914, sentenced to two years' imprisonment in the penitentiary. The trial was presided over by the district judge of the western district of Michigan, assigned to duty in the district conformably to the provisions of § 18 of the Judicial Code [36 Stat. at L. 1089, chap. 231], as amended by the act of Congress of October 3, 1913 (chap. 18, 38 Stat. at L. 203, Comp. Stat. 1913, § 985). To the conviction and sentence in January following error was directly prosecuted from this court, the assignments of error assuming that there was involved not only a question of the jurisdiction of the court as a Federal court, but also constitutional questions. For the purpose of the writ one of the district judges of the southern district of New York gave a certificate as to the existence and character of the question of jurisdiction, evidently with the intention of conforming to § 238 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

After the record on this writ had been filed in this court, a writ of error to the conviction was prosecuted in May, 1915, from the court below. In September following that court, acting on a motion to dismiss such writ of error on [108] the ground that its prosecution was inconsistent with the writ sued out from this court, entered an order providing for dismissal unless the plaintiff in error within ten days elected which of the two writs of error he would rely upon, and subsequently, before the expiration of the time stated, the court declined to comply with the request of the plaintiff in error that the questions at issue be certified to this court. On October 29, 1915, the election required of the plaintiff in error not having been made, the writ of error was dismissed.

On January 31st, 1916, the writ of error prosecuted from this court came under consideration as the result of a motion to dismiss, and finding that there was no question concerning the jurisdiction of the trial court within the intendment of the statute and no constitutional question, the writ was dismissed for want of jurisdiction. 240 U. S. 60, ante, 526, 36 Sup. Ct. Rep. 255. Thereupon the plaintiff in error in the court below asked that the cause be reinstated and heard, and, upon the refusal of the request, an application was made to this court for leave to file a petition for mandamus to compel such action, and, if not, for the allowance of a certiorari, and although the former application was denied, the case is here because of the allowance of the latter remedy.

Primarily the question is, was it the duty of the court below to exercise jurisdiction? As under the statute it is indisputable that there was jurisdiction and the duty to exert it unless the conditions existed which authorized a direct writ of error from this court, it follows that the dismissal by this court of the direct writ for want of jurisdiction affirmatively determined that there was jurisdiction in the court below, and error was committed in not exerting it unless by some neglect to avail of proper procedure, or because of some line of inconsistent conduct, the right to invoke the jurisdiction of the court below was lost. As we have seen, the assumed existence of the latter cause was the basis of the refusal to exercise jurisdiction; that is, [109] the inconsistency which it was assumed resulted from prosecuting the direct writ of error from this court and subsequently suing out the writ of error from the court below, from which it was deduced that there was a duty to elect between the two as a prerequisite to the right to ask at the hands of the court below the exertion of the jurisdictional authority cast upon it by law. But if the exercise of the assumed duty of election which was imposed had resulted in the abandonment of the writ from the court below, there would have been nothing left upon which the jurisdiction of that court could have been exerted, and it is hence apparent that in substance the order was but a direction that the plaintiff in error abandon the direct writ prosecuted from this court as a prerequisite to his right to invoke the action of the court upon the writ pending before it. But, aside from the demonstration of error which arises from the mere statement of this inevitable result of the order made by the court be-

low, it is equally clear that such order rested upon a misconception arising from treating as one, things which are distinct; that is, the existence of authority to compel the abandonment of one of two valid and available remedies because of their inconsistency, leaving therefore the one not abandoned in force, and the want of power to compel an election of one of two remedies where the exertion of judicial power alone could determine which of the two was available, and where therefore the exercise of the election ordered in the nature of things involved the power to destroy all relief, and thus frustrate the right of review conferred by the statute by one or the other of the remedies. As, in view of this distinction, it clearly results that the determination of the plaintiff in error to abandon, under the order of the court, one or the other of the two writs of error, could not have validated the writ not abandoned if it was not authorized by law, it must follow that the election to which the order of the court submitted the plaintiff in error was [110] not real, and therefore afforded no basis for the refusal of the court to determine the validity of the writ of error pending before it and to decide the case if it deemed it had jurisdiction. Indeed, if it be conceded that the situation arising from the pendency of the two writs created doubt, that concession would not change the result, since we are of opinion that the power to have certified to this court the jurisdictional or other questions as to which the doubt existed was the remedy created by the statute to meet such a situation, and to obviate the possibility of denying to the plaintiff in error the right to a review which again it must be borne in mind the statute gave under one or the other of the two writs.

Correcting the error committed by the court below by its order of dismissal, the case on its merits is within our competency to decide as the result of the operation of the certiorari. As, however, it is clear that the questions on the merits, as demonstrated by the previous judgment of dismissal of the direct writ of error, are of a character which, under the statute, if they had been disposed of by the court below in the discharge of its duty, would have been finally determined, and as it is equally apparent that none of the questions except the one of jurisdiction, that is, the duty of the court below to have decided the cause, are within the exceptional considerations by which certiorari is allowed, it follows that, in order to give effect to the statute, our duty would be, as a general rule, having corrected the error resulting from the dismissal, and having afforded a remedy for the failure of the court below to exercise jurisdiction, to go no farther and remand the case so that the questions at issue might be finally disposed of. Lutcher & M. Lumber Co. v. Knight, 217 U. S. 257, 54 L. ed. 757, 30 Sup. Ct. Rep. 505. But while not in any degree departing from the general rule, we think it is inapplicable here because of the serious doubt which may have been engendered by the certificate as to the jurisdictional question given by the district judge, [111] although it is now established that there was no foundation whatever for allowing it, and because of the resulting complexity of the question as to whether the jurisdiction of this court had not attached to the subject-matter and excluded the advisability if not the power on the part of the court below to certify to this court the question of which writ of error was paramount, when of necessity a certificate involving the solution of that question had already been made by the district judge. We therefore dispose of the merits, restating the case so far as may be essential.

The section of the Penal Code charged to have been violated punishes anyone who, "with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the government thereof any money, paper, document, or other valuable thing," etc. The indictment charged that at a stated time the petitioner "unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the twenty-sixth district of the state of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard," and other persons who were named and others to the grand jury unknown, "and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace," etc., etc.

We consider the contentions relied upon for reversal separately.

[112] 1. It is insisted that no offense under the statute was stated in the indictment because a member of the House of Representatives of the United States is not an officer acting under the authority of the

United States within the meaning of the provision of the Penal Code upon which the indictment was based. This contention is supported by reference to what is assumed to be the significance in one or more provisions of the Constitution of the words "civil officers," and reliance is specially placed upon the ruling made at an early day in the Blount Case, Whart. St. Tr. p. 200, that a Senator of the United States was not a civil officer subject to impeachment within the meaning of § 4 of article 2 of the Constitution. But, as previously held in sustaining the motion to dismiss the direct writ of error, the issue here is not a constitutional one, but who is an officer acting under the authority of the United States within the provisions of the section of the Penal Code under consideration? And that question must be solved by the text of the provision, not shutting out as an instrument of interpretation proper light which may be afforded by the Constitution, and not forgetting that a penal statute is not to be enlarged by interpretation, but also not unmindful of the fact that a statute, because it is penal, is not to be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context. United States v. Hartwell, 6 Wall. 385, 395, 18 L. ed. 830, 832; United States v. Corbett, 215 U. S. 233, 242, 243, 54 L. ed. 173, 175, 176, 30 Sup. Ct. Rep. 81.

Guided by these rules, when the relations of members of the House of Representatives to the government of the United States are borne in mind, and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute. If, however, considered from the face of the statute alone, the question was susceptible of obscurity or doubt,— which [113] we think is not the case,—all ground for doubt would be removed by the following considerations: (a) Because prior to and at the time of the original enactment in question the common understanding that a member of the House of Representatives was a legislative officer of the United States was clearly expressed in the ordinary, as well as legal, dictionaries. See Webster, *verbo* "office;" Century Dict. *verbo* "officer;" 2 Bouvier's Law Dict. 1897 ed. 540, *verbo* "legislative officers;" Black's Law Dict. 2d ed. p. 710, *verbo* "legislative officer." (b) Because at or before the same period in the Senate of the United States, after considering the ruling in the Blount Case, it was concluded that a member of Congress was a civil officer of the United States within the purview of the law requiring the taking of an oath of office. (Cong. Globe, 38th Congress, 1st session, pt. 1, pp. 320-331.) (c) Because also in various general statutes of the United States at the time of the enactment in question a member of Congress was assumed to be a civil officer of the United States. Revised Statutes, §§ 1786, 2010, and subdivision 14 of § 563. (d) Because that conclusion is the necessary result of prior decisions of this court, and harmonizes with the settled conception of the position of members of state legislative bodies as expressed in many state decisions. The Floyd Acceptances (Pierce v. United States) 7 Wall. 666, 676, 19 L. ed. 169, 173; Ex parte Yarbrough, 110 U. S. 651, 654, 28 L. ed. 274, 275, 4 Sup. Ct. Rep. 152; Wiley v. Sinkler, 179 U. S. 58, 64, 45 L. ed. 84, 88, 21 Sup. Ct. Rep. 17; Swafford v. Templeton, 185 U. S. 487, 492, 46 L. ed. 1005, 1007, 22 Sup. Ct. Rep. 783; People ex rel. Kelly v. Brooklyn, 77 N. Y. 503, 507, 508, 33 Am. Rep. 659; Morril v. Haines, 2 N. H. 246; Shelby v. Alcorn, 36 Miss. 273, 291, 72 Am. Dec. 169; Parks v. Soldiers' & S. Home, 22 Colo. 86, 96, 43 Pac. 542.

2. But it is urged, granting that a member of Congress is embraced by the word "officer," yet no offense was stated, since it was not charged that, in pretending to be an officer, the accused did an act which he would have been authorized to do under the authority of the United States had he [114] possessed the official capacity which he assumed to have. In other words, the proposition is that the first clause of the section prohibits the falsely assuming or pretending to be an officer with intent to defraud, and, as such officer, taking upon himself to act under the authority of the United States,—that is, to do an authorized act. The contention which the proposition covers was insisted upon not only in the demurrer which was overruled, but by requests to charge and exceptions to the charge given. While it is undoubtedly true that the construction asserted finds some apparent support in one or more decided cases in district courts of the United States (United States v. Taylor, 108 Fed. 621; United States v. Ballard, 118 Fed. 757; United States v. Farnham, 127 Fed. 478), we are of opinion that it misconceives the statute and fails to give it proper effect because, when rightly construed, the operation of the clause is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause, and the doing in the falsely assumed character any overt act, whether it would have been legally authorized had the assumed capacity existed or not, to carry out the fraudulent

intent. Briefly stated, we conclude this to be the meaning of the clause for the following reasons: (a) Because the words "acting under the authority of the United States" are words designating the character of the officer or employee whose personation the clause prohibits, since, if the words are thus applied, the clause becomes coherent and free from difficulty, while if, on the other hand, they are applied only as limiting and defining the character of the overt act from which criminality is to arise, confusion and uncertainty as to the officer or employee whose fraudulent simulation is prohibited necessarily results. (b) Because the consequence of a contrary construction would be obviously [115] to limit the application of the clause as shown by its general language and as manifested by the remedial purpose which led to its enactment. (Cong. Rec. vol. 14, pt. 4, p. 3263, 47th Cong. 2d Sess.) (c) Because to adopt a contrary view would be absolutely inharmonious with the context, since it would bring into play a conflict impossible of reconciliation. To make this clear it is to be observed that the last clause of the section makes criminal the demanding or obtaining in the assumed capacity which the first clause prohibits, "from any person or from the United States, . . . any money, paper, document, or other valuable thing, . . ." We say which the first clause prohibits because there is no re-expression of the prohibition against assuming or pretending contained in the first clause except as that prohibition is carried over and made applicable to the second by the words "or shall in such pretended character demand," etc. As it is obvious that the acts made absolutely criminal by the second clause are acts which may or may not have been accomplished as the result of exerting in the pretended capacity an authority which there would have been a lawful right to exert if the character had been real, and not assumed, it results not only that the conflict which we have indicated would arise from adopting the construction claimed, but the error of such contention as applied to the first clause is conclusively demonstrated.

Indeed, the consideration thus given the contention in question was unnecessary because its error is persuasively if not conclusively established by the ruling in United States v. Barnow, 239 U. S. 74, ante, 155, 36 Sup. Ct. Rep. 19. In that case the accused was charged under both clauses of the section with having on the one hand falsely assumed to be an employee of the United States, acting under the authority of the United States, "to wit, an agent employed by the government to sell a certain set of books entitled, 'Messages and Papers of Presidents.'" and with having taken [116] upon himself to act as such by visiting a named person for the purpose of carrying out the intended fraud, and, on the other hand, under the second clause of the section with having, by means of the same false personation, obtained a sum of money. The case came here to review the action of the court below in sustaining a demurrer to the indictment as stating no offense because there was no authorized employee of the character which had been falsely assumed, and no legal authority therefore to have done the overt acts with which either count was concerned. The judgment was reversed under the express ruling that the existence of the office or the authority was not essential, as the assuming or pretending to be and act as an officer or employee of the United States was within the purview of the statute, and necessarily embraced within its prohibitions.

3. It is urged that the indictment is defective because of its failure to describe the circumstances of the offense. It suffices to say that, after considering them, we think that the many authorities cited to support the contention are wholly inapplicable to the conditions disclosed by the record, and we are further of opinion that those conditions make it clear that the contention is devoid of merit. We say this because it will be observed from the text of the indictment which we have previously reproduced that it clearly charges the illegal acts complained of and the requisite fraudulent intent, states the date and place of the commission of the acts charged, and gives the name and official character of the officer whom the accused was charged with having falsely personated. It is, moreover, to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. Under this situation we think that [117] the case is clearly covered by § 1025, Revised Statutes, Comp. Stat. 1913, § 1691. Connors v. United States, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; Armour Packing Co. v. United States, 209 U. S. 56, 84, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428; New York C. & H. R. R. Co. v. United States, 212 U. S. 481, 497, 53 L. ed. 613, 623, 29 Sup. Ct. Rep. 304; Holmgren v. United States, 217 U. S. 509, 523, 54 L. ed. 861, 867, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778.

4. It is insisted that there was no proof whatever tending to show an intent to de-

fraud or to establish criminality under the section relied upon, and therefore there should have been an instruction to acquit. In so far as the proposition concerns the absence of proof of the doing of an overt act which was authorized by law, and therefore relates to the wrongful construction of the statute which we have previously pointed out, it is disposed of by what was said on that subject. As to the want of any evidence justifying the submission of the case to the jury on the question of the criminal intent relied upon or of the acts charged, we content ourselves with the statement that, after a close scrutiny of the record, we are of the opinion that the contention is wholly without merit and that the case was clearly one where the proof was of such a character as to justify its being submitted to the jury for its consideration.

5. Finally we come to consider a contention not raised in the trial court, not suggested in the court below while the case was there pending and before the order of dismissal which we have reviewed was entered, and not even indirectly referred to in this court when the case was pending on the direct writ of error, which writ was, as we have seen, dismissed because it presented for consideration no question of jurisdiction and none arising under the Constitution. Indeed, the contention now relied on was for the first time urged in a supplemental brief filed on the present hearing. The proposition is that the trial court had no jurisdiction; in fact, that no such court existed, because the trial was presided over by the district judge of the western district of Michigan, assigned to the [118] southern district of New York conformably to the statute (chap. 18, 38 Stat. at L. 203, Comp. Stat. 1913, § 985), and that the effect of such assignment under the statute was virtually to destroy the southern district of New York by creating a new district whose boundaries were undefined, thus violating the rights secured to the accused by the 6th Amendment, since he was subjected to trial in a district not established when the offense with which he was charged was committed. In fact, the further contention is made that to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and Senate. As to the first of these contentions, we think it suffices to say that it rests upon a construction of the words of the statute authorizing the assignment of a judge of one district and circuit to duty in another district and circuit which is wholly unfounded, and which rests upon a premise conflicting with the practice of the government under the Constitution substantially from the beginning. As to the second contention, we think merely to state it suffices to demonstrate its absolute unsoundness.

Affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this cause.

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[119] UNITED STATES, Appt.,
v.
GEORGE F. ARCHER and Kate C. Archer

(See S. C. Reporter's ed. 119-148.)

Appeal — from court of claims — remanding for more specific findings.

A judgment of the court of claims awarding damages for the alleged total destruction of a plantation as the result of the construction of a dike across it by government officers or agents acting under Federal legislation creating the Mississippi River Commission must be reversed and the case be remanded for more particular findings, where the finding which recites the effects upon claimant's property is too broad in its inference, and the findings otherwise lack precision, mixing statement with inference, and not clearly distinguishing between effects caused by the United States and those caused by state action.

[For other cases, see Appeal and Error, IX. 1; V. o, in Digest Sup. Ct. 1908.]

[No. 112.]

Argued December 7, 1915. Decided May 1, 1916.

APPEAL from the Court of Claims to review a judgment awarding damages for the destruction of a plantation from the construction of a dike across it by government officers or agents. Reversed and remanded for further proceedings.

See same case below, 47 Ct. Cl. 248.

NOTE.—As to what constitutes a taking of property by eminent domain—see notes to Memphis & C. R. Co. v. Birmingham, S. & T. River R. Co. 18 L.R.A. 166; and Sweet v. Rechel, 40 L. ed. U. S. 188.

On distinction between taking or damaging property and consequential injuries—see note to Gordon v. Ellenville & K. R. Co. 47 L.R.A.(N.S.) 462.

On the right to improve navigability of stream—see note to Beidler v. Sanitary Dist. 67 L.R.A. 820.

On the right of government to divert water from nontidal stream without compensation to riparian owner—see note to Fulton Light, Heat & P. Co. v. State, 37 L.R.A.(N.S.) 307.

Statement by Mr. Justice McKenna:

Petition in the court of claims for the recovery of $300,000 for damages alleged to have been caused by the officers and agents of the United States under the authority of an act of Congress creating the Mississippi River Commission by the construction and extending of a dike, known as the Leland dike, upon the land of petitioners, called the Point Chicot plantation.

A demurrer to the petition was overruled, and after answer and hearing judgment was rendered for claimants in the sum of $54,920, to review which this appeal is prosecuted.

The findings were necessarily voluminous; we condense them narratively as follows: Claimants' plantation prior to the construction of the levee system to the state of completion which now exists was of great value and in a [120] high state of cultivation, being reclaimed lands comparatively free from overflows of the Mississippi river except at intervals, the recurrence of such overflows being so separated in point of time as not to materially affect either the value or the productive capacity of the plantation. It was highly improved with houses and cabins thereon and stocked with laborers and tenants, and yielded large crops.

It has been overflowed at certain rises of the water in the river (the rise in feet, according to certain data, is given from 1844 to 1910), and during the twenty years following 1891, after the levee system had been made effective, there were eight years during which it was not overflowed.

Gauges of the height of the water are taken at Memphis and Greenville. Claimants' plantation is overflowed whenever the water rises to 135 feet, Memphis datum, and it has been more or less overflowed every year except two years (1872 and 1889) during the eighteen years prior to 1891, up to which time the levee system had not been completed sufficiently to withstand great floods and the outlets unclosed; and during the twenty years following 1891, after the levee system had been made effective and the outlets closed by the United States and the local authorities, there were eight years, namely, 1894, 1895, 1896, 1900, 1901, 1902, 1905, and 1910, during which claimants' land was not overflowed.

The plantation is overflowed at a stage of 38 feet on the Greenville gauge, or whenever the surface water rises to 135 feet, Memphis datum, and the gauge readings show that of the fifteen years from 1882 to 1896, inclusive, there were only four years in which this stage was not exceeded, and that for the fourteen years from 1897 to 1910, inclusive, there were five years in which this stage of 38 feet on the Greenville gauge was not exceeded.

From time immemorial the waters of the river during its [121] highest stages, when not contained within the low-water banks, have naturally found outlets through certain basins (they are mentioned) and through the rivers draining them into the Gulf of Mexico. And the plantations that were not overflowed so frequently before such outlets were closed by levee construction were consequently little injured by overflows.

Prior to 1883 the state and local authorities constructed a system of levees, miles of which were destroyed in 1882.

Beginning in 1883 the officers of the United States, under the authority of an act of Congress creating the Mississippi River Commission, and other acts amendatory thereof, adopted the so-called Eads plan, and in consequence thereof have projected and constructed levees on both sides of the river for various distances from Cairo, Illinois, to near the Head of the Passes, a distance of 1,050 miles from Cairo; and the local authorities along the river on both sides from Cairo to the Gulf have before and since also constructed and maintained levees at various places and of various lengths for the purpose of protecting and reclaiming land within their respective districts.

The levee lines so constructed by the United States and local authorities have been practically joined, with the result of confining the river within a narrow scope, increasing its velocity and elevation and the strength of its current. The highest elevation is approximately 6 feet in times of high water, and the plan of the United States was to increase the scouring power of the water, deepen the channel and improve navigation, and that of the local authorities to reclaim and to protect the land on both sides of the river from overflowing at times of high water.

From time immemorial the high-water bed of the river has been between the highlands on the east side and the highlands on the west side, and the claimants' plantation is within this boundary; that is, between the highlands on the Mississippi side and the highlands on the Arkansas [122] side, and has been occasionally overflowed at times of high water, as stated above, before as well as since the construction of the levees.

From Cairo to the mouth of the Yazoo river the Mississippi river is practically leveed on both sides, except on the east side, where the highlands abut on or very near the river in Kentucky and Tennessee, and

there is a gap in the line of levees of 234 miles from the mouth of the Yazoo river to Baton Rouge, unleveed.

The extension of the levee system has resulted in an increased elevation of the general flood levels which subjects claimants' land to a deeper overflow than they were subjected to formerly, and consequently has somewhat reduced its value for agricultural purposes. The immediate cause of the deeper overflow on claimants' land is the increased elevation of the flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole.

During the flood waters of 1882 the levees failed throughout the length of the river. In 1884 the crevasses were still open in all basins. They were open and closed in subsequent years (which are given); they were all closed in 1904 to 1910. In consequence of the closing of the natural basins, outlets, and crevasses, overflowed lands on both sides of the river have been reclaimed and protected from overflow in times of high water and vast benefit has accrued to the states of Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana, but the land of claimants, situated between the levees, and outside thereof, and not protected thereby, has been subjected to repeated overflow, tending to diminish and impair its value, but to what extent does not satisfactorily appear from the evidence.

A part of the levee system runs back of claimants' plantation, not touching the same, and between it and the plantation is a stretch of ground lower than the main [123] body of the plantation, and in periods of high water the water, rising and passing over and upon said land, has, by reason of its lowness, first gone thereupon, and its main current was across said land, and not upon the plantation, which, while in extreme high water it would be flooded, did not have the full force of the current of the river, but was covered in part or in whole by slacker water. The current during high-water seasons struck against the levee back of claimants' plantation, eroding and washing it away, to the great danger of its existence and the inundation of the lands to the rear thereof and diverting the water from the channel of the river. A breach or crevasse in the levee would have entailed damage to it and to the adjacent landowners, and impaired the efficacy of the levee system as projected, constructed, and maintained by the officers of the Mississippi River Commission in accordance with the plans heretofore stated.

In addition to the danger to the levee, the current, impinging upon the banks of the stream and the neck of the land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through the neck of land, thus straightening the channel and making the plantation an island.

In order to prevent the threatened danger to the levees and the neck of land, the officers of the United States, acting under the authority of the acts of Congress, and the Mississippi River Commission, constructed what is known as the Leland dike, running diagonally and at an angle from the main line of levee on the Arkansas side across and on the land of claimants to a point 662 feet beyond where the line of the plantation begins, their object being to divert the current of the stream during high waters from impinging upon the levee, and, by throwing it northeastward by the dike, to prevent the destruction of the levee and the cutting across the neck of land.

The dike first went into and on the land a distance of 662 [124] feet, but, its end being exposed to the waters of the river and to its powerful current, the officers deemed it necessary to extend the dike a distance of some 2,700 feet farther upon the land of claimants, and did so extend it in 1907 without any condemnation of the land and with no remuneration therefor being made to claimants. A large part of the soil was used for this construction.

Before the United States joined the levee lines in accordance with the Eads plan, thus making the same continuous, there were occasional overflows of the plantation, but they have been made deeper and more forceful by the adoption of such system. But before the erection of the dike the overflows did not materially damage the plantation, and it remained still valuable for agricultural purposes. By the extension of the dike the high-water current of the river has been deflected over and across a large part of the plantation, but flows in the same direction as did a portion of the high waters of the river before the erection of the dike,—but with greater force and depth,—the escape of a portion of the high waters over and across the neck of land being thereby prevented, in consequence of which the overflows of the plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part of the plantation great burdens of sand and gravel, and 3,696 acres have been thereby rendered totally unfit for cultivation or any other profitable use. This result has been caused partly by the joining of the levee systems and the erection of said dike, but directly and proximately by the erection of said dike.

The lines of levees constructed in part

by the officers of the United States and in part by the officers and agents of the local organizations of the states bordering on the river to 1909 had a length of 1,548 miles and contained 229,729,354 cubic yards. The officers of the United States constructed 1,050 miles of the total. Since 1909 [125] the authorities of the United States have built additional lines of levees containing 2,970,224 cubic yards, and the local authorities lines of levees containing 5,063,427 cubic yards, thus bringing the work of levee construction up to the year 1910.

The 3,696 acres of land damaged as stated was, at the time of the erection of the dike, of the value of $83,920, and 31 1/10 acres of the same is actually and wholly occupied by the United States by the construction of the dike, and the balance, to wit, 3,664 1/10 acres, has been destroyed and rendered wholly unfit for cultivation or any other profitable use. The land is described.

As an ultimate fact, the court finds, in so far as it is a question of fact, the 3,696 acres of land was somewhat impaired in value by the construction of the levee system, but that its use was totally destroyed by the erection of the Leland dike, and was thereby taken, its value at the time of such destruction and taking being $83,920.

Before this suit was brought George F. Archer, one of the claimants, brought a suit in the United States circuit court for the western district of Arkansas against the board of levee inspectors of Chicot county, Arkansas, for the damages arising from the erection of said dike and the taking of the 31 1/10 acres of land. A demurrer by the defendants to the complaint was overruled (128 Fed 125); and thereafter and before the beginning of this suit Archer discontinued the suit brought against the board.

The ownership of the plantation by the claimants was found. From the findings of fact the court concluded that claimants were entitled to a judgment of $54,920.

Solicitor General Davis argued the cause, and, with Mr. Robert Szold, filed a brief for appellant.

Mr. Percy Bell argued the cause and filed a brief for appellees.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

Upon the findings as thus made the parties to the action base opposing contentions. The government asserts that the government's liability is limited to the land actually taken, and all other damages are consequential. In other words, that the appropriation of the land and the erection of the Leland dike put the government in the position of owner of the land, with the rights and liabilities of owner, and that besides, it had the rights of government to improve navigable waters. There was concession or some concession of the contention by the court of claims in its opinion. The court [47 Ct. Cl. 265], through Mr. Justice Barney, said:

"In the decision of this case it may be admitted that if the government had owned the site of the Leland dike at the time of its erection, or if it had been owned by a stranger to this suit, and hence had made no invasion upon the lands of the plaintiff, it would not have been [128] liable for the destruction thereby inflicted, under the ruling in the Bedford Case, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238."

But it was further said: "Under the decisions of the Supreme Court in all cases of this character, it is the invasion upon the lands and the actual and visible possession which constitutes the taking, and when thus taken, all of the consequences incident to such invasion necessarily follow, among which is the liability to pay for the damage thereby occurring to the balance of the tract to which the land thus taken belongs." Citing United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162.

Claimants concede the power of the government over the river, and that they "do not base their claim upon any raising of the flood levels of the Mississippi river, although it is stated by them and was found as a fact by the lower court that the high-water flood level of the Mississippi river had been raised 6 feet by the completion of the general levee system."

They "recognize the fact that the right of the United States government to complete the levee system and maintain the same is indisputable, and that any purely incidental injury which might have resulted to them solely from raising the flood level would be a *damnum absque injuria*. They claim nothing by reason of said fact, adducing the same merely by way of inducement as showing that the ruin, which would inevitably have come to their plantation from the deflecting thereon of the flood waters by the construction of Leland dike, was merely accelerated and expedited, but not caused, by the raising of the flood level.

"Their claim is that the deposit of sand and gravel and the destruction of their lands thereby were a direct and immediate result of the construction of the dike which was built on their plantation, using a part of it for the base thereof and the material thereof, and constructing the same without

any condemnation of their lands and [129] ouster of them therefrom, which, with the destruction, constituted the taking of their lands within the meaning of the 5th Amendment, and entitled them to compensation therefor."

And they rely on United States v. Grizzard, supra, and other cases, and distinguish the Jackson Case, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and the Hughes Case, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019.

A serious proposition of law is hence presented by the contentions, and controversy arises, as we have seen, whether an appropriation of the land without condemnation proceedings can have different legal results from its appropriation by such proceedings. In other words, whether compensation for the land appropriated in either case would be the only measure of relief, and its payment or recovery transfer ownership of the land and the rights of ownership.

But before reaching decision on this proposition questions of fact confront us. It will be observed that the findings are somewhat involved, mixing statement with inference; indeed, it may be said, even with prophecy. And it may be said again (we say "may be said" to avoid the expression of a definite judgment at this time) that there are effects caused by the United States and effects caused by the state which are not distinguished. We think there should be more precision. Great problems confronted the national and state governments; great and uncertain natural forces were to be subdued or controlled, great disasters were to be averted, great benefits acquired. There might be liability to the individual; if so, the liability should be clear, the cause of it direct and certain. This we explained in Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and in Hughes v. United States, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019. There is an effort in the present case to satisfy these conditions, but we do not think it goes far enough.

The finding which recites the effects upon claimants' property is as follows: "In addition to the danger which [130] threatened the levee [that is, by the concentration of the current and during seasons of high water], said current, impinging upon the banks of the stream and the neck of land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land, thus straightening the channel and making Point Chicot plantation an island." In other words, it is found that but for the dike the river would have cut through the neck of land. Or, to express it another way, the dike kept the river in its channel. But, as we have seen, many forces were at work, and if the conditions at claimants' plantation were artificial, they were the result of the lawful exercise of power over navigable rivers.

The finding seems to be definite, but it is too broad in its inference. It may indeed be a just inference, but the elements are wanting upon which a judgment can be with assurance pronounced. Besides, there were two agencies at work, national and state, in the construction of the levees. There is no distribution of liability; all the results to claimants' plantation are assigned to the government. Yet it is found that the claimants at one time conceived that the local authorities were the offenders,—that is, the board of levee inspectors of Arkansas was alone responsible, and brought an action against the board. In passing upon the ground of action and its sufficiency, challenged by demurrer, the court said that the action "was instituted to recover damages alleged to have been sustained by him [Archer] by reason of the trespass of the defendant [the board of levee inspectors], who unlawfully, with force and arms, entered upon his premises—a plantation in the county of Chicot—and built a levee thereon, without having made compensation therefor." The demurrer was overruled, the court expressing the view that the action could be maintained, and intimated an opinion that an injunction might have been granted to enjoin the [131] trespass, but that Archer could elect an action for damages.

The action was discontinued. We are not informed by the findings for what reason. It may have been for good reason; we make no intimation to the contrary; but its commencement and subsequent discontinuance suggest some questions which may lead to answers pertinent to be considered. In that action the trespass upon claimants' plantation by the construction of the Leland dike was attributed to the local levee board; in the action at bar it is ascribed exclusively to the officers of the United States, and it is averred that the encroachment of the trespass was at different times, and to a greater extent the second than the first time. Did claimants object at either time? And if not, why not? Upon the answer may depend a serious legal question. Or, if they were silent, why were they silent? What were the local conditions which called for judgment, not only the general conditions to which we have adverted and the findings describe, but the exact conditions as to claimants' property? Did danger

threaten it before the erection of the dike as well as threaten the levees? As we have said, great forces were in operation and a judgment or prediction of their effect might have been difficult and uncertain, and claimants have regarded the dike as a protection to their plantation as well as to the levees.

The flow of the river is towards the Gulf, and necessarily the water is always higher on the upper side of the reaches or bends such as exist at claimants' plantation. It may be inferred, therefore, that the pressure of the water, compounded of its velocity and volume, is greatest at the recesses or apices of the bends, has its first effect there, but necessarily extends along the whole concave shore. At first, of course, there would be a break at the neck or narrowest part, but would it not successively extend until the whole mass would crumble and a wide breach be [132] formed, through which the river would pour with its full eroding force? And that such might be the effect we gather from the report of the United States engineers, of which we take judicial notice. It certainly may be questioned, therefore, whether the river, breaking through at the neck, would have confined itself to a narrow channel, "making Point Chicot plantation an island," and would not have permanently submerged it or swept it away. The Leland dike prevented a demonstration of experience, but it would seem that examples elsewhere on the river could give testimony of what would have occurred if the dike had not been constructed. It may be they were adduced, it may be expert testimony was heard and all pertinent facts exhibited to the court, and its finding is a true deduction from the testimony and the facts. We think, however, as we have already said, it is too broad in its inference, and that therefore the case should be remanded to the court for more particular findings on the testimony in the case, or, in the discretion of the court, upon further testimony to be taken; and the case should be given such despatch as may be consistent with such purposes.

In what we have said no opinion is intended to be expressed of the case as it is presented or may be presented, and all questions of law are reserved.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

Mr. Justice Pitney, dissenting:

Being unable to perceive that the facts found by the court of claims are in any material respect lacking in certainty, or are inadequate to support the judgment of that court, I am constrained to record my dissent.

[133] The salient facts included in the findings are as follows: Claimants' plantation comprises about 6,000 acres, and includes the whole or the greater part of Point Chicot, on the Arkansas side of the Mississippi river. Point Chicot is a peninsula formed by a sweep of the river, being joined at its southwesterly end to the back land by a narrow neck of comparatively low land, which is the property of others than the claimants. The river flows easterly past this neck of land on its upper or northwesterly side, and after flowing around the Point, passing the important town of Greenville, which is on the easterly or Mississippi side, it, of course, flows past the southerly side of the plantation and of the neck of land, on its way to the Gulf. The distance on the course of the river from the upper side of the neck of land to the lower is approximately 13 miles, while the distance across the neck is less than a mile. The situation is clearly shown upon the map annexed to the findings of the court of claims, and reproduced with the report of the case. 47 Ct. Cl. 248, 264.

The findings show that levee construction work of two different kinds has been in progress along the Mississippi river for more than thirty years. On the one hand, the states and local organizations of the states bordering the river on both sides have, both before and since the year 1883, constructed and maintained certain lines of levees at various places and of various lengths, for the purpose of protecting and reclaiming land within their respective districts from overflow in times of high water. The lands of claimants are not included within any such levee district, and are not affected by any state or local levee construction except as such construction has contributed to closing certain natural outlets that formerly accommodated the flood waters of the river, the result of closing the outlets being to raise the elevation of the river in times of high water. On the other hand, beginning about the year 1883, and continuing to the present time, [134] the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission and other acts amendatory thereof, and for the improvement of the river for navigation, have adopted the so-called Eads plan, and, in pursuance of it, have projected, constructed, and maintained, and are engaged in constructing and maintaining, certain lines of levees on both sides of the river at various places; the plan being to increase the velocity and scouring power of the water,

and thus deepen the channel of the river and improve it for navigation.

The findings show that "the extension of the general levee system by the United States and the local authorities has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence, and consequently somewhat reduced its value for agricultural purposes," and this because "the lands of claimants, situated between said levees and on the outside thereof, and not protected thereby, have been subjected to repeated overflow, tending to diminish and impair their value, but to what extent does not satisfactorily appear."

It is important to observe that for the diminution of the value of claimants' land thus produced by the general effect of levee construction, state and national, no compensation is claimed from the United States, and no part of such diminution is included in the amount of the judgment awarded by the court of claims.

But it came to pass that "a part of the levee system so constructed and maintained runs back of said Point Chicot plantation, not touching the same [whether this was a part of the state or of the national system does not appear from the findings, and is quite immaterial, for it was not this that encroached upon claimants' land or caused an actual invasion of it and direct damage to it], [135] and that between it and said Point Chicot plantation is a stretch of ground lower than the main body of said plantation [this is the neck of land already mentioned, owned by other parties, and, as the map shows, it extends for nearly a mile from the face of the levee to claimants' nearest boundary line], and in periods of high water, the water rising, passing over and upon said land, has, by reason of its lowness, first gone thereupon, and its main current was across said land, and not upon Point Chicot plantation, which, while in extreme high water it would be flooded as hereinabove set forth, did not have the full force of the current of the Mississippi river thereupon, but was covered in part or in whole by slacker water.

"The current during high-water seasons (being) as aforesaid struck against and impinged upon the said levee back of said Point Chicot plantation and protecting the lands on the interior, and such impingement resulted in the waters of said river eroding and washing away said levee, to the great danger of its existence, and threatening to break through said levee and inundate said lands to the rear thereof [not claimants' lands] and divert the water from the channel of the river. Such breach or crevasse in said levee would have entailed damage thereunto and to the adjacent landowners [not to claimants], and impaired the efficacy of said levee system as projected, constructed, and maintained by the officers of said Mississippi River Commission in accordance with the plans heretofore stated. In addition to the danger which threatened the levee, said current impinging upon the banks of the stream, and the neck of land adjoining Point Chicot to the mainland, cutting into it, threatened to and would have, if permitted to continue, cut through said neck of land [owned by others than claimants], thus straightening the channel and making Point Chicot plantation an island."

It is obvious that the straightening of the channel, by permitting the river to make a "cut-off" at the neck of [136] land, would have sent the principal flow of the river through the shorter route, thus interfering with and probably closing navigation along the 13 miles of river around Point Chicot, to the especial detriment of navigation at Greenville. For it is a well-known fact, and a subject of official comment, that when the river forms a new channel for itself across such a neck of land, the old bed has a tendency to fill up at the head and foot and become a lake. There are many crescent-shaped lakes in the Mississippi bottom lands, thus caused. Rep. Sec. War, 1875, vol. 2, pt. 2, p. 499. In many cases the entire bed along the former and more circuitous channel has been transformed into dry land, or nearly so. Two historic instances of this kind have given rise to interstate suits now pending on the original docket of this court: No. 6, Original, Arkansas v. Tennessee, turns upon the effect of the "Centennial Cut-off" of 1876, while in No. 10, Original, Arkansas v. Mississippi, the effect of the cut-off of 1848 is the subject of inquiry. We can thus appreciate the situation, in view of which the powers of the government of the United States were put forth in the taking of a considerable portion of claimants' land, as is shown by the findings that follow.

In order to prevent the threatened danger to the levees and the neck of land, the officers of the United States, acting under the authority of the acts of Congress, and the Mississippi River Commission, constructed what is known as the Leland dike, running diagonally and at an angle from the main line of levee on the Arkansas side, across and on the land of claimants to a point 662 feet beyond where the line of the plantation begins, their object being to divert the current of the stream during high waters from impinging upon the levee, and,

by throwing it northeastward by the dike, to prevent the destruction of the levee, and the cutting across the neck of land. The dike first went into and on the land of [137] claimants a distance of 662 feet, but, the end of it being exposed to the waters of the river and to its powerful current, the officers deemed it necessary to extend the dike a distance of some 2,700 feet farther upon the land of claimants, and did so extend it in 1907, without any condemnation of the land and with no remuneration therefor being made to claimants. A large part of the soil was used for the construction of the extension.

Before the United States joined the levee lines in accordance with the Eads plan, thus making the same continuous, there were occasional overflows of the plantation, but they have been made deeper and more forceful by the adoption of said system. But before the erection of the dike the overflows did not materially damage the plantation and it remained still valuable for agricultural purposes. By the extension of the dike the high-water current of the river has been deflected over and across a large part of the plantation, flowing in the same direction as did a portion of the high waters of the river before the erection of the dike, but with greater force and depth, the escape of a portion of the high waters over and across the neck of land being prevented by the dike, in consequence of which the overflows of the plantation have been greatly increased and intensified, the result of which has been to wash and scour out its top soil and to deposit upon a large part of the plantation great burdens of sand and gravel, and 3,696 acres have been thereby rendered totally unfit for cultivation or any other profitable use. This result had been caused partly by the joining of the levee systems and the erection of the dike, but directly and proximately by the erection of said dike.

"The 3,696 acres of land hereinbefore mentioned at the time of the erection of the Leland dike was of the value of $83,920. Thirty-one and four-tenths acres of the same is actually and wholly occupied by the United States by the construction of the dike before mentioned, [138] and the balance of said 3,696 acres, to wit, 3,664.6, has been destroyed and rendered totally unfit for cultivation or any other profitable use by the owners thereof. . . . The court finds as an ultimate fact, in so far as it is a question of fact, that the said 3,696 acres of land was somewhat impaired in value by the construction of said levee system, but that its use was totally destroyed by the erection of the Leland dike and was thereby taken, its value at the time of such destruction and taking being $83,920."

Upon these findings, a judgment was rendered in favor of the claimants for $54,920, the difference between this and the total value of the land apparently being represented by an outstanding mortgage.

The record shows that the case was tried and considered with unusual care and deliberation in the court of claims. The petition was filed July 19, 1909; final judgment was entered February 17, 1914, *nunc pro tunc* as of February 12, 1912. The merits of the case were argued at least three times, and the United States filed several motions for new trial, for amendment of the findings, etc. It was therefore only after years of contentious litigation that the court of claims arrived at the findings and conclusions upon which it based its judgment.

In this court the case has been fully argued upon the facts disclosed by the findings; the argument for the government being conducted by the learned Solicitor General in person. It was not suggested in argument that the findings were incomplete or wanting in certainty.

That the essential facts clearly appear from the findings is evident from the following excerpt from the government's brief:

"From the findings of the court of claims the following facts appear: The plantation, described as 'Point Chicot plantation,' is situated in Chicot county, in the [139] southeastern corner of Arkansas. It is in a bend, bounded on the north, east, and west by the river. Behind the Point Chicot plantation to the south was a levee, a part of the general system constructed by the United States and local authorities after 1883, pursuant to the Eads plan for the improvement of navigation. Between the levee and Point Chicot plantation was a low strip of ground often covered by the river. The natural current of the river in high water seasons, running over the low strip of ground behind the Point Chicot plantation, threatened the destruction of the levee, and a severance of the Point from the mainland, leaving Point Chicot an island. To forestall the danger to the levee from erosion, and to the connecting neck of land, and thus to prevent the river from leaving its channel, agents of the United States government constructed the Leland dike in 1904, running 662 feet into the Point Chicot plantation. In 1907 the dike was extended 2,700 feet further on claimants' land. In all, 31.4 acres were occupied in the construction of the Leland dike. . . . In periods of high water the floods deflected by the dike came over the plantation, render-

ing 3,696 acres of the plantation unfit for cultivation."

Even were it suggested, as it is not, that the court of claims had committed some trial error or had drawn improper inferences from the evidence there submitted, this court would have no authority to review the judgment and reverse it upon that ground. The rules established by this court, pursuant to § 708, Rev. Stat. (now § 243, Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1220]), for regulating appeals from the court of claims, require that the record shall contain "a finding by the court of claims of the facts in the case, established by the evidence, in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or [140] decree." The findings are conclusive upon this court unless error of law appear in the record. United States v. Smith, 94 U. S. 214, 24 L. ed. 115; Stone v. United States, 164 U. S. 380, 41 L. ed. 477, 17 Sup. Ct. Rep. 71; District of Columbia v. Barnes, 197 U. S. 146, 150, 49 L. ed. 699, 700, 25 Sup. Ct. Rep. 401.

The entire argument for the government may be reduced to the single contention that its liability for damages is limited to the 31.4 acres of claimants' lands that are actually occupied by the Leland dike, and that the court of claims erred in awarding compensation also for the 3,664.6 acres destroyed by the deflection upon it of the flood waters of the river through the construction and maintenance of the dike. The simple question is whether the case should be governed by United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162, upon which the court of claims rested its decision, or by Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; and Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011.

It was attempted to be shown in argument that the causes of the damage to claimants' lands were diverse, it being attributable in part to the levee work of the local and state authorities, and only in part to the construction of the Leland dike by the agents of the United States government. It seems to me that the findings render this matter perfectly clear, for they show that while the general work of levee construction in which local, state, and Federal agencies co-operated resulted in an increased elevation of the flood levels and subjected claimants' land to deeper overflows than before, and consequently somewhat reduced its value for agricultural purposes, no compensation was awarded—indeed, none was or is asked—for this general and consequential result of levee construction. Nor was the judgment in favor of claimants based at all upon the value that claimants' lands would have had but for this levee construction. On the contrary, the finding is explicit that while the tract of 3,696 acres of land was somewhat impaired in value by the construction of the levee system, its use was totally [141] destroyed by the subsequent erection of the Leland dike, and that *its value at the time of such destruction* was $83,920.

In view of this, I confess myself unable to comprehend the basis of the criticism that the findings lack precision and that the effects of the work done, respectively, by the states and by the United States, ought to be more clearly distinguished. It is not suggested in what respect the findings lack precision, and the government advances no such contention. The findings certainly render it most clear that no compensation is claimed or allowed for anything done by the state or local authorities; that neither of these has invaded the soil of claimants' lands; that this invasion was done solely by agents of the United States government, acting under the authority of acts of Congress, in the execution of an important public work; and that by their acts 31.4 acres were actually occupied for the construction of the dike, and the balance of the 3,696 acres were destroyed as the direct consequence of the effect of the dike in turning the flood waters of the river upon and across claimants' lands in other than their natural course; and this because the dike performed the very function that it was designed to perform.

Unfavorable reference is made to the finding that, in addition to the danger which threatened the levee, the current, impinging upon the banks of the stream at the neck of land, cut into it, threatening to cut through it and thus straighten the channel and make of Point Chicot plantation an island. I am unable to see in this anything else than a very clear and direct inference based upon the physical facts and the effect of previous floods upon the neck of land as recited in the findings, viewed in the light of a history of cut-offs so frequent and familiar along the lower Mississippi as to have become a matter of common knowledge. But, if the finding is wanting in any respect, this has nothing to do with claimants' right to compensation for the taking of their lands. The [142] danger to the neck of land connecting Point Chicot with the mainland does not affect the question of the quantity or value of the land taken from claimants. It bears *solely* upon the neces-

city for the taking. Now, the objection of want of necessity may be appropriately raised by an objecting landowner. But surely it does not lie in the mouth of the government, after an actual taking of private property, to answer a claim for compensation by setting up that there was no necessity for taking it.

It is said that it may be questioned whether the river, breaking through at the neck, would have confined itself to a narrow channel, making Point Chicot plantation an island, and would not have permanently submerged it or swept it away. Plainly, this is wholly speculative; and it seems to me, in view of the findings and the illustrative map, that the result hinted at is not even a remote possibility. The findings are clear to the effect that, before the construction of the dike, flood waters went across the neck of land, to the relief of the Point Chicot plantation, upon which the ground is much higher. The entire width of the river opposite the neck of land and on its upper side is about one-half mile, perhaps less. As already mentioned, the neck is less than a mile across, and it extends for over a mile from the levee to the nearest line of the Point Chicot plantation.

My brethren deduce an inference of possible extensive erosion from the reports of the United States engineers. The reports at the utmost would be no more than evidential as to this point. Nor am I aware that this court, in reviewing a judgment of the court of claims, is at liberty to seek contradiction of the express findings of fact made by that court by reference to some government publication of which we may take judicial notice.

But if, before construction of the Leland dike, there was any probability, near or remote, that the opening of a cut-off at the neck of land would lead to any encroachment [143] of the river upon claimants' land, the only possible legitimate effect of this upon their claim for compensation for the lands actually taken and directly damaged by the construction of the dike would be to reduce the damages to such extent as it should be made to appear that by such construction claimants had been specially benefited through the saving of their other lands from destruction. But the burden of showing this was upon defendant, not upon claimants. And I can see no justification for reversing a judgment, fairly recovered by claimants, upon the mere conjecture that possibly there ought to have been an allowance in favor of the United States for the direct benefit that the dike construction conferred upon claimants.

Reference is made to the fact that before this suit was brought George F. Archer, one of the claimants, brought a suit in the United States circuit court for the eastern district of Arkansas against the board of levee inspectors of Chicot county, Arkansas, for the damages arising from the erection of the dike and the taking of the 31.4 acres of land, and that, after the overruling of a demurrer to the complaint, the action was discontinued before the commencement of this suit (128 Fed. 125). As a finding of fact, this manifestly imports nothing whatever pertinent to the right of action of claimants against the government of the United States. As an evidential circumstance, even were it entitled to any weight, this court has nothing to do with it, for we have no jurisdiction to consider or weigh evidence. Even as against the defendant in that action, the discontinued suit would not estop the plaintiff therein; and certainly this court does not intend to intimate that it furnishes any bar to the recovery by the claimants of compensation for the land actually taken by the government of the United States.

The question whether claimants objected to the entry by the officers of the United States is likewise immaterial, [144] for their suit is based, not upon the ground that the officers were trespassers, but upon the ground that they were lawfully engaged in the construction of a public work under governmental authority, and in the doing of it found it necessary to take and did take a considerable part of claimants' land, with incidental direct damage to another and greater part. This, upon well-settled principles, is to be deemed a taking of private property for the public use, and by the plain mandate of the 5th Amendment to the Constitution is to be made the subject of compensation. The protest of the property owner is not necessary to entitle him to compensation. Acquiescence in an unauthorized taking may estop a landowner from having equitable relief by way of injunction against the consequences of the taking, or from treating the taking as a trespass; but it does not disentitle him to compensation for the land actually taken. New York v. Pine, 185 U. S. 93, 96, 103, 46 L. ed. 820, 821, 825, 22 Sup. Ct. Rep. 592. Nor is the absence of formal condemnation proceedings of any consequence. An agreement on the part of the government to pay him the fair value of his property is necessarily implied, on principles of justice and equity, from the mere act of taking, and it is upon the implied assumpsit that the action rests. United States v. Lynah, 188 U. S. 445, 462, 465, 468-470, 47 L. ed. 539, 545-549, 23 Sup. Ct. Rep. 349.

Stress is laid upon the suggestion that if the government or some third party had

owned the site of the Leland dike at the time of its erection, so that in its construction there had been no invasion of the lands of the claimants, the government would not have been liable for the destruction thereby inflicted. It is quite true that the constitutional inhibition against the taking of private property for public use without compensation has been generally construed as not conferring a right to compensation upon a landowner, no part of whose property has been actually invaded, and who has sustained only consequential damages by reason of the erection of a public work upon [145] adjoining land owned by a third party. It is this doctrine that underlies the decisions of this court in Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; and Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011. The great hardship of the doctrine has been so generally recognized that many of the states have established constitutions providing in substance that private property shall not be taken *or damaged* for public use without compensation. Richards v. Washington Terminal Co. 233 U. S. 546, 554, 58 L. ed. 1088, 1091, L.R.A.1915A, 887, 34 Sup. Ct. Rep. 654. A rule so harsh in its operation ought not to be extended; and this case very clearly stands on the other side of the line, and comes within a class of cases quite as well established, of which United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A. (N.S.) 1135, 31 Sup. Ct. Rep. 162, is an example.

I cannot yield assent to the suggestion that the taking of the 31.4 acres, actually invaded and occupied by the construction of the dike, can be treated as a matter apart from the destruction of the 3,664.6 acres of claimants' lands immediately adjoining, which, as a direct result of the construction of the dike and because of the function that it performs, have been "rendered totally unfit for cultivation or any other profitable use by the owners thereof." Assuming, for the purposes of the argument, that if the government itself, or some stranger, had owned the site of the dike, so that in the erection of it no actual invasion had been made upon claimants' lands, the government would not have been liable on an implied assumpsit for the destruction thereby inflicted, it is sufficient to say that *that is not this case.* The whole of the lands in question were owned by claimants, and were in use as integral parts of a single plantation. There was an actual invasion and exclusive occupancy of claimants' lands in the construction of the dike, and the destruction of the adjoining lands was a direct and necessary consequence of the use made of the dike, and, in justice, must be regarded as an inseparable part of the taking. It is the established rule, recognized everywhere, that where [146] only part of a tract of land is taken, the owner is entitled not merely to the market value of the part taken, but to all damages to the remainder of his tract proximately resulting from the use made of the part actually taken; or, putting it in another way, he is entitled to the difference between the market value of the entire tract and the market value of that which is left; excluding from consideration, however, any general benefit that is shared by all landowners whose property is similarly circumstanced. A multitude of cases might be cited in support of this proposition, but is is not necessary, for they can be found in the text books and cyclopedias. The doctrine has been uniformly adhered to by this court. In Bauman v. Ross, 167 U. S. 548, 574, 42 L. ed. 270, 283, 17 Sup. Ct. Rep. 966, it was expressed thus: "When part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." In Sharp v. United States, 191 U. S. 341, 353, 354, 48 L. ed. 211, 215, 216, 24 Sup. Ct. Rep. 114, an attempt was made to apply the same rule to separate and independent farms owned by the same owner, and having no necessary relation to each other, the farming on each having been conducted separately, and each farm having its own house and outbuildings. The court said: "Upon the facts which we have detailed, we think the plaintiff in error was not entitled to recover damages to the land not taken because of the probable use to which the government would put the land it proposed to take. If the remaining land had [147] been part of the same tract which the government seeks to condemn, then the damage to the remaining portion of the tract taken, arising from the probable use thereof by the government, would be a proper subject of award in these condemnation proceedings. But the government takes the whole of one tract." In United States v. Grizzard, 219 U. S. 180, 182, 183, 55 L. ed. 165, 166, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162, which was an action by the

owners of a farm for a taking of a part of it by the United States for public purposes, the court said: "Reference has been made to the well-known class of cases touching an injury to land not taken by the construction of a railroad along and upon an abutting public road, or a change of grade to the damage of adjacent property, and like indirect injuries to the use of property adjacent but of which no part was taken from the owner. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336; Sharp v. United States, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114. But here there has been an actual taking by permanently flooding a part of the farm of the defendants in error. An incident of that flooding is that a public road running across the flooded land is also flooded. But if this were not so, and the roadway had simply been cut off by the interposition of the flooded portion of the farm, the damage would be the same. Since, therefore, there has been a taking of a part of the owners' single tract and damage has resulted to the owners' remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of the taken land, the rule applied in the cases cited does not control this case. . . . Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

Bedford v. United States, 192 U. S. 217, 225, 48 L. ed. 414, 417, 24 Sup. Ct. Rep. 238, is clearly [148] distinguishable, it being an instance of consequential damages to the claimants' land by reason of government operations conducted 6 miles farther up the river. There was no actual invasion of any part of their land, and therefore no responsibility for the consequential damages arising from the government operations. Jackson v. United States, 230 U. S. 1, 23, 57 L. ed. 1363, 1374, 33 Sup. Ct. Rep. 1011, was likewise a case of consequential damages without actual taking of any part of the claimant's lands. It was decided both in the court of claims (47 Ct. Cl. 579, 613) and by this court upon the authority of the Bedford Case.

It seems to me that the findings of the court of claims are sufficiently clear and definite to furnish the materials for a proper judgment upon the claim in controversy; that an actual invasion and occupation of a part of claimants' lands, particularly described, by the agents of the United States, in the construction of the dike under the authority of acts of Congress, is shown, as well as the market value of the particular part actually invaded and of the larger and adjacent portion of the same tract necessarily destroyed as a direct and immediate result of the construction and maintenance of the dike. I also think that the case comes clearly within the authority of United States v. Grizzard, supra, and that the judgment under review should be affirmed.

More than eight years have elapsed since the practical destruction of the greater part of claimants' plantation; nearly seven years since the suit was commenced. And as no interest is allowable against the government in a case of this kind up to the time of the rendition of judgment in the court of claims (§ 1091, Rev. Stat. § 177, Judicial Code [36 Stat. at L. 1141, chap. 231, Comp. Stat. 1913, § 1168]; Tillson v. United States, 100 U. S. 43, 47, 25 L. ed. 543, 544; Harvey v. United States, 113 U. S. 243, 28 L. ed. 987, 5 Sup. Ct. Rep. 465), any unnecessary postponement of the judgment is a virtual denial of justice.

For these reasons, I dissent.

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[149] WILLIAM FRYE WHITE, Receiver of Cowardin, Bradley, Clay, & Co., Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 149-154.)

Public contracts — ambiguity — practical construction.

Any uncertainty as to whether a roadway shown on the plans was called for by a contract for the construction of a filtration plant for the United States, so as to entitle the contractor to payment for the work done by him on such roadway, should be resolved in the contractor's favor, where supplemental plans relating to such roadway and giving details as to grades were furnished to him, and the government engineer first in charge, who himself drew the plans, considering that the construction of the roadway was part of the scheme, supervised and inspected the work of constructing it on lines, slopes, and grades and of selected materials, and directed payment therefor as being included in the contract.

[For other cases, see United States, VI. b, in Digest Sup. Ct. 1908.]

[No. 309.]

Argued April 19, 1916. Decided May 1, 1916.

APPEAL from the Court of Claims to review a judgment dismissing a petition for the recovery from the United States of a sum alleged to be due to a public contractor. Reversed and remanded with directions to enter judgment for appellant on the findings.

See same case below, 48 Ct. Cl. 169.

Statement by Mr. Justice McKenna:

Appellant is the receiver of the firm of Cowardin, Bradley, Clay, & Company, and the successor of one John D. McClennan. The latter filed in the court of claims a petition, subsequently amended by appellant, praying a judgment against the United States for the sum of $43,510, the amount due that company on a contract for labor and materials furnished for the construction of a filtration plant in the District of Columbia.

The court found, among other things, that there is a driveway running completely about the reservoir, which is an irregularly shaped body of water, comprising the western and southern part of the filtration plant. The starting point of "the roadway" (so-called by the court), its course and termination, are stated.

The set of plans attached to the written contract, and by its terms made a part of the agreement, included certain plans showing the roadway bordering the reservoir west of the filter beds. One of the plans (sheet 2) was a drawing [150] showing the work in general sections; another plan (sheet 4) was a general plan and showed finished surfaces; and the general plan No. 1 showed the entire projected plant. All of these plans indicated a roadway, and sheet No. 16 also indicated a roadway.

Afterwards two supplemental plans, relating to the roadway and giving details as to grades, were furnished the contractor.

Appellant's predecessor, McClennan, began work on the roadway in January or February, 1904. It does not appear that the contractor was ordered in terms by the government engineers to build the roadway, but it is shown that when he commenced work on it the engineers gave him the line of the toe of the slope, and from time to time furnished him with the lines showing the direction of the road and the stakes showing the grade, and that the work was done under their inspection as to the lines, slopes, and the character of the material allowed to be deposited thereon.

The contractor began to build the roadway by filling with earth excavated from other parts of the work, and he continued to fill in and build the roadway in accordance with the plans and under the inspection of the engineers until February 14, 1905, and had been paid at various times about $12,000 on account of the work done on estimates made by the government. The first payment was on voucher, month of March, 1904, covering all work done on the road up to the end of February, 1904, for "embankment (A, item No. 2), 13,000 cubic yards, at 30 cents, less 10 per cent retained, amounting to $3,510." Except for said voucher no separate estimates were made of the amount of fill placed in the roadway, the work done thereon being included in the regular monthly estimates with the work done on other portions of the filtration plant.

Shortly after McClennan was appointed receiver in [151] August, 1903, he made arrangements with the Soldiers' Home authorities, at a considerable cost, to dispose of waste material on the Soldiers' Home grounds under certain conditions, the terms of which, so far as the amount of material to be placed thereon is concerned, were never carried out. The roadway was just as convenient a place as any to dispose of waste material, and the cost of putting it there was no more than it would have been to have placed it on the Soldiers' Home grounds.

McClennan, he then being receiver, was informed by the engineer officer in charge on behalf of the United States that he would not allow any further payments for work done on the roadway. For a short time afterward, and pending negotiations regarding the matter with the engineer officer, appellant continued dumping material that he wanted to dispose of on the roadway. He finally discontinued work thereon, at which time about 6,000 cubic yards of fill was necessary to complete the roadway. It was subsequently finished by the United States without further cost.

In the final settlement there was deducted from the amount paid a sum equal to such of the fill in the roadway as had been paid for at the rate of 30 cents per cubic yard, amounting to about $12,000.

"On or about February 15, 1904, the government engineer in charge had cross sections taken over the line of the roadway in question, which cross sections were used in computing the amount of work done by the contractor thereon outside of the lines allowed and paid for in the final estimate, and the amount of fill so made and not paid for was found to be 67,578 cubic yards, which, at 30 cents per cubic yard, amounts to $20,273.40."

From these facts the court concluded that appellant was not entitled to recover, and dismissed the petition. Judgment was en-

tered accordingly and this appeal was then prosecuted.

Mr. Chauncey Hackett argued the cause and filed a brief for appellant:

If any doubt remains as to the correct interpretation of the contract, the practical construction of the parties prevails.

Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117; Lowrey v. Hawaii, 206 U. S. 222, 51 L. ed. 1033, 27 Sup. Ct. Rep. 622; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; Chicago v. Sheldon, 9 Wall. 50, 19 L. ed. 594; Old Colony Trust Co. v. Omaha, 230 U. S. 118, 57 L. ed. 1417, 33 Sup. Ct. Rep. 967; Chicago G. W. R. Co. v. Northern P. R. Co. 42 C. C. A. 25, 101 Fed. 795; Atty. Gen. v. Drummond, 1 Drury & War. 353, affirmed in 2 H. L. Cas. 837.

Apart from any rights under the contract, the claimant is entitled to recover upon *quantum meruit*.

Belt v. United States, 15 Ct. Cl. 92; Livingston v. Ackeston, 5 Cow. 531; Hickam v. Hickam, 46 Mo. App. 496; Turner v. Webster, 24 Kan. 38, 36 Am. Rep. 251.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court:

It appears from the findings that the plans showed a roadway bordering the reservoir. This finding seems to be contested by the government, the contention being that where the roadway was to be placed "was merely marked," and no detail whatsoever as to its exact location or dimensions was shown by the plans. The finding, however, is more specific. One of the plans showed the work in general sections and indicated the roadway; another showed finished surfaces, with the roadway thereon; still another showed the entire filtration plant, the road again being indicated, and it was marked again on another plan. Such persistent repetition must have had other purpose than mere designation, and, besides, there were supplemental plans furnished the contractor relating to the roadway, giving detail as to grades. And, further, the engineer in charge gave the "toe of the slope" to the contractor and "from time to time furnished him with the lines showing the direction of the road and the stakes showing the grade." "The lines, slopes, and the character of the material allowed to be deposited thereon" were under his inspection.

The force of these findings is added to by the fact that the engineer first in charge and under whom the work was commenced on the roadway drew the plans and his action was their interpretation. It was not inadvertent. The first payment to the contractor was on a voucher which contained the work on the road as an item of liability, and, though subsequent vouchers omitted such [153] specification, work on the roadway was included in the regular monthly estimates. And this continued until a new engineer came upon the scene. With him came controversy. He not only introduced a new construction of the contract, but so far reversed the construction and action of his predecessor as to deduct in the final settlements the amounts allowed by the latter.

Undoubtedly the contract has ambiguity, and to present and resolve the ambiguity in detail would require a precise and literal examination of the contract. Such examination would greatly and, we think, uselessly, prolong this opinion. We should be brought, nevertheless, to a few broad determining considerations.

The contention of the government is based upon what is said to be the purpose of the contract, which, it is further said, "*so far as appellant was concerned* [italics counsel's], was the construction of the filtration plant proper." The appellant, in opposition, declares that the contract enumerated three kinds of fills "and all other fills and embankments shown by the plans or directed to be made by the engineer officer in charge." Though some doubts beset appellant's contention and some considerations bear against it, there are others which determine for it. The most important of the considerations against it is the charge by the government that the contractor was paid for every yard of excavation, and that the dirt excavated had to be deposited somewhere, and the roadway "was just as convenient a place as any to dispose" of it. And this is given strength by the fact that the contractor had arranged, at a considerable cost, with the Soldiers' Home authorities to dispose of waste material on the grounds of the Soldiers' Home.

But there is the countervailing consideration to which we have adverted, that is, of the action of the engineer first in charge, and it was he who drew the contract. He was there for direction. He considered that the roadway [154] was part of the scheme. He directed and superintended its construction. And it was a systematic structure, not a mere dumping place or deposit for material. It was constructed upon li-

slopes, and grades, and of selected materials. Further, in continued manifestation of his judgment that the contract included it, and in approval of its conformity to the contract, he directed payment for it. There is nothing which reflects upon the sincerity of his judgment, and it is necessarily the important factor in determining the responsibility of the government.

Whether the roadway was necessary or accessory to the filtration plant is not important to consider. We may observe, however, that it was subsequently finished by the United States, and manifestly deemed desirable.

Judgment reversed and cause remanded, with directions to enter judgment for appellant on the findings and in accordance with this opinion.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

ESTEBAN DE LA RAMA, Plff. in Err. and Appt.,
v.
AGUEDA BENEDICTO DE LA RAMA.

(See S. C. Reporter's ed. 154–160.)

Appeal — from Philippine supreme court — local practice — objections raised too late.

1. The Federal Supreme Court will not reverse a decree of the supreme court of the Philippine Islands on objections that a division of the conjugal property could not be asked in a divorce suit in the Philippine courts, but must proceed on the footing of a decree already made, and that the judge of first instance who decided the cause was illegally designated, where such objections were not presented to the court below, nor assigned as error on the appeal.

[For other cases, see Appeal and Error, VIII. j; VIII. m. 1, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — procedure.

2. Due process of law does not forbid the hearing of a cause upon a transcript of evidence formerly heard in court,—especially where the course pursued has the assent of the parties.

[For other cases, see Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

Appeal — from supreme court of Philippine Islands — following decision below.

3. Taking the date of a divorce decree as the date for liquidating the wife's claim for a division of the conjugal property cannot be held erroneous on appeal to the Federal Supreme Court from a decree of the supreme court of the Philippine Islands, on the grounds that there was no formal decree of separation of the property, and no such inventory as was required by law, where there is nothing in the record sufficient to control the opinion of the latter court that the method adopted by the judge of first instance "in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the Code."

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Interest — on judgment — from what time — judicial discretion.

4. The allowance of interest on a decree for the division of the conjugal property from the date of a divorce decree in the wife's favor is within the discretion of the court, notwithstanding the success of the husband in reducing the amount on appeal, where that was the date at which, but for the delays of the law, the wife would have received her dues, the husband having had the use of the money in the meantime.

[For other cases, see Interest, I. d; I. f; Appeal and Error, 4393, 4394, in Digest Sup. Ct. 1908.]

Appeal — mode of review — divorce suit.

5. Appeal, not writ of error, is the proper mode of reviewing in the Federal Supreme Court a decree of the supreme court of the Philippine Islands in a suit by a wife for divorce, alimony *pendente lite*, and a division of the conjugal property.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

[No. 216.]

Submitted April 18, 1916. Decided May 1, 1916.

IN ERROR to and APPEAL from the Supreme Court of the Philippine Islands to review a decree which, on a second appeal, affirmed a decree in favor of the wife in a suit by her for divorce, alimony *pendente lite*, and a division of the conjugal property. Writ of error dismissed. Decree affirmed on appeal.

See same case below, 25 Philippine, 437.

The facts are stated in the opinion.

Mr. Rufus S. Day submitted the cause for plaintiff in error and appellant. Messrs. Charles Edmond Cotterill and Edmund W. Van Dyke were on the brief:

The proceeding for divorce and the proceeding to secure a separation of the property were required by law in the Philippines

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the supreme court of the Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

to be instituted, if at all, in separate actions, and they were, therefore, improperly joined.

1 Ruiz Civil Code, p. 396; 1 Manresa, Comentarios al Codigo Civil Español, p. 396; 9 Code, pp. 769 et seq.

The failure of the supreme court below to hold that the suit ought to have been dismissed by the court of first instance—or to hold, at least, that that part of the demand of the plaintiff which relates to the separation of the conjugal partnership property ought to have been dismissed—is error of which this court may take cognizance even though not mentioned in the assignments of error.

Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502; Gsell v. Insular Collector of Customs, 239 U. S. 93, ante, 163, 36 Sup. Ct. Rep. 39.

The courts below erred in attempting to liquidate the claim of the wife to a share in the conjugal partnership property as of July 5, 1902, the date of the judgment of divorce. The judgment with reference to the wife's claim to such share was a mere money judgment. There should have been an order or decree of separation of the property in question, as required by law, and the liquidation should have been made as of the date of that order or decree. In the absence thereof, neither the court of first instance of Iloilo nor the supreme court of the Islands had jurisdiction to render any judgment whatever in this branch of the case.

9 Manresa, pp. 687, 773; 9 Ruiz, civil code, pp. 184, 208;

The court below erred in affirming that part of the judgment of the court of first instance of Iloilo which allows interest on the amount stated therein from July 5, 1902.

Garrozi v. Dastas, 204 U. S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224; Kneeland v. American Loan & T. Co. 138 U. S. 509, 34 L. ed. 1052, 11 Sup. Ct. Rep. 426; Illinois C. R. Co. v. Turrill, 110 U. S. 301, 28 L. ed. 154, 4 Sup. Ct. Rep. 5.

Messrs. **Frederic R. Coudert** and **Howard Thayer Kingsbury** submitted the cause for defendant in error and appellee:

The trial court had power to award a divorce and liquidate the conjugal property in the same suit.

De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485; De Villanueva v. Villanueva, 239 U. S. 293, ante, 293, 36 Sup. Ct. Rep. 109; De Lesdernier v. De Lesdernier, 45 La. Ann. 1364, 14 So. 191; Lozengheim v. Martin, 7 La. Ann. 180; Duncan v. Brown, 18 N. M. 579, 139 Pac. 140; Howe v. Howe, 4 Nev. 469; Harman v. Harman, 1 Cal. 215; Kashaw v. Kashaw, 3 Cal. 312; Rice v. Rice, 31 Tex. 174.

The judge who rendered the judgment of December 5th, 1910, had power to do so.

McDowell v. United States, 159 U. S. 596, 40 L. ed. 271, 16 Sup. Ct. Rep. 111.

The appellant has no standing to attack in this court either the joinder of relief or the jurisdiction of the trial judge.

The Vaughan (The Telegraph v. Gordon) 14 Wall. 258, 20 L. ed. 807; San Pedro & C. del A. Co. v. United States, 146 U. S. 120, 138, 36 L. ed. 912, 916, 13 Sup. Ct. Rep. 94; McLoughlin v. Raphael Tuck & Sons Co. 191 U. S. 267, 271, 48 L. ed. 178, 24 Sup. Ct. Rep. 105.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit by a wife for divorce, alimony *pendente lite*, and a division of the conjugal property. It has been before this court in the first aspect (201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485), and now comes here on matters affecting the division of property, beginning with the fundamental objection that the division could not be asked in the divorce suit, but must proceed on the footing of a decree already made. As to this it is enough to say that no such error was assigned as a ground for appeal, and the objection comes too late. At the previous stage the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit, and to other allowances claimed, was said to be the basis of our jurisdiction. 201 U. S. 318. De Villanueva v. Villanueva, 239 U. S. 293, 294, ante, 293, 295, 36 Sup. Ct. Rep. 109. The court of first instance had jurisdiction of the subject-matter, and the separation or union of the two causes was merely a question of procedure and convenience. The defendant impliedly [158] admitted the jurisdiction by pleading that there was no common property, and that "therefore" the separation should be denied. After the matter had been adverted to by the trial judge and the joinder declared proper, it was dealt with as legitimate by the supreme court, and upon a petition for rehearing the only objections urged by the defendant concerned matters of detail. There is every reason that the local practice sanctioned in this case by the local courts should not be disturbed.

The next error alleged in argument also was not assigned. It is that Judge Norris, who first heard the evidence, having resigned, Judge McCabe, of the court of first instance, who finally decided the separation of conjugal property, was designated by Judge Ross (before whom otherwise the

case would have come), on the ground that the latter was disqualified; and that Judge Ross had no power to do so under the Code of Civil Procedure then in force. Upon this point again we should not disturb the course adopted by the local tribunals without stronger reasons than are offered here, and therefore do not discuss the question at length. The parties could have agreed in writing upon a judge, and they did agree in writing at a later stage that Judge McCabe should decide the case without waiting for the action of the assessors whom the law provides to assist upon matters of fact. This objection, like the preceding, seems not to have been even suggested to the supreme court of the Philippines. To listen to it now would be not to prevent, but to accomplish, an injustice not to be tolerated except under the most peremptory requirement of law.

The next point argued, again not assigned as error, is that it seems from the opinion of the judge of first instance that the trial was had upon the evidence that had been offered before Judge Norris. If we are to assume the fact, it is a most extraordinary suggestion that, even though the parties seem to have assented to the course [159] pursued, due process of law forbids a hearing upon a transcript of evidence formerly heard in court. We shall say no more upon this point.

The errors that were assigned may be disposed of with equal brevity. The first one is the taking of July 5, 1902, the date of the decree of divorce, afterwards affirmed, as the date for liquidating the wife's claim. It is urged that there was no formal decree of separation of the property, and that until such an order had been made the court had no right to enter a judgment. It also is argued that there was no such inventory as was required by law. But the testimony and other evidence are not before us, and, apart from our often-stated unwillingness to interfere with matters of local administration unless clear and important error is shown, there is nothing in the record sufficient to control the opinion of the supreme court of the Islands that "the method adopted by [the judge of first instance] in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the Code." [25 Philippine, 445.] We disallow the attempt to reopen some questions of detail, such as a charge of estimated profits, upon this and other grounds. See Piza Hermanos v. Caldentey, 231 U. S. 690, 58 L. ed. 439, 34 Sup. Ct. Rep. 253.

The only remaining item is charging interest on the judgment from July 5, 1902. But that was the date at which, but for the delays of the law, the wife would have received her dues, the husband has had the use of the money meanwhile, and we are not prepared to say that it was not at least within the discretion of the court to allow the charge, notwithstanding the success of the husband in reducing the amount on appeal. Stoughton v. Lynch, 2 Johns. Ch. 209, 219; Hollister v. Barkley, 11 N. H. 501, 511. See Barnhart v. Edwards, 128 Cal. 572, 61 Pac. 176; McLimans v. Lancaster, 65 Wis. 240, 26 N. W. 566; Rawlings v. Anheuser-Busch Brewing Co. 69 Neb. 34, 94 N. W. 1001. A discretion is recognized even in actions of tort. Eddy v. [160] Lafayette, 163 U. S. 456, 467, 41 L. ed. 225, 229, 16 Sup. Ct. Rep. 1082; Frazer v. Bigelow Carpet Co. 141 Mass. 126, 4 N. E. 620. The judgment upon the appeal will be affirmed and the writ of error dismissed. De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485; Gsell v. Insular Collector of Customs, 239 U. S. 93, ante, 163, 36 Sup. Ct. Rep. 39.

Writ of error dismissed.

Judgment affirmed.

ELWYN H. JOHNSON, Trustee in Bankruptcy of the Warren Construction Company, Plff. in Err.,

v.

ROOT MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 160–165.)

Bankruptcy — unlawful preference — equitable lien — payment.

A contract between a railway company, a construction company, and the latter's sureties, which, after reciting the controversy as to whether the construction contract had been performed, the filing of claims for liens and attachment suits for more than the sum admitted by the railway company to be due, and the latter company's assertion of its right against the surety companies, fixed a sum to be paid by the railway company in full settlement of the mutual claims between it and the construction company, which sum, with an additional amount to be furnished by the surety companies, should be put into the hands of named trustees "to be used in paying all lienable claims" growing out of the construction contract, created an equitable lien in favor of all alleged liens which the parties should deem to have color of right, and the fund having thus been appropriated and set aside more than four months before bankruptcy proceedings against the construction company were begun, a preference was not created by the formal ascertainment of, and payment to, a specific beneficiary within the four months' period.

[For other cases, see Bankruptcy, VI. b, 2, in Digest Sup. Ct. 1908.]

[No. 308.]

Argued and submitted April 18, 1916. Decided May 1, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which, reversing a judgment of the District Court for the District of Indiana, ordered judgment in favor of the defendant in a suit by a trustee in bankruptcy to recover an alleged preference. Affirmed.

See same case below, 135 C. C. A. 139, 219 Fed. 397.

The facts are stated in the opinion.

Mr. W. H. Thompson argued the cause, and, with Messrs. C. C. Shirley, S. D. Miller, W. H. H. Miller, Fred H. Atwood, Frank B. Pease, Charles O. Loucks, and Vernon R. Loucks, filed a brief for plaintiff in error:

Cases sustaining equitable liens present circumstances essentially different from those involved in the instant case.

Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Van Iderstine v. National Discount Co. 227 U. S. 575, 57 L. ed. 652, 33 Sup. Ct. Rep. 343; Greey v. Dockendorff, 231 U. S. 513, 58 L. ed 339, 34 Sup. Ct. Rep. 166; McDonald v. Daskam, 53 C. C. A. 554, 116 Fed. 276; Ketchum v. St. Louis, 101 U. S. 306, 315, 25 L. ed. 999.

The contract of January 12, 1912, was made more than four months prior to bankruptcy, but the contract of April 10, and the payment made therein, was within the four months' period. The Root Manufacturing Company was not a party to the earlier agreement, but, even if it had been, the transaction would not be deprived of its preferential character by the fact that it was effected in carrying out and performing a contract or other negotiation executed or agreed upon at a time more than four months before bankruptcy proceedings.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74; Re Smith, 176 Fed. 429; Re Great Western Mfg. Co. 81 C. C. A. 341, 152 Fed. 127; Vitzhun v. Large, 162 Fed. 686; Re Dismal Swamp Contracting Co. 135 Fed. 415; Re Ronk, 111 Fed. 154; Long v. Farmers' State Bank, 9 L.R.A.(N.S.) 585, 77 C. C. A. 538, 147 Fed. 360.

To create an equitable lien, there must be a clear intention on the part of the parties to do so.

Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453.

An instrument creating an equitable lien must purport to give an absolute present right. It must purport not to promise, but to transfer the interest.

Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657.

Mr. Frank S. Roby submitted the cause for defendant in error. Mr. Elias D. Salsbury was on the brief:

The payment to the Root Manufacturing Company by Messrs. Littleton and Willson, trustees, with the approval of the bankrupt, the railway company, and the surety companies, was a construction of the contract as applied to that claim, and an interpretation of the term by the parties themselves, and such construction and interpretation will be followed by the courts.

Knox County v. Ninth Nat. Bank, 147 U. S. 91, 99, 37 L. ed. 93, 96, 13 Sup. Ct. Rep. 267; Steinbach v. Stewart, 11 Wall. 566, 20 L. ed. 56; Frazier v. Myers, 132 Ind. 72, 31 N. E. 536.

An equitable lien was created by the agreements between the parties.

Sexton v. Kessler & Co. 225 U. S. 96, 99, 56 L. ed. 995, 1000, 32 Sup. Ct. Rep. 657.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to recover an alleged preference from the defendant in error. The circuit court of appeals reversed a judgment recovered by the plaintiff, and ordered judgment for the defendant. 135 C. C. A. 139, 219 Fed. 397. This writ of error was taken out before the passage of the act of January 28, 1915, chap. 22, § 4, 38 Stat. at L. 803, 804.

The facts are these: On May 9, 1910, the Warren Construction Company, the bankrupt, had contracted to do some construction for a railroad company, receiving monthly payments on account, and agreeing that if at any time there should be evidence of any lien for which the railroad might become liable, and which was chargeable to the Warren Company, the railroad might retain an amount sufficient to indemnify it. Should there prove to be such a claim after the payments were made, the Warren Company agreed to refund all moneys the railroad might be compelled to pay in discharging any lien made obligatory in consequence of the Warren Company's default. The Warren Company gave a bond with sureties for the performance of this contract. Later it made a [163] written subcontract with the Root Manufacturing Company for materials, in which the Root Company in the fullest terms renounced all lien on its own behalf, and contracted that all under it should do the same. Monthly payments were to be made on account and

final payment within forty days after the contract was "fulfilled."

In 1911 the Root Company notified the railroad that it was not being paid, and that it would not furnish more material unless the railroad would see that it was paid. The railroad gave the assurance and the Root Company continued to furnish the materials called for by its contract. Seemingly the payments continued to be unsatisfactory, and on November 18, 1911, after the Root Company had performed its contract, there was unpaid $12,895.34. On November 25, 1911, the Root Company filed statutory notices of its intention to hold a lien upon the railroad's property for the amount then due. On January 12, 1912, after conferences of all parties concerned, a contract was made between the railroad, the Warren Company and its sureties, reciting controversy as to whether the Warren Company's contract had been performed, the filing of claims for liens and attachment suits for more than the sum admitted by the railroad to be due, and the railroad's assertion of its right against the surety companies. This contract fixed $42,000 as a sum to be paid by the railroad in full settlement of the mutual claims between it and the Warren Company, and provided that, with $20,000 to be furnished by the surety companies, the sum should be put into the hands of named trustees, "to be used in paying all lienable claims" growing out of the construction contract. If the fund was not sufficient to pay lienable claims in full, the surety companies were to furnish the additional money necessary. After all lienable claims were paid, the balance, if any, of the fund was to be paid first to reimburse the surety companies for their contribution, [164] and after that to the Warren Company, subject to such attachments as might be filed against the sum.

On April 10, 1912, a written contract was made between the railroad, the sureties, the Warren Company, and the Root Company, which recited the claim of the Root Company and that the railroad had money in its hands, held back under its contract with the Warren Company, for the purpose of protecting the road against liens, and agreed that $6,447.67 should be paid to the Root Company by way of compromise, that the Root Company should assign its claim to the trustee under the former instrument, surrendering to the Warren Company notes for 60 per cent of its claim, and that the trustee should reassign to the Root Company the unpaid portion of its claim when attachments against the fund had been disposed of. The payment was made the same day, and the Root Company executed a release, as agreed. The sum was a larger percentage than will be received by the unsecured creditors of the Warren Company, but a smaller one than that received by any other subcontractors with a lien. The petition in bankruptcy was filed on July 18, 1912, and the above payment was a preference if it stood as a payment to an unsecured creditor in the circumstances on the date when it was made.

The circuit court of appeals held that the instrument of January 12 created an equitable lien that justified the payment, although it was of opinion that the lien asserted by the Root Company could not have been enforced. The plaintiff in error contends that the provision in favor of "lienable claims" was confined to those that were secured by a valid lien. We express no opinion as to whether the lien of the Root Company, asserted against the property of the railroad, could have been defeated by its contract with the Warren Company notwithstanding the Warren Company's default. It is enough that we agree with the ultimate view of the circuit court of [165] appeals. The agreement of January 12 was intended for practical purposes, to clear the railroad property from claims. It contemplated possible controversies, as it provided for costs, but it did not require that every disputed lien should be fought out to the end. It was understood by the parties to extend to the compromise of claims that stood upon debatable ground, as was shown by the agreement under which the payment was made. It set aside a specific fund in a third hand to that end. All the parties acted in good faith. The $42,000 credited to the Warren Company as retained by the railroad was nearly twice what the railroad admitted to be due, apart from the compromise by which it secured the application of that sum to clearing its land. We are of opinion that there is no reasonable doubt that all parties were justified in the course adopted, that the instrument of January 12 created an equitable lien in favor of all alleged liens which the parties should deem to have color of right, and that the fund being thus appropriated and set aside, it does not matter that the formal ascertainment of the specific beneficiary was made within four months of the bankruptcy proceedings. It was well understood before. The Root Company took part in the preliminary discussions, and there can be no doubt that it was expected by all on January 12 that its claim, however disputed, would have to be dealt with when the fund came to be paid out.

Decree affirmed.

[166] LATTA & TERRY CONSTRUCTION COMPANY, Appt.,
v.
BRITISH STEAMSHIP "RAITHMOOR," William Evans, Master and Claimant.[1]

(See S. C. Reporter's ed. 166–177.)

Admiralty jurisdiction — collision with unfinished pier for beacon.

The admiralty jurisdiction embraces a libel *in rem* to recover for the damages negligently inflicted by a colliding vessel upon an unfinished foundation pier (and a temporary platform used in connection with the work of construction) consisting of concrete piles built by a government contractor on the edge of a navigable channel in water some 27 feet deep, and intended to support a beacon to be installed by the United States.

[For other cases, see Admiralty, 187–192, in Digest Sup. Ct. 1908.]

[No. 24.]

Argued January 26, 1916. Decided May 1, 1916.

APPEAL from the District Court of the United States for the Eastern District of Pennsylvania to review a decree which dismissed, for want of jurisdiction, a libel *in rem* in so far as it sought to recover for the damages negligently inflicted by a colliding vessel upon an unfinished pier intended to support a government beacon. Reversed and remanded for further proceedings.

See same case below, 186 Fed. 849.

The facts are stated in the opinion.

Mr. H. Alan Dawson argued the cause, and, with Messrs. Edward J. Mingey and J. Rodman Paul, filed a brief for appellant:

The analogy to an unfinished ship supports the jurisdiction in the case at bar.

Tucker v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195.

The case at bar is ruled by The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46, and the general principles therein announced and applied.

Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 320, 52 L. ed. 508, 512, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125.

Courts of admiralty have taken jurisdiction for damages to the following structures for the reason that they were located in navigable waters and did not concern commerce on land:

(1) A beacon.

The Blackheath, supra.

(2) Submarine cables resting on the bottom of navigable water, notwithstanding connection of the ends with the shore.

Postal Teleg. Cable Co. v. P. Sanford Ross, 221 Fed. 105; The William H. Bailey, 100 Fed. 115, affirmed in 50 C. C. A. 76, 111 Fed. 1006; The Anita Berwind, 107 Fed. 721; The City of Richmond, 43 Fed. 85; Stephens & C. Transp. Co. v. Western U. Teleg. Co. 8 Ben. 502, Fed. Cas. No. 13,371.

(3) Temporary platform structure resting on girders sunk into the bottom of the navigable waters of the Hudson river, and in use by private contractors in the removal of a rock, under contract with the government.

The Senator Rice, 212 Fed. 960.

(4) Injury to a person on a pontoon fastened to the shore by a cable, and used as a landing in connection with a ferry.

The Mackinaw, 165 Fed. 351.

(5) Floating bathhouse moored to the shore by poles and chains, access to it from the shore being had over a gangway of planks.

The M. R. Brazos, 10 Ben. 435, Fed. Cas. No. 9,898.

(6) Floating drydock moored to a wharf.

Simpson v. The Ceres, Fed. Cas. No. 12,881.

(7) Raft of logs in tow of a tug in navigable waters.

The F. & P. M. No. 2, 33 Fed. 511.

(8) Fish nets extending out from the shore into navigable waters of Albermarle sound.

The Armorica, 189 Fed. 503.

(9) Steel blooms thrown into navigable water through the breaking down of a defective wharf.

The City of Lincoln, 25 Fed. 835.

(10) Salvage by a tug in extinguishing a fire on a steamship in drydock, undergoing repairs.

The Jefferson, 215 U. S. 130, 54 L. ed. 125, 30 Sup. Ct. Rep. 54, 17 Ann. Cas. 907.

(11) Hire of a dredge while engaged in a partly land transaction in dredging material from a navigable stream for the purpose of piping it onto the land in aid of a land project.

Bowers Hydraulic Dredging Co. v. Federal Contracting Co. 148 Fed. 290.

(12) Repairs to an intrastate canal boat in drydock.

The Robert W. Parsons (Perry v. Haines) 191 U. S. 17, 48 L. ed. 73, 24 Sup. Ct. Rep. 8.

(13) Injury to a floating elevator which was anchored to and moved up and down upon wooden spuds imbedded in the mud under navigable waters, where she was en-

[1] This case is reported by the Official Reporter under the title of "The Raithmoor."

gaged in transferring grain from a schooner to canal boats.

The Frank R. Gibson, 87 Fed. 364.

Courts of admiralty have declined to take jurisdiction of injuries to the following classes of objects upon the ground that they were land structures:

(1) Warehouse on wharf, houses on shore, and contents of warehouse on shore.

The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; Ex parte Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254.

(2) Injuries to a pier, wharf, or dock, and to persons or property thereon.

Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125; The Mary Stewart, 10 Fed. 137; The Mary Garrett, 63 Fed. 1009; The Albion, 123 Fed. 189; Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 Fed. 845; The Curtin, 152 Fed. 588; The Haxby, 94 Fed. 1016; The Ottawa, Browne, Adm. 356, Fed. Cas. No. 10,616.

(3) Injuries to bridges which immediately concern commerce upon land.

The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416; Re Rock Island Bridge, 6 Wall. 213, 18 L. ed. 753; Milwaukee v. The Curtis, 3 L.R.A. 711, 37 Fed. 705; The John C. Sweeney, 55 Fed. 540; The Neil Cochran, Browne, Adm. 162, Fed. Cas. No. 10,087.

(4) A marine railway, the upper end of which was on shore, and securely and permanently fastened to the shore, but the ways of which ran down into navigable water, merely, however, to facilitate the transfer of vessels from the water to the shore, the structure being likened by the court to a wharf built out into the stream.

The Professor Morse, 23 Fed. 803.

(5) The surface part of borings made to locate an aqueduct under the river for the municipal purpose of supplying water to a city.

The Poughkeepsie, 162 Fed. 494, affirmed in 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687.

(6) Temporary platform resting on the bottom of a navigable river and used in drilling or boring test holes in the work of building a tunnel or bridge (which does not clearly appear) for a transit route from New York city to Brooklyn.

United Engineering & Contracting Co. v. New York, N. H. & H. Tug Transfer No. 5, cited in The Poughkeepsie, 162 Fed. 495.

(7) A derick consisting of an upright, the lower extremity of which rested on the soil of a shoal in Long Island sound, and in use in erecting a pier for a lighthouse at a place which was not in navigable water, and had in fact become a part of the land before the pier construction was begun; the injury to the derrick being caused by a schooner striking in navigable water the outer end of one of the guy lines which ran from the derrick to an anchorage in the soil under navigable water off the shoal or land.

The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302.

(8) Goods lost in navigable waters through being thrown from a wharf as a result of the collision by a vessel with the wharf.

The Haxby, 95 Fed. 170.

The following additional cases contain instructive discussions of the rule that locality is the test of jurisdiction in tort:

The Belfast, 7 Wall. 624, 637, 19 L. ed. 266, 269; Manro v. Almeida, 10 Wheat. 473, 6 L. ed. 369; Waring v. Clarke, 5 How. 441, 459, 12 L. ed. 226, 235; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 394, 12 L. ed. 465, 487; Ex parte Easton, 95 U. S. 68, 72, 24 L. ed. 373, 374; Leathers v. Blessing, 105 U. S. 626, 630, 26 L. ed. 1192, 1194; Panama R. Co. v. Napier Shipping Co. 166 U. S. 280, 285, 41 L. ed. 1004, 1005, 17 Sup. Ct. Rep. 572; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619; The Strabo, 90 Fed. 110; Hermann v. Port Blakely Mill Co. 69 Fed. 646; The H. S. Pickands, 42 Fed. 239; Etheridge v. Philadelphia, 26 Fed. 43; The C. Accame, 20 Fed. 642; Leonard v. Decker, 22 Fed. 741; The Florence, 2 Flipp. 56, Fed. Cas. No. 4,880; Steele v. Thacher, 1 Ware, 85, Fed. Cas. No. 13,348.

A court of admiralty having rightfully taken jurisdiction of the damage to appellant's pile driver and barge, should retain it to redress the entire wrong inflicted by the same maritime tort.

The St. Lawrence (Meyer v. Tupper) 1 Black, 522, 527, 17 L. ed. 180, 183; New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 22, 20 L. ed. 90, 96; Benedict, Adm. 3d ed. §§ 329, 358; 1 Kent, Com. 14th ed. p. 379; Toledo S. S. Co. v. Zenith Transp. Co. 106 C. C. A. 501, 184 Fed. 391; The Juliana, 2 Dodson, Adm. 503; The Harriett, 1 W. Rob. 183; The Virgin v. Vyfhius, 8 Pet. 538, 549, 8 L. ed. 1036, 1040; American Ins. Co. v. Johnson, 1 Blatchf. & H. 9, Fed. Cas. No. 303; Dean v. Angus, Bee, 360, Fed. Cas. No. 3,702; The J. E. Rumbell, 148 U. S. 1, 15, 37 L. ed. 345, 348, 13 Sup. Ct. Rep. 498; Andrews v. Wall, 3 How. 568, 573, 11

L. ed. 729, 731; The Lottawanna (Wilson v. Bell) 20 Wall. 201, 223, 22 L. ed. 259, 263; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 582, 583, 22 L. ed. 654, 664, 665; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 406, 52 L. ed. 264, 270, 28 Sup. Ct. Rep. 133; M'Donough v. Dannery, 3 Dall. 188, 1 L. ed. 563; Waring v. Clarke, 5 How. 441, 12 L. ed. 226; Erie R. Co. v. Erie & W. Transp. Co. 204 U. S. 220, 51 L. ed. 450, 27 Sup. Ct. Rep. 246; United States v. Cornell S. B. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. ed. 1058; Schuchardt v. Babbidge, 19 How. 239, 15 L. ed. 625; The John E. Mulford, 18 Fed. 455; The Mariska, 47 C. C. A. 115, 107 Fed. 989; Leland v. The Medora, 2 Woodb. & M. 93, Fed. Cas. No. 8,237.

Mr. Henry R. Edmunds argued the cause and filed a brief for appellee:

The purpose for which a thing is intended does not fix its character, as far as admiralty jurisdiction is concerned.

People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961; Roach v. Chapman, 22 How. 129, 16 L. ed. 294; The John B. Ketcham, 2d, 97 Fed. 872; The Paradox, 61 Fed. 860; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; The William Windom, 73 Fed. 496.

An injury to a structure affixed to the land, and wholly or partially supported by it, is not capable of being redressed in admiralty.

The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; The Professor Morse, 23 Fed. 803; The Haxby, 94 Fed. 1016, 95 Fed. 170; The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 18 L. ed. 125; The John C. Sweeney, 55 Fed. 540; Martin v. West, 222 U. S. 191, 56 L. ed. 159, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42; Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 30 L. ed. 447, 7 Sup. Ct. Rep. 254; Milwaukee v. The Curtis, 3 L.R.A. 711, 37 Fed. 705.

Locality is not the sole test of jurisdiction in cases of tort.

Cleveland Terminal & V. R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 125.

The jurisdiction of the Federal courts in admiralty cases is given by the Constitution. Not even Congress has power to add anything to it. If a subject is not within this class, the courts can take no cognizance of it, whether or not it is connected, as to time and place, with some others which they clearly have power to adjudicate.

The St. David, 209 Fed. 985.

Mr. Justice Hughes delivered the opinion of the court:

The appellant filed a libel *in rem* in the admiralty against the steamship "Raithmoor" to recover damages for tort. The steamship, coming up the Delaware river on the evening of July 18, 1909, collided with a scow and pile driver belonging to the appellant, and also with a structure which the appellant was erecting for the United States to serve as a beacon, and with a temporary platform used in connection with the work of construction. For the injury to the scow and pile driver a decree was entered in favor of the libellant. But the district court [173] held that there was no jurisdiction in the admiralty of the claim for the damage to the structure and platform, and the libellant appeals. The Raithmoor, 186 Fed. 849.

The district court thus states the character and location of the structure:

"The company" (the appellant) "was executing an independent contract with the United States, which bound them to furnish the necessary materials, labor, plant, etc., and to erect in place a foundation pier to receive a gas beacon. The work was under the continual supervision of a government official, but had neither been finished nor accepted. The structure was to consist of three cylindrical piles of reinforced concrete to be sunk about 19½ feet into the bottom of the river, and to project 12 feet above mean high water, these to be covered with a sheet steel cap. The piles were to be encased in steel and to be protected also by depositing rip-rap around them to a specified height. When completed, the pier was to be used solely as a beacon on the edge of a navigable channel that has not yet been made ready, and the government was to install upon the cap a lamp and other appliances. The site is ¾ of a mile from the eastern or New Jersey shore, and about 2 miles from the western or Delaware shore, of the river, and is surrounded by navigable water, about 27 feet deep at low tide. The work was begun in June, and at the time of the collision was approaching completion. The piles were in place, and not much remained to be done except to put the metal cap into place and deposit the rip-rap. The necessities of the work required a temporary platform to be built close to the concrete piles. This was of wood, about 15 feet square, and rested upon wooden piling driven into the bottom of the river." Id. p. 850.

The decisions of this court with respect to the jurisdiction [174] of the admiralty in cases of tort make the question to be determined a very narrow one. In The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 36, 18 L. ed. 125, 128, it was broadly declared that "the whole, or at least the substantial, cause of action, arising out of the wrong, must be complete within the local-

ity upon which the jurisdiction depends—on the high seas or the navigable waters." Accordingly it was held that a libel for damage to a wharf and storehouses, caused by a fire started on a vessel through negligence, was beyond the limit of admiralty cognizance, as the damage was wholly done, and the wrong was thus consummated, upon the land. Upon this ground, the jurisdiction of the district court to entertain a petition for the limitation of the liability of the shipowner in such a case was denied in Ex parte Phenix Ins. Co. 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. The principle was restated in Johnson v. Chicago & P. Elevator Co. 119 U. S. 388, 397, 30 L. ed. 447, 7 Sup. Ct. Rep. 254. And see Knapp S. & Co. Co. v. McCaffrey, 177 U. S. 638, 643, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824; Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 411, 45 L. ed. 1155, 1159, 21 Sup. Ct. Rep. 831. But in The Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct. Rep. 46, a distinction was drawn, and the jurisdiction of the admiralty was upheld in the case of an injury caused by a vessel in negligently running into a beacon which stood 15 or 20 feet from the channel of Mobile river, or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. The court pointed out the essential basis of the decision, in saying: "It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea." (Id. p. 367.) It was suggested in the concurring opinion of Mr. Justice Brown (Id. p. 368) that the decision [175] practically overruled the earlier cases, and that it recognized the principle of the English statute extending the jurisdiction of the admiralty court to "any claim for damages by any ship." This consequence, however, was expressly denied in Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co. 208 U. S. 316, 320, 52 L. ed. 508, 512, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215. In that case it was decided that the admiralty did not have jurisdiction of a claim for damages caused by a vessel adrift, through its alleged fault, to the center pier of a bridge spanning a navigable river and to a shore abutment and dock. Referring to The Blackheath, and drawing the distinction we have noted, the court said: "The damage" (that is, in The Blackheath) "was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function. . . . But the bridges, shore docks, protection piling, piers, etc." (of the Cleveland Terminal Company) "pertained to the land. They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore, and aids to commerce on land as such." The decision in The Troy, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416, was to the same effect. The steamer Troy had collided with the center pier of a swinging span over the St. Louis river, a navigable stream, and the jurisdiction of the admiralty of a libel for the injury was denied. See also Phœnix Constr. Co. v. The Poughkeepsie, 212 U. S. 558, 53 L. ed. 651, 29 Sup. Ct. Rep. 687; Martin v. West, 222 U. S. 191, 197, 56 L. ed. 159, 162, 36 L.R.A.(N.S.) 592, 32 Sup. Ct. Rep. 42.

If, then, in the present instance, the metal cap of the beacon had been in place, the rip-rap deposited, and the beacon put into actual service, the case would fall exactly within the ruling of The Blackheath, and the admiralty would have jurisdiction although the structure was attached to the bottom. There would be no difference in the two cases which would afford the slightest ground for argument. If, on the other hand, simply because of the [176] incompleteness of the beacon, it is to be exclusively identified with the land, and its intended purpose is to be disregarded, the admiralty would have no jurisdiction. We think that a distinction based solely on the fact that the beacon was not fully completed would be a needless refinement,—a nicety in analysis not required by reason or precedent. We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character. See The Plymouth, supra; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58–61, 58 L. ed. 1208, 1211, 1212, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733, and cases there cited. The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation, and while it had not yet been finished and accepted, it was being erected

under the constant supervision of a government inspector acting under the authority of the United States in the improvement and protection of navigation. It is urged that the government might abandon its plan; but there has been no abandonment. The question is not as to an abandoned mass, but as to a beacon in course of erection. Even a completed beacon might be abandoned, and whatever question might arise in such a case is not presented here. Again, an analogy is suggested to the case of a vessel which is being constructed on shore, but the argument falls short, as it is to be remembered that as soon as a vessel is launched, although still incomplete, it is subject to the admiralty jurisdiction. Tucker v. Alexandroff, 183 U. S. 424, 438, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195. This is not the case of a structure which at any time was identified with the shore, but, from the beginning [177] of construction, locality and design gave it a distinctively maritime relation. When completed and in use, its injury by a colliding ship would interfere, or tend to interfere, with its service to navigation; and, while still incomplete, such an injury would tend to postpone that service. We know of no substantial reason why the jurisdiction of the admiralty should be sustained in the one case and denied in the other.

With respect to the temporary platform, it is to be observed that this was a mere incident to the structure, and as such the jurisdiction would extend to the claim for the damage to it.

The decree, so far as it dismissed the libel for want of jurisdiction, is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, Plff. in Err.,
v.
MARGARET HARRINGTON.

(See S. C. Reporter's ed. 177-180.)

Master and servant — employers' liability — when servant is engaged in interstate commerce.

A member of a railway yard switching crew engaged in switching loaded coal cars belonging to the railway company from a storage track to a coal shed or chutes was not then employed in interstate commerce within the meaning of the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), although the coal thus placed was to be used by locomotives in interstate hauls.

[For other cases, see Master and Servant, II., in Digest Sup. Ct. 1908.]

[No. 853.]

Submitted April 17, 1916. Decided May 1, 1916.

IN ERROR to the Kansas City Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, in favor of plaintiff in an action against a railway company for the wrongful death of an employee. Affirmed.

See same case below, — Mo. App. —, 180 S. W. 443.

The facts are stated in the opinion.

Messrs. O. M. Spencer, William Warner, Oliver H. Dean, and H. M. Langworthy submitted the cause for plaintiff in error. Mr. William D. McLeod was on the brief:

The deceased was engaged and employed in interstate commerce.

Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 153, 57 L. ed. 1125, 1128, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Kamboris v. Oregon-Washington R. & Nav. Co. 75 Or. 358, 146 Pac. 1097; Barlow v. Lehigh Valley R. Co. 158 App. Div. 768, 143 N. Y. Supp. 1053; Montgomery v. Southern P. Co. 64 Or. 597, 47 L.R.A.(N.S.) 13, 131 Pac. 507; Cousins v. Illinois C. R. Co. 126 Minn. 172, L.R.A. —, —, 148 N. W. 58, 6 N. C. C. A. 182; Ambruster v. Chicago, R. I. & P. R. Co. 166 Iowa, 155, 147 N. W. 337; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1; Law v. Illinois C. R. Co. L.R.A. 1915C, 17, 126 C. C. A. 27, 208 Fed. 869; Great Northern R. Co. v. Knapp, 240 U. S. 464, ante, 745, 36 Sup. Ct. Rep. 399.

Mr. J. G. L. Harvey submitted the cause for defendant in error:

An employee engaged in switching company coal from the company's storage track to its warehouse, especially when the coal

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

came from the railway company's mine, all within the state of Missouri, is not engaged in interstate commerce within the purview of the Federal employers' liability act of April 22, 1908, and amendments thereto of 1910.

Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648; Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, ante, 436, 36 Sup. Ct. Rep. 188.

Mr. Justice **Hughes** delivered the opinion of the court:

Margaret Harrington brought this action to recover damages for the death of her husband, Patrick Harrington, a switchman employed by the plaintiff in error. She obtained judgment under the state law, the plaintiff in error contending unsuccessfully that the decedent was engaged in interstate commerce and that the case was governed by the Federal employers' liability act. 180 S. W. 443. The state court said, in its statement of facts:

"Defendant owns and operates a system of railroads covering this and a number of other western states and is a common carrier of both interstate and intrastate traffic. Its terminal yards at Kansas City are in Missouri and are an important center for the handling of both kinds of business originating upon and confined to defendant's lines, as well as for the interchange of business with other interstate railroads. Locomotives and cars [179] used in both kinds of traffic are received, sent out, cared for, and repaired in the yards. The switching crew of which Harrington was a member did not work outside of this state, and was engaged, at the time of his death, in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives of all classes, some of which were engaged or about to be engaged in interstate and others in intrastate traffic. It may be conceded, as argued by defendant, that none of its locomotives or cars was set apart for service only in intrastate commerce. Defendant operated local trains from Kansas City to terminal points in this state which carried only intrastate commerce, but the locomotives and cars of such trains were subject to be diverted to other trains engaged in interstate commerce."

The plaintiff in error takes exception to the statement in part, asserting that there was no evidence that any of the locomotives, which were supplied with fuel from the coal chutes, were engaged exclusively in intrastate commerce, or that any of the defendant's trains within the state were engaged exclusively in that commerce. For the present purpose, we may assume the fact to be as stated by the plaintiff in error, and we may also assume, as it insists, that there was no evidence that the coal had been brought from mines within the state of Missouri or from mines owned by the plaintiff in error. With the movement of the coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the company, and "had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident." So, also, as the question is with respect to the employment of the decedent at the time of the injury (Illinois [180] C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls.

As we have pointed out, the Federal act speaks of interstate commerce in a practical sense suited to the occasion, and "the true test of employment in such commerce in the sense intended is, Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, ante, 436, 438, 36 Sup. Ct. Rep. 188, and cases there cited. Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use. It has been held that an employee of the carrier, while he is mining coal in the carrier's

colliery, intended to be used by its interstate locomotives, is not engaged in interstate commerce within the meaning of the Federal act (Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 36 Sup. Ct. Rep. 160), and there is no distinction in principle between the two cases. In Great Northern R. Co. v. Knapp, 240 U. S. 464, ante, 745, 36 Sup. Ct. Rep. 399, the question whether the employee was engaged in interstate commerce was not presented, as the application of the Federal statute was conceded in the state court.

Judgment affirmed.

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[181] KANSAS CITY SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
MRS. NORA M. JONES, Administratrix of the Succession of T. A. Jones, Deceased.

(See S. C. Reporter's ed. 181–183.)

Error to state court — prejudicial error — employers' liability — excluding evidence of contributory negligence.

Reversible error is committed by the highest court of a state in ruling that evidence of contributory negligence in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), which it found that the trial court had rejected for a wrong reason, *viz.*, because contributory negligence was not pleaded, was nevertheless properly excluded because it was not offered for the specific purpose of mitigating the damages, where there was no settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered.

[For other cases, see Appeal and Error, 5051–5065, in Digest Sup. Ct. 1908.]

[No. 492.]

Argued April 3 and 4, 1916. Decided May 1, 1916.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which affirmed a judgment of the District Court of Caddo Parish, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 137 La. 178, 68 So. 401.

The facts are stated in the opinion.

Mr. S. W. Moore argued the cause, and, with Messrs. F. H. Moore and J. D. Wilkinson, filed a brief for plaintiff in error:

The supreme court of Louisiana erroneously held that, although the defendant had the right to offer such evidence in mitigation of damages, such evidence, in the present case, was properly excluded, since the defendant, in offering the evidence, did not expressly restrict it to that specific purpose.

38 Cyc. 1340; Buckstaff v. Russell & Co. 151 U. S. 626, 638, 38 L. ed. 292, 296, 14 Sup. Ct. Rep. 448; McAfee v. Crofford, 13 How. 447, 456, 14 L. ed. 217, 221; People v. Doyle, 21 Mich. 227; State v. Farmer, 84 Me. 440, 24 Atl. 985; Pegg v. Warford, 7 Md. 582, 607; Wigmore, Ev. § 13; Clark v. Hull, 184 Mass. 164, 68 N. E. 60; Ponder v. Cheeves, 104 Ala. 307, 16 So. 145; Farnsworth v. Nevada Co. 42 C. C. A. 509, 102 Fed. 578; Mighell v. Stone, 175 Ill. 261, 51 N. E. 906; Hubbard v. Allyn, 200 Mass. 166, 86 N. E. 356; Emrich v. Union Stock Yard Co. 86 Md. 482, 38 Atl. 943; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; Morris v. Atlantic Ave. R. Co. 116 N. Y. 552, 22 N. E. 1097; Hauff v. South Dakota C. R. Co. 34 S. D. 183, 147 N. W. 986; Birmingham R. Light & P. Co. v. Barrett, 179 Ala. 274, 60 So. 262; Coolidge v. Boston Elev. R. Co. 214 Mass. 568, 102 N. E. 74; Mitchell v. Harcourt, 62 Iowa, 349, 17 N. W. 581; Calvert County v. Gantt, 78 Md. 286, 28 Atl. 101, 29 Atl. 610; Re Potter, 161 N. Y. 84, 55 N. E. 387; Gunn v. Ohio River R. Co. 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465; Guertin v. Hudson, 71 N. H. 505, 53 Atl. 736; Bell v. Missouri, K. & T. R. Co. 36 Tex. Civ. App. 569, 82 S. W. 1073; Shumard v. Johnson, 66 Tex. 70, 17 S. W. 398; Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447; Aughey v. Windrem, 137 Iowa, 315, 114 N. W. 1047; Union Sav. Asso. v. Edwards, 47 Mo. 445; Ft. Worth & D. C. R. Co. v. Harlan, — Tex. Civ. App. —, 62 S. W. 971; Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791; Kerbaugh v. Caldwell, 80 C. C. A. 470, 151 Fed. 195, 10 Ann. Cas. 453; O'Connell v. Cox, 179 Mass. 250, 60 N. E. 580; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Fidelity & D. Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444; Illinois Steel Co. v. Paczocha, 139 Wis. 23, 119 N. W. 550; Smith v. Smith, 106 Ind. 43, 5 N. E. 411; Keesling v. Doyle, 8 Ind. App. 43, 35 N. E. 126; Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On error to state courts in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

Fed. 143, 14 Am. Neg. Rep. 678; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. 64 C. C. A. 180, 129 Fed. 677; Stanley v. Beckham, 82 C. C. A. 304, 153 Fed. 155; Prettyman v. United States, 103 C. C. A. 384, 180 Fed. 38; Himrod v. Ft. Pitt Min. & Mill. Co. 121 C. C. A. 186, 202 Fed. 724; Fortunich v. New Orleans, 14 La. Ann. 115; Thompson v. Chauveau, 6 Mart. N. S. 462; Casper v. Prosdame, 46 La. Ann. 36, 14 So. 317.

Since the rulings complained of by defendant were rulings concerning questions of law, including the question as to the legal effect of the evidence as to contributory negligence, and were with direct reference to the denial to defendant of a right or immunity claimed under the Federal employers' liability act, they constitute Federal questions reviewable by this court.

Chapman & D. Land Co. v. Bigelow, 206 U. S. 41, 51 L. ed. 953, 27 Sup. Ct. Rep. 679; Stanley v. Schwalby, 162 U. S. 255, 278, 40 L. ed. 960, 968, 16 Sup. Ct. Rep. 754; Kansas City Southern R. Co. v. C. H. Albers Commission Co. 223 U. S. 591, 56 L. ed. 565, 32 Sup. Ct. Rep. 316; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

Mr. Leon R. Smith argued the cause, and, with Messrs. Newton C. Blanchard and Otis W. Bullock, filed a brief for defendant in error:

When the offer of testimony includes that which is admissible with that which is not, and the competent and incompetent are blended together, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made.

5 Jones, Ev. § 894, p. 377; Farleigh v. Kelley, 28 Mont. 421, 63 L.R.A. 319, 72 Pac. 756; Vurpillat v. Zehner, 2 Ind. 397, 28 N. E. 556; St. Louis, I. M. & S. R. Co. v. Hendricks, 48 Ark. 177, 3 Am. St. Rep. 220, 2 S. W. 783, 8 Am. Neg. Cas. 37; Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686; Cole v. Horton, — Tex. Civ. App. —, 61 S. W. 503; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; Over v. Schiffling, 102 Ind. 191, 26 N. E. 91.

Averments of a Federal question to give jurisdiction to this court to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case here from the state court intended to assert a Federal right.

Mutual L. Ins. Co. v. McGrew, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix) 185 U. S. 112, 46 L. ed. 820, 22 Sup. Ct. Rep. 581; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 488, 56 L. ed. 1171, 1176, 32 Sup. Ct. Rep. 790; Benson v. United States, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60; Jacobi v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48.

It is essential that the record should disclose not only that the alleged right, privilege, or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed.

Clark v. Pennsylvania, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113.

It is not error to exclude evidence, admissible for one purpose, when offered for another specific purpose for which it is inadmissible.

Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; Hamberg v. St. Paul, F. & M. Ins. Co. 68 Minn. 335, 71 N. W. 388; Howard v. Vaughan-Monning Shoe Co. 82 Mo. App. 405; Root v. Monroeville, 16 Ohio C. C. 617, 4 Ohio C. D. 53; Stickney v. Hughes, 12 Wyo. 397, 75 Pac. 945, 13 Wyo. 257, 79 Pac. 922.

Generally, in order to predicate error on the overruling of an objection to testimony, specific ground of objection must have been brought to the attention of the trial court prior to the ruling. But, where a general objection to evidence is sustained, the party against whom the ruling was made cannot urge as a ground of reversal that the objection was not specific.

Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538; International Harvester Co. v. McKeever, 21 S. D. 91, 109 N. W. 642.

While the trial court was not bound to seek grounds for excluding evidence upon a general objection thereto, if it did so, and found a valid objection, the person offering it cannot complain.

Adams v. Southern R. Co. 166 Ala. 449, 51 So. 987.

If the exclusion of certain evidence is proper on any ground, the cause will not be reversed because the objection to it was not sufficiently definite, unless the objection not urged might have been obviated.

Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

Mr. Justice McReynolds delivered the opinion of the court:

Claiming under the Federal employers'

liability act (chap. 149, 35 Stat. at L. 65, chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662), [182] defendant in error brought this suit in a state court against the railroad company to recover damages resulting from her husband's death by accident while employed as engineer on a passenger train. A loaded car, having escaped from the switching crew, ran down a long grade, struck his engine with great violence as it was rounding a curve near the Shreveport yard, and killed him.

The company denied negligence on its part, but interposed no plea setting up the defense of contributory negligence. A jury found for the administratrix, and judgment thereon was affirmed by the supreme court of the state.

During cross-examination of the fireman, counsel attempted to show that the engineer was negligent in not having his train under proper control. The court sustained an objection "to any evidence as to contributory negligence as same is not pleaded." Proper exception was taken and duly noted. Thereupon, the record recites, "counsel for plaintiff asks that this objection and ruling and bill of exceptions be made general to apply to all such evidence and it is so ordered." Upon rehearing the supreme court held evidence of contributory negligence, though not pleaded, and inadmissible to defeat a recovery, should have been received in mitigation of damages if offered for that specific purpose. But it said the evidence in question was properly excluded because tendered without restriction.

We have been cited to no authority showing a settled local rule requiring counsel, without inquiry by the court, to announce in advance the purpose for which evidence is tendered. Earlier cases in Louisiana lend support to the contrary and commonly approved practice. Thompson v. Chauveau, 6 Mart. N. S. 458, 461; Hitchcock v. North, 5 Rob. (La.) 328, 329, 39 Am. Dec. 540; Fortunich v. New Orleans, 14 La. Ann. 115; Caspar v. Prosdame, 46 La. Ann. 36, 14 So. 317. See McAfee v. Crofford, 13 How. 447, 456, 14 L. ed. 217, 221; Buckstaff v. Russell & Co. 151 U. S. 626, 636, 38 L. ed. 292, 296, 14 Sup. Ct. Rep. 448; Farnsworth v. Nevada Co. 42 C. C. A. 500, 102 [183] Fed. 578, 580; Hubbard v. Allyn, 200 Mass. 166, 171, 86 N. E. 356; Mighell v. Stone, 175 Ill. 261, 262, 51 N. E. 906.

It is declared by the act of Congress upon which the suit is based:—

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . ."

Manifestly, under this provision, a defendant carrier has the Federal right to a fair opportunity to show in diminution of damages any negligence attributable to the employee.

The state supreme court upheld the railway company's claim of right to show contributory negligence under its general denial; but the trial court emphatically denied this and positively excluded all evidence to that end. As, under the Federal statute, contributory negligence is no bar to recovery, the plain purpose in offering the excluded evidence was to mitigate damages. In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the supreme court had been sustained, it could have been easily obviated; but counsel had no reason to anticipate such a ruling, and certainly, we think, were not required to do so at their peril.

Plaintiff in error has been improperly deprived of a Federal right. The judgment below is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[184] MARYLAND DREDGING & CONTRACTING COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 184–190.)

Public contracts — delay in completing — liquidated damages — unforeseen condition — extension of time.

The encountering of the stumps and roots of a submerged forest in excavating a channel for the United States does not relieve the contractor from liability under his contract to pay the stipulated liquidated damages and the additional cost of supervision and inspection in case the work is not finished in time, where the Chief Engineer refused to sanction any extension of time, and the contract, which makes time of its essence, provides that if completion is delayed by strikes, epidemics, quarantine restrictions, or by the "abnormal force or violence of the elements," additional time may, with the sanction of the Chief Engineer, be allowed, the specifications further stating that the time allowed is considered sufficient "unless extraordinary and unforeseeable conditions super-

vene," and warning each bidder to examine and decide for himself the character of the material to be excavated, as no allowance will be made except for the removal of such materials as "solid rock, large boulders, and compact gravel."

[For other cases, see United States, VI. e, in Digest Sup. Ct. 1908.]

[No. 310.]

Argued April 25, 1916. Decided May 8, 1916.

APPEAL from the Court of Claims to review a judgment dismissing, upon demurrer, a petition for the recovery from the United States of a part of the contract price of a public improvement, withheld because of delay in completion. Affirmed.

See same case below, 49 Ct. Cl. 710.

The facts are stated in the opinion.

Mr. C. C. Calhoun argued the cause, and, with Messrs. D. B. Henderson and J. Barrett Carter, filed a brief for appellant:

The word "such," as here used, meant of like kind or character in regard to the difficulty in handling or the cost of removing, and was used to protect the contractor against just such hardship as was encountered.

Com. v. Miller, 3 Cush. 243; Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488; Ogden v. Glidden, 9 Wis. 46; Travers v. Wallace, 93 Md. 507, 49 Atl. 415.

The use of the terms "abnormal force or violence of the elements" clearly indicates the purpose of the government to give relief to the contractor in the event it encountered any "extraordinary and unforeseeable" obstruction furnished by nature.

Baily v. De Crespigny, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595.

The phrases contained in article 5 of the contract, "by abnormal force and violence of the elements," and in § 16 of the specifications, "unless extraordinary and unforeseeable conditions supervene," are equivalent to and should be given the same meaning, force, and effect as the well-known phrase "act of God," used in contracts, as clearly appears from the following:

Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 714, 64 Am. Dec. 394; 1 Cyc. 758; 1 Words & Phrases, 118.

If this equivalent phrase, "act of God," had been used in the contract and specifications, instead of the phrases which were used, there can be no doubt but that the contractor, upon the principle announced by the following authorities, would have been entitled to an extension of time on account of encountering this submerged forest at the point and under the conditions alleged in the amended petition.

Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Bullock v. White Star S. S. Co. 30 Wash. 448, 70 Pac. 1106; 1 Words & Phrases, 119.

When Captain Brown, the engineer in charge, once reached the conclusion that the encountering of the submerged forest entitled appellant to an extension of time, his decision was binding upon the government, and he could not thereafter decide this identical question otherwise.

United States v. Gleason, 175 U. S. 589, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; United States v. Barlow, 184 U. S. 123, 46 L. ed. 463, 22 Sup. Ct. Rep. 468; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 187, 34 L. ed. 917, 11 Sup. Ct. Rep. 290.

The construction which the parties themselves have placed upon the contract should control.

District of Columbia v. Gallaher, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585; Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117.

A sum stipulated to be paid as liquidated damages on the breach of an agreement, where no actual damage resulted therefrom, constitutes a penalty, although there was no ambiguity or obscurity in the words or language employed.

1 Sedgw. Damages, 9th ed. p. 779; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; Van Buren v. Digges, 11 How. 461, 13 L. ed. 771.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

Unforeseen difficulties, however great, will not excuse failure to perform a contract.

Carnegie Steel Co. v. United States, 240 U. S. 156, ante, 576, 36 Sup. Ct. Rep. 342; Dermott v. Jones (Ingle v. Jones), 2 Wall. 1, 7, 8, 17 L. ed. 762, 764; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240; The Harriman, 9 Wall. 161, 19 L. ed. 629.

The case of the United States v. Bethlehem Steel Co. 205 U. S. 105, 119, 51 L. ed. 731, 736, 27 Sup. Ct. Rep. 450, is conclusive of the right of the government to charge liquidated damages without a showing of actual damages in the premises.

[186] Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a judgment of the court of claims dismissing the claimant's petition upon demurrer. On August 15, 1908, the claimant made a contract with Captain Brown of the Engineers, acting for the United States, to excavate a channel from Beaufort inlet to Pamlico sound, through Core and Adams creeks, in conformity with specifications made part of the contract. It was approved on September 10, and required the work to be begun within forty-five days after date of notification of approval, September 14, and to be completed within eighteen months. The work not having been finished on time, $7,320 of the agreed compensation was withheld as liquidated damages, and $210.50 as additional costs of superintendence and inspection, $7,530.50 in all, for which sum this suit is brought.

The petition alleges that after getting through Core creek to and through the headwaters of Adams creek to a point on tide water about 5 miles from its mouth, where for a mile and a half it averages more than 1,200 feet wide, and for the next 3 miles and a half 2,500 feet, the stumps and roots of a submerged forest were encountered at about 8 feet below the bottom of the water, which made it impossible to do the work with the ordinary machinery and in the ordinary way, or to finish the work by the time agreed. It is alleged that the forest was submerged by some abnormal force and violence of the elements, and that it could not have been discovered by the ordinary methods of inspection, and was not discovered in fact, although the claimant and others and the government had exercised every known precaution, and had made exhaustive examinations with the utmost care and skill. The petition sets up that this was a prevention "by abnormal force and violence of the elements" within [187] the contract, and that the claimant also was entitled to an allowance of time under a clause in the specifications stating that the time is considered sufficient "unless extraordinary and unforeseeable conditions supervene." It also sets up that an extension of time was recommended by Captain Brown, although disallowed by the Chief Engineer. Finally the petition alleges that it was known by the government officials when the contract was made that the portion of the canal excavated by the claimant could not be used to any practical extent for commercial purposes until adjoining portions of a proposed line were completed, and that the additional work was not provided for or seriously contemplated within the time of the claimant's work. It is concluded that although the contract purports to provide for liquidated damages, fixed at $20 a day, yet, in the circumstances, it really imposed a penalty, and that the government has no right to retain the sum.

As has been implied already, the contract agreed "that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the party of the second part to complete this contract within the time as specified and agreed upon that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance, and they are hereby agreed upon, liquidated, and fixed at the sum of twenty (20) dollars for each division for each and every day the party of the second part shall delay in the completion of this contract," and the claimant agrees to pay that amount "as liquidated damages, and not by way of penalty." It is agreed further that the United States shall have the right to recover all costs of inspection and superintendence incurred by it during the period of delay, and that it may [188] retain all the above-mentioned sums from any moneys falling due under the contract.

There is a proviso that if the claimants "shall by strikes, epidemics, local or state quarantine restrictions, or by the abnormal force or violence of the elements, be actually prevented from completing the work . . . at the time agreed upon" without contributory negligence on his part, "such additional time may, with the prior sanction of the Chief of Engineers, be allowed him" . . . "as, in the judgment of the party of the first part, or his successor, shall be just and reasonable." As we have intimated, the specifications also state that the time allowed is considered sufficient "unless extraordinary and unforeseeable conditions supervene." The claimant further thinks that he finds some support for his argument in a provision that "solid rock, large boulders, and compact gravel will not have to be removed at the prices bid for ordinary excavation. If such materials should be encountered, their removal, if required by the engineer, will be done under special agreement and paid for as extra work." On the other hand, the claimant was required to remove all trees, and "the channel must be cleared of all snags, logs, roots, stumps, or wreckage that project into or encroach in any way upon the cross section, . . . the cost of same being included in the unit price bid for excavation." The claimant invokes

a provision that the engineer's decision as to quality, quantity, and interpretation of the specifications shall be final; and this ends the statement of his case.

It is hopeless to argue against the provisions that we have recited, and the further express warning that each bidder "is expected to examine and decide for himself, as no allowance will be made should any of it prove to be otherwise than as stated," except as above recited with regard to solid rock, etc. It is suggested that the special agreement to be made for the removal of "such materials" [189] means materials of similar kind; but the phrase cannot be stretched to cover roots. The statement in the specifications that the time is sufficient unless extraordinary conditions supervene does not promise an extension if such conditions do supervene. The extent of this promise is found in the words of the contract providing for the allowance of such additional time as, with the sanction of the Chief Engineer, the engineer in charge may think reasonable. Those words tend also to support the contention of the government that "supervene" means come into being in the course of the work, as in the case of strikes, epidemics, etc., and not merely be discovered to have existed and still to exist. We may add that the averment hazarded that the submergence of the forest was due to abnormal force of the elements is too obvious an attempt to pervert the meaning of the proviso as to being actually prevented by such force from completing the work, to require analysis. But it is enough to say that any extension depended on the sanction of the Chief of Engineers, and that that sanction was denied. It is said that the engineer in charge construed the contract differently, as he recommended an allowance of time. But the ground of the recommendation does not appear to have been an incorrect interpretation of the contract; on the contrary, it is alleged that the liquidated damages were withheld by Captain Brown; and if his interpretation had been wrong, it is hard to see how it would have bound his superior on whose sanction the recommendation depended for effect. The suggestion that it was the duty of the Chief Engineer to give his sanction in the absence of fraud finds no support in the words used. The claimant must abide by the words. Carnegie Steel Co. v. United States, 240 U. S. 156, 164, ante, 576, 578, 36 Sup. Ct. Rep. 342.

The allegations by which the claimant attempts to avoid his contract making time of the essence, that the damages were difficult to prove, and that therefore they should be fixed at $20 a day, are too speculative [190] to do more than emphasize the necessity for the liquidation. There is no element of deception or exorbitance, and although the case seems a hard one, we see no ground upon which the claimant can escape from the terms to which he has agreed. United States v. Bethlehem Steel Co. 205 U. S. 105, 119, 51 L. ed. 731, 736, 27 Sup. Ct. Rep. 450.

Judgment affirmed.

GEORGIA, FLORIDA, & ALABAMA RAILWAY COMPANY, Plff. in Err.,
v.
BLISH MILLING COMPANY.

(See S. C. Reporter's ed. 190-199.)

Connecting carriers — Carmack amendment — liability of terminal carrier for its own wrong.

1. A terminal carrier is not relieved from liability for misdelivering an interstate shipment by the provisions of the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8592), § 20, making the initial carrier liable for loss or damage occurring anywhere *en route*, with a remedy over against the carrier at fault, but the bill of lading which the initial carrier under that statute must issue governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid.

[For other cases, see Carriers, II. c, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — construction of interstate bill of lading.

2. The question as to the proper construction of a bill of lading for an interstate shipment issued under the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8592), § 20, is a Federal one which will sustain the appellate jurisdiction of the Federal Supreme Court over a state court.

[For other cases, see Appeal and Error, 1751-1797, in Digest Sup. Ct. 1908.]

Carriers — notice of claim — misdelivery.

3. Misdelivery of an interstate shipment by the terminal carrier must be regarded

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

as "failure to make delivery," within the meaning of a clause in the bill of lading issued by the initial carrier, conformably to the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8592), § 20, which casts upon that carrier responsibility with respect to the entire transportation, that "claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

Carriers — notice of claim — validity.

4. The initial carrier may validly stipulate in the bill of lading, issued conformably to the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8592), § 20, for an interstate shipment that "claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

Carriers — notice of claim — waiver.

5. The effect of a stipulation in a bill of lading for an interstate shipment requiring claims for damages or misdelivery to be presented within four months after a reasonable time for delivery has elapsed cannot be avoided by suing the carrier in trover on the theory that in making the misdelivery it converted the shipment, and thus abandoned the contract, since the parties could not waive the terms of the contract under which the shipment was made, pursuant to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592), nor could the carrier by its conduct give the shipper the right to ignore the terms and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

Carriers — notice of claim — sufficiency.

6. A claim for the value of a shipment of flour misdelivered by the carrier is sufficiently made to satisfy the requirement of the bill of lading that claims based on failure to make delivery shall be made in writing within four months after the time for delivery has elapsed, where the shipper, after making an investigation in response to a telegram from the carrier's traffic manager, telegraphed the latter five days after the arrival of the flour at destination, "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle."

[For other cases, see Carriers, II. b, 7, b, in Digest Sup. Ct. 1908.]

[No. 292.]

Argued and submitted March 15, 1916.
Decided May 8, 1916.

IN ERROR to the Court of Appeals of the State of Georgia to review a judgment which modified, and as modified affirmed, a judgment of the City Court of Bainbridge, Decatur County, in that state, in favor of plaintiff in an action of trover against a carrier. Affirmed.

See same case below, 15 Ga. App. 142, 82 S. E. 784.

The facts are stated in the opinion.

Mr. T. S. Hawes argued the cause, and, with Messrs. Alexander Akerman and Charles Akerman, filed a brief for plaintiff in error:

The remedy provided by the Carmack Amendment against the initial carrier is exclusive.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Southern R. Co. v. Bennett, — Ga. App. —, 86 S. E. 418.

Stipulations in interstate bills of lading limiting the time in which suits shall be filed are valid.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Stipulations that a carrier shall not be liable unless claim is filed in a specified period are valid.

Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879.

A limitation of liability made by the initial carrier will inure to the benefit of any succeeding carrier sued for the loss or damage.

Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

The main purpose and effect of the Carmack Amendment was to provide a uniform rule as to the liability of interstate carriers of goods, to relieve them from diverse rules to which they had been theretofore subjected, and to supersede all the regulations and policies of a particular state upon the subject.

Spada v. Pennsylvania R. Co. 86 N. J. L. 187, 92 Atl. 379.

A party who unsuccessfully relies in the state courts upon an act of Congress as a defense is entitled to bring the case up to the Federal Supreme Court by writ of error.

Sage v. Hampe, 235 U. S. 99, 59 L. ed. 147, 35 Sup. Ct. Rep. 94.

A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held to assert a right and immunity under such statutes.

Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

A Federal question must be deemed to have been raised in the state courts with sufficient definiteness to comply with the provisions of the Judicial Code, § 237, where it appears from the opinion of the state supreme court that a question under the Constitution of the United States was treated as sufficiently raised, and was specifically dealt with and ruled against the plaintiff in error.

Mallinckrodt Chemical Works v. Missouri, 238 U. S. 41, 59 L. ed. 1192, 35 Sup. Ct. Rep. 671.

In the following cases the Supreme Court has recently held that a Federal question was sufficiently raised:

North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Louisiana R. & Nav. Co. v. Behrman, 235 U. S. 164, 59 L. ed. 175, 35 Sup. Ct. Rep. 62; Lesser v. Gray, 236 U. S. 70, 59 L. ed. 471, 35 Sup. Ct. Rep. 227; Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625; Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 59 L. ed. 1042, 35 Sup. Ct. Rep. 636.

All service performed by a railroad company, whether as carrier or as warehouseman, is controlled by the stipulations contained in the uniform bill of lading issued by the initial carrier.

Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177.

Mr. A. L. Miller submitted the cause for defendant in error. Mr. E. M. Donalson was on the brief:

Where one ships goods to his own order, the delivery of the goods by the carrier to another without the production of the bill of lading covering the shipment of goods is a delivery made at the risk of the carrier, and subjects him to a suit in trover for conversion.

Boatmen's Sav. Bank v. Western & A. R. Co. 81 Ga. 223, 7 S. E. 125; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; Southern R. Co. v. Strozier, 10 Ga. App. 157, 73 S. E. 42; Merchants' & M. Transp. Co. v. Moore, 124 Ga. 482, 52 S. E. 802, 19 Am. Neg. Rep. 138; Hobbs v. Chicago Packing & Provision Co. 98 Ga. 576, 58 Am. St. Rep. 320, 25 S. E. 584.

The Supreme Court of the United States has in a similar case decided the question involved here, and held that the judgment of the state court was not reviewable.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78.

To give the Supreme Court of the United States jurisdiction of a writ of error to a state court, it must affirmatively appear that a Federal question was presented for decision by the state court; that it was decided there; that a decision of this Federal question was necessary to the determination of the cause; and that it was decided adversely to the party claiming a right under the same.

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; New Orleans & N. E. R. Co. v. National Rice Mill. Co. 234 U. S. 80, 58 L. ed. 1223, 34 Sup. Ct. Rep. 726; Garr, S. & Co. v. Shannon, 223 U. S. 468, 56 L. ed. 510, 32 Sup. Ct. Rep. 236.

Any one of connecting carriers, that commits the wrong, is liable, as well as the initial carrier.

Eastover Mule & Horse Co. v. Atlantic Coast Line R. Co. 90 S. C. 470, 83 S. E. 599; Elliott v. Chicago, M. & St. P. R. Co. 35 S. D. 57, 150 N. W. 777; Bichlmeir v. Minneapolis, St. P. & S. Ste. M. R. Co. 159 Wis. 404, 150 N. W. 508; Atchison, T. & S. F. R. Co. v. Boyce, — Tex. Civ. App. —, 171 S. W. 1094.

Under the peculiar facts of the instant case, it is doubtful whether there was any liability on the part of the initial carrier.

Louisville & N. R. Co. v. Brewer, 183 Ala. 172, 62 So. 698.

The contract of carriage, contained in the bill of lading, was abandoned by the railway company when it converted the flour. The carrier cannot repudiate the contract and then hold the shipper to its terms that a written claim must be made within a specified time for loss or damage.

Merchants' & M. Transp. Co. v. Moore, 124 Ga. 482, 5 S. E. 802, 19 Am. Neg. Rep. 138; Salberg v. Pennsylvania R. Co. 31 L.R.A.(N.S.) 1178, and note, 228 Pa. 641, 77 Atl. 1007.

The contract of carriage does not provide that a claim must be submitted in writing if the property is converted by the carrier, but only if there is loss or damage. There is a wide difference between the meaning of the word "conversion" and the meaning of the word "loss," or the meaning of the word "damage."

Atlantic Coast Line R. Co. v. Goodwin, 1 Ga. App. 356, 57 S. E. 1070.

Mr. Justice Hughes delivered the opinion of the court:

The Blish Milling Company brought this action in trover against the Georgia, Florida, & Alabama Railway Company, and recovered judgment, which was affirmed by the court of appeals of Georgia. 15 Ga. App. 142, 82 S. E. 784. The facts are these:

On May 13, 1910, the Blish Milling Company shipped from Seymour, Indiana, to Bainbridge, Georgia, a carload of flour consigned to its own order, with direction to notify Draper-Garrett Grocery Company at Bainbridge. The bill of lading was issued by the Baltimore & Ohio Southwestern Railroad Company. The shipper's sight draft upon the Draper-Garrett Grocery Company, for $1,109.89, covering the price of the flour, with a carrying charge, was attached to the bill of lading and forwarded to a bank in Bainbridge for collection. The flour was transferred to another car by the Central of Georgia Railway Company, a connecting carrier, and reached Bainbridge on June 2, 1910, over the line of the Georgia, Florida, & Alabama Railway Company, the plaintiff in error, in accordance with routing. The plaintiff in error, without requiring payment of the draft and surrender of the bill [193] of lading (which were ultimately returned to the Blish Milling Company), delivered the car to the Draper-Garrett Grocery Company immediately on its arrival by placing it on the sidetrack of that company. In the course of unloading, the Grocery Company discovered that some of the flour was wet, and thereupon reloaded the part removed and returned the flour to the plaintiff in error. The subsequent course of events is thus stated by the court of appeals (id. pp. 144, 145):

"The railway company" (that is, the plaintiff in error) "retook possession of the car and unloaded it, and in a few days sold, as perishable property, a part of the flour alleged to be damaged, and on December 23, 1910, sold the remainder. On June 3, 1910, after the Grocery Company had turned the flour back to the railway company, B. C. Prince, traffic manager of the Georgia, Florida, & Alabama Railway Company, telegraphed to the Blish Milling Company as follows: 'Flour order notify Draper-Garrett Grocery Company refused account damage. Hold at your risk and expense. Advise disposition.' On the next day the Milling Company replied by telegraphing to Prince, 'Sending our representative there. What is nature of damage?' To this Prince replied: 'Flour transferred in route. Slight damage by water, apparently rough handling. When will your representative reach Bainbridge?' The Blish Milling Company replied that its man would be there that night or the next day. On June 7 (after the Milling Company's representative had reached Bainbridge and conferred with the agents of the railway company and with the Grocery Company) the Milling Company sent a final telegram, saying, 'We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle.' It appears, from the evidence of Mr. Draper, that the price of flour declined after his order was given and before the flour reached Bainbridge. There [194] is conflict in the evidence as to a tender of the flour by the railway company to the Milling Company's representative. According to some of the testimony, about 18 barrels of the flour had been sold by the railway company before the alleged tender was made, and therefore it was not within the power of the carrier to tender the shipment in its entirety." The verdict in favor of the Milling Company was for $1,084.50, from which the court of appeals required a deduction of the amount of the unpaid freight, which was held to have been erroneously included.

With other defenses, the railway company pleaded that the shipper had failed to comply with the following provision of the bill of lading, issued by the initial carrier: "Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." This defense was overruled. The court of appeals stated that "so far as appears from the record, no claim was filed by the shipper," but deemed the provision to be inapplicable. Id. p. 149.

There are only two questions presented here, and these are thus set forth in the brief of the plaintiff in error:

"1st. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack amendment of § 20 of the Hepburn bill [34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592].

"2d. That, under the stipulation in the bill of lading providing for the filing of claims for loss or damage, the action was barred."

The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack amendment, but the bill of lading required to be issued by the initial carrier upon [195] an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating

carriers to the extent that the terms of the bill of lading are applicable and valid. "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment, so far as it is valid under the act." Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 648, 57 L. ed. 683, 686, 33 Sup. Ct. Rep. 391. See Adams Exp. Co. v. Croninger, 226 U. S. 491, 507, 508, 57 L. ed. 314, 320, 321, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, 591, ante, 453, 456, 36 Sup. Ct. Rep. 177; Southern R. Co. v. Prescott, 240 U. S. 632, 637, ante, 836, 839, 36 Sup. Ct. Rep. 469; Northern P. R. Co. v. Wall, decided April 24, 1916 [241 U. S. 87, ante, 905, 36 Sup. Ct. Rep. 493].

These decisions also established that the question as to the proper construction of the bill of lading is a Federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention—specifically covers "failure to make delivery." It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee, but actual delivery to another, or delivery in violation of instructions. But "delivery" must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a "failure to make delivery" as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous, and are carried on [196] through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility (Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 199–203, 55 L. ed. 167, 179–181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; New York, P. & N. R. Co. v. Peninsula Produce Exch. 240 U. S. 34, 38, ante, 511, 515, 36 Sup. Ct. Rep. 230), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation, which, as defined in the Federal act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims "in case of failure to make delivery," the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier, and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (Kansas City Southern [197] R. Co. v. Carl, 227 U. S. 639, 648, 57 L. ed. 683, 686, 33 Sup. Ct. Rep. 391; Southern R. Co. v. Prescott, 240 U. S. 632, 637, ante, 836, 839, 36 Sup. Ct. Rep. 469); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier, which, in the contemplation of the parties, was to make the delivery. The clause gave abundant opportunity for presenting claims, and we regard it as both applicable and valid.

In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but, as the state court said: "If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier." 15 Ga. App. p. 147. It is urged, however, that the carrier, in making the misdelivery, converted the flour and thus abandoned the contract. But the parties

could not waive the terms of the contract under which the shipment was made pursuant to the Federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Kansas City Southern R. Co. v. Carl, supra; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556; Southern R. Co. v. Prescott, supra. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it.

But, while this is so, we think that the plaintiff in error is not entitled to succeed in its ultimate contention under the stipulation for the reason that it appears that notice [198] of the claim was in fact given. It is true that in the statement made by the court of appeals it is said that, so far as appears from the record, "no claim was filed by the shipper." We must assume, however, that this was in effect a construction of the provision as requiring a more formal notice than that which was actually sent. For the court had already set forth the uncontroverted facts in detail showing that the shipper (having made an investigation in response to the communication of the traffic manager of the railway company) had telegraphed to the latter, on June 7, 1910, only five days after the arrival of the goods at destination, as follows: "We will make claim against railroad for entire contents of car at invoice price. Must refuse shipment as we cannot handle." In the preceding telegrams which passed between the parties, and are detailed by the state court in stating the facts, the shipment had been adequately identified, so that this final telegram, taken with the others, established beyond question the particular shipment to which the claim referred, and was in substance the making of a claim within the meaning of the stipulation,—the object of which was to secure reasonable notice. We think that it sufficiently apprised the carrier of the character of the claim, for while it stated that the claim was for the entire contents of the car "at invoice price," this did not constitute such a variance from the claim for the value of the flour as to be misleading; and it is plain that no prejudice resulted. Granting that the stipulation is applicable and valid, it does not require documents in a particular form. It is addressed to a practical exigency and it is to be construed in a practical way. The stipulation required that the claim should be made in writing, but a telegram which, in itself, or taken with other telegrams, contained an adequate statement, must be deemed to satisfy this requirement. See Ryan v. United States, 136 U. S. 68, 83, 34 L. ed. 447, 453, 10 Sup. Ct. Rep. 913; Kleinhans v. Jones, 15 C. C. A. 644, 37 U. S. App. 185, 68 [199] Fed. 742, 745; Godwin v. Francis, L. R. 5 C. P. 295, 39 L. J. C. P. N. S. 121, 22 L. T. N. S. 338; Reg. v. Riley [1896] 1 Q. B. 309, 314, 321, 65 L. J. Mag. Cas. N. S. 74, 74 L. T. N. S. 254, 44 Week. Rep. 318, 18 Cox, C. C. 285, 65 J. P. 519, 10 Am. Crim. Rep. 402; Howley v. Whipple, 48 N. H. 487, 488; State v. Holmes, 56 Iowa, 588, 590, 41 Am. Rep. 121, 9 N. W. 894.

Judgment affirmed.

B. S. STOWE, Trustee in Bankruptcy of the Estate of J. Downey Harvey, a Bankrupt, Appt.,

v.

S. G. HARVEY.

(See S. C. Reporter's ed. 199-201.)

Fraudulent conveyances — transfer of corporate stock — retention of possession.

A transfer of corporate stock, effected by the delivery of a properly indorsed stock certificate, cannot be said to have been in fraud of the transferrer's creditors, on the theory that by the retention of the stock in his own name he was clothed with a false credit, or that there was not the requisite change of possession, where, under the local law, title to stock may be transferred by delivery of certificates, and

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NOTE.—On validity of pledge or other transfer of stock of corporation when not made in the books of the company, as against attachments, executions, or subsequent transfers—see notes to Mapleton Bank v. Standrod, 67 L.R.A. 656; and Everitt v. Farmers' & M. Bank, 20 L.R.A.(N.S.) 996.

On contract for the sale of corporate stock as one for the sale of goods, etc., within statutes of frauds—see notes to Sprague v. Hosie, 19 L.R.A.(N.S.) 874; and Hewson v. Peterman Mfg. Co. 51 L.R.A.(N.S.) 398.

On necessity of writing to transfer shares of stock—see notes to French v. White, 2 L.R.A.(N.S.) 804; and Herbert v. Simson, L.R.A.1915D, 733.

corporate books are not for public information.

[For other cases, see Fraudulent Conveyances, V., in Digest Sup. Ct. 1908.]

[No. 329.]

Argued April 27 and 28, 1916. Decided May 8, 1916.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which reversed, with directions to dismiss the suit, a decree of the District Court for the Northern District of California in favor of a trustee in bankruptcy in a suit by him to set aside a transfer from the bankrupt. Affirmed.

See same case below, 134 C. C. A. 635, 219 Fed. 17.

The facts are stated in the opinion.

Mr. A. E. Shaw argued the cause, and, with Messrs. Bert Schlesinger, Edwin H. Williams, and Edward M. Cleary, filed a brief for appellant:

The appellate court was not warranted in setting aside the determination of the trial court as to the credit and weight which should be given to the testimony of the various witnesses.

Davis v. Schwartz, 155 U. S. 637, 39 L. ed. 293, 15 Sup. Ct. Rep. 237; McKinley Creek Min. Co. v. Alaska United Min. Co. 183 U. S. 563, 569, 46 L. ed. 331, 334, 22 Sup. Ct. Rep. 84, 21 Mor. Min. Rep. 730; Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; Callaghan v. Myers, 128 U. S. 617, 667, 32 L. ed. 547, 562, 9 Sup. Ct. Rep. 177; Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 410, 43 L. ed. 492, 496, 19 Sup. Ct. Rep. 233; Dade v. Irwin, 2 How. 383, 391, 11 L. ed. 308, 312; Crawford v. Neal, 144 U. S. 585, 600, 36 L. ed. 552, 559, 12 Sup. Ct. Rep. 759.

In reversing the findings of the trial judge, the court of appeal wholly ignored the rules of law theretofore enunciated by it to the effect that findings of a trial judge in an equity suit, based on the evidence of witnesses before him, and resulting in a substantial conflict with respect to the material issues, will not be set aside on appeal.

Vanderbilt v. Bishop, 117 C. C. A. 652, 199 Fed. 421.

In a case such as the present, the Supreme Court will review the evidence taken in the inferior court to ascertain whether there is substantial evidence to support the findings of the chancellor who presided at *the trial.*

3 Foster, Fed. Pr. 5th ed. pp. 23, 59; Re Neagle, 135 U. S. 1, 42, 34 L. ed. 55, 63, 10 Sup. Ct. Rep. 658.

Those who help to give false credit to an insolvent debtor have no rights superior to those of his creditors.

National Bank v. Shackelford, 239 U. S. 81, ante, 158, 36 Sup. Ct. Rep. 17; Moore v. Page, 111 U. S. 117, 119, 28 L. ed. 373, 374, 4 Sup. Ct. Rep. 388.

The gift of these shares by Harvey to his wife was not accompanied by an actual and continuous change of possession, and therefore is void as to his creditors.

Stevens v. Irwin, 15 Cal. 503, 76 Am. Dec. 500; Murphy v. Mulgrew, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; Tregear v. Etiwanda Water Co. 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658.

Certificates of stock in a corporation are not actually the stock, but are merely the symbolic representations of the stock; that is, they are the symbols which represent the intangible thing,—the stock itself.

Film Producers v. Jordan, — Cal. —, 154 Pac. 605; Payne v. Elliot, 54 Cal. 342, 35 Am. Rep. 80, 14 Mor. Min. Rep. 515.

Mr. Charles S. Wheeler argued the cause, and, with Mr. John F. Bowie, filed a brief for appellee:

In California a valid gift of shares of stock may be made by delivering the stock certificate to the donee, indorsed in blank. No transfer upon the books of the corporation is necessary to complete the gift.

Calkins v. Equitable Bldg. & L. Asso. 126 Cal. 531, 59 Pac. 30; Spreckels v. Nevada Bank, 113 Cal. 272, 276, 33 L.R.A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; National Bank v. Western P. R. Co. 157 Cal. 576, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391. See also First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 290.

The United States circuit court of appeals was, of course, not bound by the facts found by the trial judge. It is well settled that that court will not hesitate to reverse the trial court upon the facts where there has been a serious mistake in dealing with the facts.

United States v. Marshall, 127 C. C. A. 231, 210 Fed. 597; DeLaval Separator Co. v. Iowa Dairy Separator Co. 114 C. C. A. 385, 194 Fed. 423; Iowa v. Carr, 112 C. C. A. 477, 191 Fed. 257.

And the United States Supreme Court has said that it is proper for a court of

equity, upon appeal, to set aside the findings of a trial judge when clearly in conflict with the weight of the evidence upon which they were made.

Kimberly v. Arms, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 315.

No duty rests upon this court to review elaborately the facts determined by the court of appeals.

Bloom v. National United Ben. Sav. & L. Co. 152 N. Y. 119, 46 N. E. 166; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Texas & P. R. Co. v. Howell, 224 U. S. 577, 56 L. ed. 892, 32 Sup. Ct. Rep. 601; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 63, 58 L. ed. 1208, 1213, 51 L.R.A.(N.S.) 1157, 34 Sup. Ct. Rep. 733; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 378, 59 L. ed. 277, 278, 35 Sup. Ct. Rep. 130.

In California the general public has no right to see the stock books of a corporation. It was not a concealment, either from the public or from Mr. Harvey's creditors, to carry the stock in Mr. Harvey's name on those books.

National Bank v. Western P. R. Co. 157 Cal. 581, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391.

In California a bona fide stockholder is not necessarily the owner of stock; and one who becomes a bona fide stockholder does not cease to be such by the indorsement and delivery, by way of sale or gift, of the shares of stock to another, although he ceases thereby to be the "owner."

Smith v. San Francisco & N. P. R. Co. 115 Cal. 593, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582.

The fact that Mr. Harvey voted this stock as a stockholder is therefore not inconsistent with his testimony that he had indorsed and given the certificates of stock to his wife. The same is true with regard to the signature of Mr. Harvey to the amendment of the by-laws. He was a lawful stockholder, though not owning the shares, and as such stockholder could give a valid assent to the amendment of the by-laws.

Ibid.

The indorsement and delivery of the certificate passes the title as against the world.

Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 200; Calkins v. Equitable Bldg. & L. Asso. 126 Cal. 534, 59 Pac. 30; Spreckels v. Nevada Bank, 113 Cal. 272, 33 L.R.A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; National Bank v. Western P. R. Co. 157 Cal. 676, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391.

[200] Mr. Justice McReynolds delivered the opinion of the court:

J. Downey Harvey of San Francisco was adjudged a bankrupt November 17, 1911. Appellant, having become trustee of the estate, instituted this proceeding to set aside a transfer by the bankrupt to his wife—defendant in error—of certain stock in Shore Line Investment Company, because made without consideration and with intent to delay and defraud his creditors. The complaint alleges that the gift was made and stock transferred in November, 1909, when it is admitted Harvey was insolvent. Mrs. Harvey maintains that her husband gave the stock and actually delivered the properly indorsed certificate to her in 1905, during all of which year his solvency is conceded. The substantial controversy throughout has been upon the question of fact thus raised.

Having heard witnesses, the trial court held the transfer was made in 1909, and rendered a decree in favor of the trustee. The circuit court of appeals, after a careful review of the evidence, reached a contrary conclusion. 134 C. C. A. 635, 219 Fed. 17. We are now asked to reverse its decree and sustain the trial court.

Notwithstanding doubts necessarily engendered by some conflicting statements and questionable circumstances, upon consideration of the whole record we think the decision of the circuit court of appeals is correct.

Appellant also suggests (a) that the gift is void because Mrs. Harvey permitted her husband for more than four years to retain apparent title to the stock and hold himself out as its real owner; and (b) that there was no actual and continuous change of possession, as required by the state statute against fraudulent conveyances. In reply to these suggestions it seems only necessary to cite National Bank v. Western P. R. Co. 157 Cal. 573, 581, 27 L.R.A.(N.S.) 987, 108 Pac. 676, 21 Ann. Cas. 1391, which announces as settled doctrine in California [201] that title to stock may be transferred by delivery of certificates, and corporate books are not for public information.

The judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice McKenna took no part in the consideration or decision of this case.

FRANKLIN K. LANE, Secretary of the Interior, Plff. in Err.,
v.
UNITED STATES OF AMERICA EX RELATIONE JULIA LAMERE MICKADIET, *née* Tiebault, and Alma Lamere Tiebault.

(See S. C. Reporter's ed. 201-211.)

Mandamus — to control administrative action — ascertainment of heirs of Indian allottee.

1. An order of the Secretary of the Interior, recognizing the adopted children of a deceased Indian allottee as his heirs, though made "final and conclusive" by the act of June 25, 1910 (36 Stat. at L. 855, chap. 431, Comp. Stat. 1913, § 4226), under which he acted, did not exhaust his power so as to permit the courts by mandamus to interfere with his action in reopening the matter for further consideration, where the property to which the order relates is still in the administrative control of the Department because of the trust imposed by the law of the United States until the expiration of the statutory period.
[For other cases, see Mandamus, II. d, 6, in Digest Sup. Ct. 1908.]

Mandamus — to control administrative action — ascertainment of heirs of Indian allottee.

2. A decree of adoption made by a state court furnishes no ground for interfering by mandamus with the exercise by the Secretary of the Interior of his power under the act of June 25, 1910 (36 Stat. at L. 855, chap. 431, Comp. Stat. 1913, § 4226), to determine the legal heirs of a deceased allottee, and in so doing to ascertain the existence of the state court's judgment, the jurisdiction *ratione materiæ* of the court by which it was rendered, and the legal effect which it was entitled to receive under the state law.
[For other cases, see Mandamus, II. d, 6, in Digest Sup. Ct. 1908.]

[No. 449.]

Argued April 10, 1916. Decided May 22, 1916.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which reversed, with a direction to issue the mandamus prayed for, a judgment of the Supreme Court of the District, dismissing the petition for a writ of mandamus to control the action of the Secretary of the Interior concerning the ascertainment of the heirs of a deceased Indian allottee. Reversed and remanded with directions to affirm the judgment of the Supreme Court of the District.

See same case below, 43 App. D. C. 414.

The facts are stated in the opinion.

Solicitor General **Davis** argued the cause, and, with Mr. Robert Szold, filed a brief for plaintiff in error:

Since the United States, the real party defendant, has not consented to be sued in this cause, it should be dismissed for want of jurisdiction.

Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568.

The immunity of the United States from suit is not waived by failure to present the point in the lower court.

Carr v. United States, 98 U. S. 433, 438, 25 L. ed. 209, 211; Stanley v. Schwalby, 162 U. S. 255, 270, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754.

Prior to conveyance of legal title to the heirs of the Indian allottee the Secretary of the Interior has jurisdiction to reconsider a determination of heirship. The statutory direction that the Secretary's decision shall be final and conclusive is addressed to the courts.

Hallowell v. Commons, 239 U. S. 506, ante, 409, 36 Sup. Ct. Rep. 202; Pearson v. Williams, 202 U. S. 281, 50 L. ed. 1029, 26 Sup. Ct. Rep. 608.

The decided cases settle the general rule.

Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; United States ex rel. Knight v. Lane, 228 U. S. 6, 57 L. ed. 709, 33 Sup. Ct. Rep. 407.

In this case the legal title beyond all doubt remains in the United States.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

The judgment of the Secretary cannot be controlled by mandamus.

Hallowell v. Commons, supra; United States ex rel. Ness v. Fisher, 223 U. S. 683, 693, 56 L. ed. 610, 613, 32 Sup. Ct. Rep. 356; Oregon v. Hitchcock, 202 U. S. 60, 70, 50 L. ed. 935, 938, 26 Sup. Ct. Rep. 568.

The order for rehearing was not arbitrary, but within the exercise of reasonable discretion.

Jaster v. Currie, 69 Neb. 4, 94 N. W. 995; Tucker v. Fisk, 154 Mass. 574, 28 N. E. 1051.

Mr. **Irving F. Baxter** argued the cause, and, with Messrs. Norris Brown, Edward F. Colladay, and Howard Saxton, filed a brief for defendant in error:

The Secretary of the Interior is without jurisdiction to annul the decision of his predecessor of January 11, 1913, for the reason that such decision was a judicial act and can only be reviewed, if at all, by the courts.

NOTE.—On power of courts to enforce ministerial duties of heads of departments—see note to Cooke v. Iverson, 52 L.R.A.(N.S.) 415.

Hallowell v. Commons, 127 C. C. A. 343, 210 Fed. 793; Bond v. United States, 181 Fed. 613; Pel-Ata-Yakot v. United States, 188 Fed. 387; Parr v. Colfax, 117 C. C. A. 48, 197 Fed. 302; Oglesby v. Attrill, 14 Fed. 214; Allen v. Wilson, 21 Fed. 881; Baptist v. Farwell Transp. Co. 29 Fed. 180.

When the Secretary of the Interior under the public lands act proceeds to investigate, to hear testimony, and to decide the issue as to who is rightfully entitled to a patent or to a homestead entry, his decision thereon is not reviewable by his successor in office.

Germania Iron Co. v. James, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Emblem v. Lincoln Land Co. 42 C. C. A. 499, 102 Fed. 563; United States v. Stone, 2 Wall. 525, 17 L. ed. 765; Lane v. Watts, 234 U. S. 525, 540, 58 L. ed. 1440, 1456, 34 Sup. Ct. Rep. 965; Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, 30 Sup. Ct. Rep. 338; Union Terminal R. Co. v. Railroad Comrs. 54 Kan. 352, 38 Pac. 290; Renaud v. State Court of Mediation & Arbitration, 124 Mich. 648, 51 L.R.A. 458, 83 Am. St. Rep. 346, 83 N. W. 620.

The adoption decree of the county court of Thurston county, Nebraska, acting within its jurisdiction, from which no appeal was taken, is not subject to collateral attack, and the Secretary of the Interior is without power or jurisdiction to annul, modify, or vacate such decree.

Ferguson v. Herr, 64 Neb. 662, 90 N. W. 625, 94 N. W. 542; Jones v. Leeds, 41 Ind. App. 164, 83 N. E. 526; Brown v. Brown, 101 Ind. 340; Wolf's Appeal, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Chaloner v. Sherman, 132 C. C. A. 96, 215 Fed. 867.

Harrison Tebo and every other blood relative of My Soul Tiebault, deceased, are estopped in law to question the validity of the adoption decree entered by the county court of Thurston county, Nebraska. Such decree was binding upon My Soul Tiebault during his lifetime, and is not subject to collateral attack by his heirs after his death.

Re Williams, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; Van Matre v. Sankey, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; Re Johnson, 98 Cal. 543, 21 L.R.A. 380, 33 Pac. 460; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; 1 R. C. L. 624; Ferguson v. Herr, 64 Neb. 660, 90 N. W. 625, 94 N. W. 542.

Messrs. Charles J. Kappler and Harry L. Keefe filed a brief as *amici curiæ*.

The primitive dependence and the economic helplessness of these people under modern civilization have been recognized by the courts, and it has been observed that the obligation of the government towards them falls upon the Executive, and out of this obligation arises the duty of protection.

United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The legal interpretation of this alloting statute has been made clear by this court, and in the construction of the trust created thereby, it has been held that the holding of the individual allotment in trust by the United States, for the sole use and benefit of the Indian ward, was merely one of the instrumentalities employed by the government in its policy of protecting and developing these people in their passage from a state of dependence and pupilage into fuller citizenship, and preparing them to assume the responsibilities of civilized life.

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Marchie Tiger v. Western Invest. Co. 221 U. S. 298, 311, 55 L. ed. 742, 747, 31 Sup. Ct. Rep. 578; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93.

Prior to the act of Congress of August 15, 1894, the Secretary of the Interior, as the representative of the government in the execution of treaty obligations, was vested with exclusive jurisdiction to determine the descent of these lands during the trust period.

McKay v. Kalyton, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

This jurisdiction was temporarily interrupted by the passage of the act of 1894, but it has been held that the act of June 25, 1910, restored to the Secretary of the Interior the authority which inherently belonged to his office.

Hallowell v. Commons, 239 U. S. 506, ante, 409, 36 Sup. Ct. Rep. 202; Marchie Tiger v. Western Invest. Co. 221 U. S. 311, 55 L. ed. 747, 31 Sup. Ct. Rep. 578.

If a court proceeds without jurisdiction its decrees are void, regardless of how technically correct the record may appear.

Sheldon v. Newton, 3 Ohio St. 494; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Cooper v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

A court of general or superior jurisdiction may, even in a collateral proceeding, question the decree of another court when it appears that such decree was rendered without jurisdiction because of fraud, de-

ceit, or other jurisdictional defects, notwithstanding the averments contained in the record of the judgment itself.

Michaels v. Post, 21 Wall. 398, 22 L. ed. 520; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; D'Arcy v. Ketchum, 11 How. 165, 13 L. ed. 648; Public Works v. Columbia College, 17 Wall. 521, 527, 21 L. ed. 687, 691; Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 134–139, 56 L. ed. 1009, 1024–1026, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875.

The decision which the Secretary of the Interior now proposes to open for reconsideration was rendered under a misapprehension of these well-settled principles of law, and he therefore never exercised his full jurisdictional function. As such a tribunal, the Secretary is undoubtedly clothed with the power and authority to rehear and determine what he has not fully passed upon, *viz.*, jurisdiction of the county court affecting Indian lands; and if he finds that in the former decision he was not fully advised of the facts, he may ascertain them; and if he finds that in such former decision he has made errors of law or fact, he may correct the same.

Knight v. United Land Asso. 142 U. S. 161, 177–181, 35 L. ed. 974, 979–181, 12 Sup. Ct. Rep. 258.

Mr. Chief Justice White delivered the opinion of the court:

The relators, who are defendants in error, invoked the aid of the trial court to control by mandamus the action of the Secretary of the Interior concerning an allotment in severalty of land made to an Indian in pursuance of the authority conferred by the act of February 8, 1887 (chap. 119, 24 Stat. at L. 388, Comp. Stat. 1913, § 4195), entitled, "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations." Under the facts stated in his return to the alternative rule, the Secretary, asserting that the land embraced by the allotment in question was held in trust by the United States for the benefit of the allottee, and that the official action sought to be prohibited was not subject to judicial control, because it was one of exclusive administrative authority, denied that there was a right to grant the relief prayed. The return was demurred to as stating no ground for withholding the relief. The trial court overruled the demurrer and discharged the rule, but the court below reversed, and, holding that the Secretary had no power to take the action which it was alleged he intended to take concerning the allotment in question, awarded the mandamus prayed (43 App. D. C. 414), and the correctness of this ruling is the question now to be decided.

The facts are these: Tiebault was a Winnebago Indian living on the tribal reservation in Nebraska, and in August, 1887, received an allotment in severalty of the tribal land to which he was entitled, made in virtue of the act of 1887. That act, after conferring authority upon the Secretary of the Interior to make allotments of tribal lands as therein specified, directed that official to issue [205] to the allottees patents, which "shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period." (Section 5.)

About ten years after the allotment Tiebault, having continued to reside on the land and to enjoy the same conformably to the statute, began proceedings in the court of Thurston county, Nebraska, for the adoption as his children of the two relators, who were also Winnebago Indians, and a decree of adoption as prayed was entered. When, ten years after the adoption, Tiebault died without surviving issue, the adopted children, asserting rights as his sole heirs, sought the possession of the land embraced by the allotment and of some other land which had also been covered by an allotment made to a daughter of Tiebault, who died before him without issue, and which land he had therefore inherited. This claim of heirship was disputed by nephews and nieces of Tiebault claiming to be his next of kin. The result was the commencement of proceedings in the district court of the United States for the district of Nebraska on the part of the adopted children to obtain a recognition of their right of heirship, the nephews and neices being among the parties defendant. Considerable testimony was taken, but no decree was entered because, by the act of May 8, 1906 (chap. 2348, 34 Stat. at L. 182), and the act of June 25, 1910 (chap. 431, § 1, 36 Stat. at L. 855, Comp. Stat. 1913, § 4226), it resulted that the district court was [206] without power to proceed further, exclusive jurisdiction over the subject having been conferred by the acts in question upon the Secretary of

the Interior. The pertinent provisions of the act last referred to are in the margin.[1]

The theater of the controversy was therefore, by the assent of the parties and of the United States, transferred to the Interior Department, where testimony was begun before an examiner, and the Secretary of the Interior, in June, 1913, entered an order in favor of the adopted children, holding them to be the lawful heirs of Tiebault, and entitled under the statute to the ownership and enjoyment of the allotted lands.

The Secretary having been given authority both by the 6th section of the act of 1906 and by the provisions of the act of 1910, which we have quoted, to reduce the twenty-five-year period, the recognized heirs applied for an order terminating the trust period and for the issue to them of a fee-simple patent. This application was opposed by the next of kin, who had been parties to the previous proceeding as to heirship, and they also asked [207] to be permitted to reopen the controversy as to the validity of the adoption and the heirship resulting from it, on the ground that, as the result of newly discovered evidence, they desired to show that the Nebraska decree of adoption and the previous administrative order had been obtained by fraud. Under this request it would seem that considerable testimony was taken, but it was never acted upon because the recognized heirs, the relators, disputed the authority of the Secretary to reopen the controversy, on the ground that the previous departmental order recognizing them as heirs was not subject to be reopened or reviewed, and, in any event, that the decree of adoption of the Nebraska court was beyond the competency of the Secretary to review or set aside even upon the charges of fraud which were made. Without passing upon the merits involved in the claim to reopen, or expressing any opinion concerning the conclusiveness of the Nebraska decree, the Secretary granted the application to reopen, and ordered the issues thereon to stand for future consideration. Thereupon the petition for mandamus was filed, to which a return was made, alleging the facts to be as we have stated them, resulting in the judgment of the court below awarding the mandamus which is before us for review.

It is undoubted that the fee-simple title to the land embraced by the allotment had not passed from the United States, and that, as expressly stated in the granting act, the land was held in trust by the United States for the benefit of the allottees to await the expiration of the trust period fixed by law, when the duty on the part of the United States of conveying the fee of the land would arise. It is equally undoubted under these conditions that the land was under the control, in an administrative sense, of the Land Department for the purpose of carrying out the act of Congress. As there is no dispute, and could be none, concerning the general rule that courts have no [208] power to interfere with the performance by the Land Department of the administrative duties devolving upon it, however much they may, when the functions of that Department are at an end, correct, as between proper parties, errors of law committed in the administration of the land laws by the Department, it must follow, unless it be that this case by some exception is taken out of the general rule, that there was no power in the court below to control the action of the Secretary of the Interior, and reversal therefore must follow. United States v. Schurz, 102 U. S. 378, 396, 26 L. ed. 167, 171; Brown v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; United States ex rel. Knight v. Lane, 228 U. S. 6, 57 L. ed. 709, 33 Sup. Ct. Rep. 407. But, as the court below rested its conclusion of power solely upon the existence of an assumed exception to the general rule, and as the correctness of that view is the sole ground relied upon to sustain the judgment, that question is the single subject for consideration, and we come to dispose of it.

The exception rests upon two considerations: (a) The want of power of the Secretary to reopen or reconsider the prior administrative order recognizing the relators as the heirs of the deceased allottee, —an absence of authority which, it is deemed, resulted from the provisions of the act of 1910 which we have previously quoted

[1] "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor."

in the margin; and (b) the further absence of all authority of the Secretary to disregard the decree of adoption of the Nebraska court by collaterally questioning the same in order to deprive of the status of adoption which that decree, it is insisted, had conclusively fixed as against all the world under the law of Nebraska.

(a) The first proceeds upon the theory that the provision of the act of 1910 to the effect that the decision of the Secretary recognizing the heirs of a deceased allottee "shall be final and conclusive" caused the prior order of the Secretary, recognizing the relators as heirs, to completely exhaust his power, and therefore to give a character of absolute finality to such order, even although the property [209] to which it related was yet in the administrative control of the Department because of the trust imposed by the law of the United States until the expiration of the statutory period. But we are of opinion that this is a mistaken view. The words "final and conclusive" describing the power given to the Secretary must be taken as conferring, and not as limiting or destroying, that authority. In other words, they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive competency of the administrative authority. As it is obvious that the right to review on proper charges of newly discovered evidence or fraud a previous administrative order while the property to which it related was under administrative control was of the very essence of administrative authority (Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208), it must follow that the construction upheld would not only deprive the Secretary of the final and conclusive authority which the statute in its context contemplated he should have, but would indeed render the administrative power conferred wholly inadequate for the purpose intended by the statute. And it must be further apparent that the inadequacy of authority which the proposition, if accepted, would bring about, could not be supplied, since it would come to pass that, although the property was yet in the control of the United States to carry out the trust, there would be an absence of all power, both in the administrative and judicial tribunals, to correct an order once rendered, however complete might be the proof of the fraud which had procured it.

But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land, and not to leave all his rights of [210] enjoyment open to changing decisions which might be made during the long period of the trust term, and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But, in last analysis, this is a mere argument seeking to destroy a lawful power by the suggestion of a possible abuse. We say this because, although it be conceded, for the sake of the argument only, that an exercise of power which was plainly an abuse of discretion, depriving of the right which the statute plainly gave, would be subject to correction by the courts, such concession would be here without influence, since there is no basis whatever upon which to rest an assumption of abuse of discretion.

(b) So far as the Nebraska decree is concerned, the mistake upon which the proposition proceeds is obvious; since, conceding the premise upon which it must rest to be well founded, it affords no ground for preventing by judicial action the exercise by the Secretary of his power to determine the legal heirs, and in doing so to ascertain the existence of the Nebraska judgment, the jurisdiction *ratione materiæ* of the court by which it was rendered, and the legal effect which it was entitled to receive under the law of Nebraska.

There was a suggestion in argument, which it was conceded was not made in the courts below, of an absolute want of jurisdiction upon the theory that, as the title of the allotted property was yet in the United States for the purposes of the trust, there could in any event be no jurisdiction over the cause, since, in substance and effect, it was a suit against the United States. As, however, the considerations involved in this proposition were absolutely coincident with those required to be taken into view in order to determine the power of the Secretary, we have not deemed it necessary to specially consider the subject.

It follows from what we have said that the court below was without jurisdiction to control the conduct of the [211] Secretary concerning a matter within the administrative authority of that officer, and therefore that the mandamus was wrongfully allowed, and the judgment awarding it must be and it is reversed and the case remanded with directions to affirm the judgment of the Supreme Court of the District of Columbia, dismissing the petition for a writ of mandamus.

Reversed.

Mr. Justice **McReynolds** took no part in the consideration and decision of this case.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plff. in Err.,
v.
GEORGE BOMBOLIS, as Administrator of the Estate of Constantine Nanos, alias Gust Nanos, Deceased.

(See S. C. Reporter's ed. 211-223.)

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

[No. 478.]

Argued and submitted April 19 and 20, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court of Hennepin County, in that state, in favor of plaintiff in an action for death, brought under the Federal employers' liability act Affirmed.

See same case below, on first appeal, 128 Minn. 112, 150 N. W. 385.

The facts are stated in the opinion.

Mr. Frederick M. Miner argued the cause, and, with Mr. William H. Bremner, filed a brief for plaintiff in error:

The right of trial by jury which is secured to all persons subject to the jurisdiction of the United States, by the provisions of the 7th Amendment, means a jury of twelve men, who must, in finding facts, act unanimously.

American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The right which is secured by the 7th Amendment is not a matter of procedure, but of substance, and one possessing such right cannot be deprived of the same by any means short of an amendment to the Constitution of the United States.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, supra; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

The 7th Amendment is a limitation upon all of the powers delegated by the Constitution to those agencies which comprise the government of the United States; therefore, not only the courts, but the legislature of the United States, is limited by this Amendment, and the right secured thereby enters into and controls all suits founded upon legislation enacted by Congress in whatever court the same may be brought, where such court sits and exercises power within the domain of the United States.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 595, 41 L. ed. 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Bauman v. Ross, 167 U. S. 592, 42 L. ed. 289, 17 Sup. Ct. Rep. 966; Thompson v. Utah, 170 U. S. 343-350, 42 L. ed. 1061-1066, 18 Sup. Ct. Rep. 620; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528-537, 43 L. ed. 796-800, 19 Sup. Ct. Rep. 513; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Maxwell v. Dow, 176 U. S. 581, 596, 44 L. ed. 597, 603, 20 Sup. Ct. Rep. 448, 494; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; Downes v. Bidwell, 182 U. S. 244, 270, 45 L. ed. 1088, 1100, 21 Sup. Ct. Rep. 770; Rassmussen v. United States, 197 U. S. 516-526, 49 L. ed. 862-865, 25 Sup. Ct. Rep. 514; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55, 57, 56 L. ed. 327, 348, 349, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Slocum v. New York L. Ins. Co. 228 U. S. 364, 377, 57 L. ed. 879, 885, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B, 252; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75.

A state court can derive no authority from the power which creates it to adjudicate controversies based upon the Federal act.

NOTE.—On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169; Levin v. United States, 63 C. C. A. 476, 128 Fed. 826.

The principles of law comprised within the term "comity," by which courts entertain controversies involving rights created by sovereign power, other than that which created such courts, do not afford the basis or ground upon which state courts may exercise their powers in controversies founded upon the Federal act.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

The *dictum* of District Judge Whitson, to the effect that the principle of comity by analogy may be involved in this question, is evidently inadmissible, and, with due respect, seems to involve a contradiction.

Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

When it, "comity," is the basis of judicial determination, the court extending the comity out of favor and good will extends to foreign laws an effect they would not otherwise have.

Stowe v. Belfast Sav. Bank, 92 Fed. 90.

But its obligation is not imperative.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708.

Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other, but is the recognition which one nation allows within its territory, to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens, who are under the protection of its laws.

Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139.

It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests.

People v. Martin, 175 N. Y. 315, 96 Am. St. Rep. 628, 67 N. E. 589, 15 Am. Crim. Rep. 591.

To say that a state court obeys the Constitution of the United States, or a law made pursuant thereto, as a voluntary act, or as a matter of convenience and expediency, would be absurd, and involve a contradiction in terms.

Ableman v. Booth, 21 How. 506, 516, 16 L. ed. 169, 173.

Congress, in the legitimate exercise of the power conferred upon it, may withhold jurisdiction to try causes founded upon laws passed by it, or can confer exclusive jurisdiction with respect to such matters upon the Federal courts.

Claflin v. Houseman, supra; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397.

State courts, in deciding controversies founded upon this act, are applying the judicial power of the United States; and if it be held that the 7th Amendment is a limitation only upon that power, state courts could not enforce such power apart from the limitation of the said Amendment.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Cohen v. Virginia, 6 Wheat. 414, 5 L. ed. 293.

The judicial power of the United States is coextensive with its legislative power.

Cohen v. Virginia, supra.

If a case is not within the judicial power of the United States an appeal will not lie to this court, for it is self-evident that one sovereign power cannot exercise supervision over the judiciary of another.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97; Cohen v. Virginia, supra.

A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of procedure.

Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781.

Messrs. Frederick M. Miner and William H. Bremner also united in a joint brief filed in behalf of plaintiff in error in Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. George B. Leonard for defendant in error. For his contentions, see joint brief filed in behalf of defendant in error in Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. Chief Justice White delivered the opinion of the court:

Counting upon the employers' liability act of 1908 (chap. 149, 35 Stat. at L. 65), as amended by the act of 1910 (chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662), the defendant in error sued in a state court to recover for the loss resulting from the death of Nanos, his intestate, alleged to have been occasioned by the negligence of the plaintiff in error while he, Nanos, was in its employ and engaged in interstate commerce.

Whatever may have been the controversies in the trial court prior to the verdict of the jury in favor of the plaintiff, and the contentions which were unsuccessfully urged in the court below to secure a reversal of the judgment entered thereon, on this writ of error they have all but one been abandoned, and hence have all but one become negligible. As the one question here remaining was also involved in five other cases pending under the employers' liability

act on writs of error to the courts of last resort of Virginia, Kentucky, and Oklahoma, those cases and this were argued together. As the other cases, however, involve additional questions, we dispose separately of this case in order to decide in this the one question which is common to them all, and thus enable the other cases, [216] if we deem it is necessary to do so, to be treated in separate opinions

By the Constitution and laws of Minnesota in civil causes, after a case has been under submission to a jury for a period of twelve hours without a unanimous verdict, five sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law. When in the trial of this case the court instructed the jury as to their right to render a verdict under such circumstances, the defendant company objected on the ground that, as the cause of action against it arose under the Federal employers' liability act,—in other words, was Federal in character,—the defendant was by the 7th Amendment to the Constitution of the United States entitled to have its liability determined by a jury constituted and reaching its conclusion according to the course of the common law, and hence to apply the state statute would be repugnant to the 7th Amendment. This objection, which was overruled and excepted to, was assigned as error in the court below, was there adversely disposed of (128 Minn. 112, 150 N. W. 385), and the alleged resulting error concerning such action is the one question which, we have said, is now urged for reversal.

It has been so long and so conclusively settled that the 7th Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580), that it is not now open in the slightest to question that if the requirements of that Amendment applied to the action of the state of Minnesota in adopting the statute concerning a less than unanimous verdict, or controlled the state court in enforcing that statute in the trial which is under review, both the statute and the action of the court were void because of repugnancy to the Constitution of the United States. The one [217] question to be decided is therefore reduced to this: Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict?

Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U. S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was [218] this view of the contention which led the supreme court of Minnesota in this case and the courts of last resort of the other states in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice, both state and national, which had prevailed from the commencement. And it was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress, in the enactment of the employers' liability act, to clearly contem-

plate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the employers' liability act and the safety appliance act, and in the large number of cases which have been tried in state courts, growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the 7th Amendment which was urged in this case and the cases which were argued with it.

Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the previous authoritative rulings on the subject, and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. Chesapeake & O. R. Co. v. Carnahan, — Va. —, 86 S. E. 863; Chesapeake & O. [219] R. Co. v. Kelly, 160 Ky. 296, 169 S. W. 736, 161 Ky. 655, 171 S. W. 185; Louisville & N. R. Co. v. Stewart, 163 Ky. 823, 174 S. W. 744; St. Louis & S. F. R. Co. v. Brown, — Okla. —, 144 Pac. 1075. In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon.

1. It is true, as pointed out in Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768, and in American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618, that the right to jury trial which the 7th Amendment secures is a substantial one in that it exacts a substantial compliance with the common-law standard as to what constitutes a jury. But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and with which it is not concerned. It is also true, as pointed out in the cases just cited, that although territorial courts of the United States are not constitutional courts, nevertheless, as they are courts created by Congress, and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the 7th Amendment are applicable in such courts. But this affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law, in the teeth of the express and settled doctrine that the Amendment does not relate to proceedings in such courts.

2. The proposition that, as the 7th Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress, and regulate the enforcement of [220] such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

Indeed, the truth of this view and the profound error involved in the contention relied upon is aptly shown by the further propositions advanced in argument and based upon the premise insisted upon. Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a

limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes. It is [221] true that the argument does not squarely face the contention to which it reduces itself, since it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts, in enforcing the Federal right, are to be treated as Federal courts, and be subjected *pro hac vice* to the limitations of the 7th Amendment. And, of course, if this principle were well founded, the converse would also be the case, and both Federal and state courts would, by fluctuating hybridization, be bereft of all real, independent existence. That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering.

But here again the error of the proposition is completely demonstrated by previous adjudications. Martin v. Hunter, 1 Wheat. 304, 330, 4 L. ed. 97, 103; Houston v. Moore, 5 Wheat. 1, 27, 28, 5 L. ed. 19, 25; Ex parte McNiel, 13 Wall. 236, 243, 20 L. ed. 624, 626; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55–59, 56 L. ed. 327, 348–350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. Moreover, the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them. This principle was made the basis of the first Federal judiciary act, and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitutional grant or legislative [222] enactment, state or national. In fact, this theory and practice is but an expression of the principles underlying the Constitution, and which cause the governments and courts of both the nation and the several states not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in Second Employer's Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States, exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a Federal right. It is true in the Mondou Case it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States. On the contrary, the principle upon which the Mondou Case rested, while not questioning the diverse governmental sources from [223] which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose.

Affirmed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,
v.
HARRY A. BROWN.

(See S. C. Reporter's ed. 223–228.)

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

1. The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Trial — taking case from jury — assumption of risk.

2. The abandonment by plaintiff of his claim under the Federal safety appliance acts in an action based upon those acts and the Federal employers' liability act, brought by a railway brakeman who was injured while attempting to work by hand an automatic coupler, did not necessarily withdraw all evidence tending to show that the couplers were defective, so as to establish as a matter of law that he assumed the risk, and to require a directed verdict for defendant, where the testimony concerning the condition of the couplers is clearly admissible under the issues based on the employers' liability act as explaining the occasion for the brakeman's presence on the track, and as negativing negligence on his part, the withdrawal of the claim not being a concession that the testimony relating to the couplers was false.

[For other cases, see Trial, VI. d, 3, in Digest Sup. Ct. 1908.]

Error to state court — reversible error — wrong reason for decision.

3. The inaccuracy of the statement by the court of last resort in passing on an objection to an instruction upon assumption of risk, in an action under the Federal employers' liability act, that assumption of risk was not a defense, furnishes no reason why its affirmance of the judgment of the trial court should be reversed by the Federal Supreme Court, where there is no contention in the latter court concerning the correctness of the charge as to the assumption of risk upon which the case was submitted to the jury.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Error to state court — reversible error — instruction — comparative negligence.

4. Charging the jury in an action under the Federal employers' liability act that, in the event of finding the plaintiff guilty of contributory negligence, they should "reduce his damages in proportion to the amount of negligence which is attributable to him," is not reversible error, even though further definition might have aided the jury in appreciating the standard by which the damages should be measured, where the defendant made no request for a charge clarifying any obscurity on the subject which it deemed to exist.

[For other cases, see Appeal and Error, VIII. m, 4, in Digest Sup. Ct. 1908.]

[No. 399.]

Submitted April 19 and 20, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Carter County, in that state, in favor of plaintiff in an action under the Federal employers' and safety appliance acts. Affirmed.

See same case below, — Okla. —, 144 Pac. 1075.

The facts are stated in the opinion.

Messrs. **W. F. Evans** and **R. A. Kleinschmidt** submitted the cause for plaintiff in error. Mr. J. H. Grant was on the brief:

Congress, in the exercise of its admitted power to regulate commerce between the states, has taken complete possession of the subject of liability of interstate carriers for injury to their servants while in the discharge of any duty in connection with interstate commerce.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

NOTE.—On error to state court in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and *effect of* the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

By abandoning and withdrawing the charge and claim that the couplers were defective, plaintiff swept away every pretext and every excuse for giving a stand-still signal, and he likewise swept away every pretext and every excuse for placing himself between the rails in front of the moving cars. If the couplers were not defective, then there was no reason for him to give a stand still signal, and no excuse for his going in between the rails to adjust the coupler on the car which ran over him.

Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 154.

Plaintiff's case was submitted to the jury under the provisions of the employers' liability act alone, and the defense of assumption of the risk was therefore available to the defendant.

Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897; Second Employers' Liability Cases (Moudou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

It is the duty of the trial judge to withdraw the case from the jury and to direct a verdict, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 32, 27 L. ed. 66, 1 Sup. Ct. Rep. 18; Griggs v. Houston, 104 U. S. 553, 26 L. ed. 840; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266.

Plaintiff assumed the risk of dangers ordinarily incident to his employment as brakeman.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Sans Bois Coal Co. v. Janeway, 22 Okla. 425, 99 Pac. 153; Coalgate Co. v. Hurst, 25 Okla. 588, 107 Pac. 657; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Kohn v. McNulta, 147 U. S. 241, 37 L. ed. 152, 13 Sup. Ct. Rep. 298; Southern P. Co. v. Seley, 152 U. S. 153, 38 L. ed. 395, 14 Sup. Ct. Rep. 530; Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 747; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Williams v. Choctaw, O. & G. R. Co. 79 C. C. A. 146, 149 Fed. 104; Burke v. Union Coal & Coke Co. 84 C. C. A. 626, 157 Fed. 178; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

Plaintiff assumed the risk of obvious dangers, such as stepping between the rails in front of a moving train, or in attempting to couple cars, or to prepare the train for coupling by standing between the rails, and the like.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

If plaintiff was entitled to recover at all, his recovery should have been measured by the standard prescribed by the act of Congress under which his action was prosecuted. But the trial court failed to give the jury any standard by which to measure his damages.

Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653; Nashville C. & St. L. R. Co. v. Banks, 156 Ky. 609, 161 S. W. 554.

The doctrine of comparative negligence is a very different thing from the rule put in force in this act.

Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456, 4 Am. Neg. Cas. 258; Whirley v. Whiteman, 1 Head, 623; East Tennessee, V. & G. R. Co. v. Humphreys, 12 Lea, 200; Louisville, N. & G. S. R. Co. v. Fleming, 14 Lea, 130; East Tennessee, V. & G. R. Co. v. Fain, 12 Lea, 35; East Tennessee, V. & G. R. Co. v. Curley, 12 Lea, 46; Kansas P. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Atchison, T. & S. F. R. Co. v. Morgan, 31 Kan. 77, 1 Pac. 298; Atchison, T. & S. F. R. Co. v. Henry, 57 Kan. 154, 45 Pac. 576.

Mr. W. F. Evans also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Messrs. C. B. Stuart, A. C. Cruce, and M. K. Cruce submitted the cause for defendant in error. Messrs. W. I. Cruce and L. S. Dolman were on the brief:

Will this court review the actior

state supreme court, wherein it held that the plaintiff below, in dismissing that portion of his complaint which was based upon the safety appliance act, did not withdraw from the jury all the testimony he had introduced with reference to the defective coupling? Is any Federal question here involved? Certainly it did not involve the construction of any act of Congress. It was rather a question of general law, depending for its solution upon local construction. It was merely incidental to the Federal questions involved in the case, and did not, in its essence, involve the existence either of plaintiff's right to recover under the Federal statute, or of the defendant's right to be shielded under that statute.

Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

Much stronger cases of contributory negligence have been by this court left where the jury left them.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, ante, 324, 36 Sup. Ct. Rep. 126; Kanawha & M. R. Co. v. Kerse, 239 U. S. 576, ante, 448, 36 Sup. Ct. Rep. 174.

The doctrine of assumption of risk has no place in the case, and what plaintiff in error is really contending for is: That the defendant in error was guilty of such contributory negligence as to defeat his right to recover. It is not always easy, of course, to distinguish between contributory negligence and assumed risk, but it seems that there ought to be no difficulty in this case.

4 Thomp. Neg. § 4611; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Peirce v. Clavin, 27 C. C. A. 227, 53 U. S. App. 492, 82 Fed. 550.

The court did not err in instructing the jury as to the effect of contributory negligence, nor in failing to give defendant's requested charge on contributory negligence.

Chadwick v. Oregon-Washington R. & Nav. Co. 74 Or. 19, 144 Pac. 1165; Tilghman v. Seaboard Air Line R. Co. 167 N. C. 163, 83 S. E. 315, 1090; Cross v. Chicago, B. & Q. R. Co. 191 Mo. App. 202, 177 S. W. 1127; Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329; Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 67, note; Hall v. Vandalia R. Co. 169 Ill. App. 12; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

Under the Federal employers' liability act the defendant is liable if it is guilty of any causative negligence, however slight, in connection with that of the plaintiff.

New York, C. & St. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

Messrs. C. B. Stuart, A. C. Cruce, and M. K. Cruce also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. Chief Justice White delivered the opinion of the court:

Basing his cause of action upon the Federal employers' liability and safety appliance acts, Brown, the defendant in error, sued to recover damages resulting from injuries alleged to have been occasioned by the negligence of the railroad company while he was in its employ and engaged in interstate commerce. At the close of the testimony the claim under the safety appliance act was withdrawn and the case was submitted to the jury alone upon the employers' liability act. There was a verdict and judgment for the plaintiff, which was affirmed by the court below. — Okla. —, 144 Pac. 1075.

There was a sharp conflict between the testimony offered on behalf of the plaintiff and that on behalf of the defendant. The material facts disclosed by the plaintiff's testimony are as follows: Brown, a head brakeman, and other members of a local freight train crew on the day in question were engaged in the yards at Ashdown, Arkansas, in making up an extra freight train to be taken out by an extra crew to Hugo, Oklahoma. The cars intended [225] for the interstate train were placed on an east and west passing track east of a switch connecting a spur track which ran in a northeasterly direction past a stave mill. After placing some cars from the spur track on the passing track, the engine returned to the spur track with several cars, some of which were to be left at the mill and the remainder brought out and coupled to those already collected for the train and standing on the passing track. Brown accompanied the cars, and, after cutting off those intended for the mill, gave the engineer a signal to go ahead, the engine being headed west, and when the cars approaching the switch came opposite the car on the passing track to which the coupling was to be made, Brown crossed over from the spur

track to the passing track to adjust the coupler on the car standing there. Finding the knuckle of the coupler closed, he attempted to open it with the lever at the side of the car, but it did not work. He then tried to manipulate the knuckle with his hand, but could get it only part way open, and, closing it, he stepped out to the north side of the track (the engineer's side). As the last car coupled with the engine was then just clearing the switch, he gave the engineer a stop signal and walked west to the switch stand to set the switch so that the engine and cars might be backed to make the coupling. By the time he had walked the short intervening distance and set the switch the engine had come to a stop with the rear car a few steps west of the switch. Intending then to adjust the coupler on the end of this car, Brown gave the engineer, who was watching him, a "spot" signal, which indicated that he was not to move the engine until a further signal was given by Brown, and crossed over to the south side of the track in order to use the lifting pin to open the knuckle of the coupler. When the lever failed to work he stepped behind the car and was about to try to open the knuckle with his hand when he heard the cars ahead of him move. He at once turned to leave the [226] track, but was struck and knocked down by the car which was backed in disregard of the "spot" signal, and his feet were caught under the wheels and crushed.

The assignments of error are numerous, but those requiring to be specially noticed may be disposed of under three headings:

1. The contention that rights of the railroad company guaranteed by the 7th Amendment were violated because only nine of the twelve jurors concurred in the verdict is without merit. Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, ante, 961, 36 Sup. St. Rep. 595.

2. A twofold contention is based upon rulings concerning the doctrine of the assumption of the risk. Upon the withdrawal by the plaintiff of his claim under the safety appliance act, the court charged the jury concerning assumption of the risk as follows:

"You are instructed that, by accepting employment as a brakeman with the defendant, the plaintiff assumed the risk of such dangers as are ordinarily incident to the occupation he was engaged in, and if you find that his injury was occasioned by one of the incidents ordinarily attending the occupation upon which he was engaged, you should return a verdict for the defendant; but you are instructed in this connection that the plaintiff only assumed the risks that are ordinarily incident to the occupation in which he was engaged, and that he did not assume the risks that were attendant upon the negligence of a fellow servant."

(a) It is insisted that the abandonment of the claim as to a violation of the safety appliance act necessarily withdrew all evidence tending to show that the couplers were defective, and, in the absence of such evidence, the proof established as a matter of law that the plaintiff assumed the risk, and the court should have directed a verdict in favor of the railroad. We think the proposition is plainly without merit. The testimony concerning [227] the condition of the couplers was clearly admissible under the issues based on the employers' liability act as explaining the occasion for Brown's being on the track, and as negativing negligence on his part. In so far as the contention implies that the withdrawal of the claim was a concession that the testimony relating to the couplers was false, we think the conclusion is wholly unwarranted. If we were to conjecture as to the reason for the abandonment of the claim under the safety appliance act, we think it at least quite as probable that plaintiff's counsel were of opinion that, in the situation disclosed by the plaintiff's testimony, the safety appliance act was inapplicable.

(b) In the court below it would seem that the correctness of the general instruction as to assumption of the risk which we have quoted as given by the trial court was challenged on a ground which has been abandoned because not here pressed. But it is said reversible error exists because the court below, in passing upon such objection, remarked that as the "defendant's liability to plaintiff grows out of a violation of a statutory duty, arising under an act of Congress," assumption of the risk was not a defense. This, it is said, was erroneous, first, because so far as the safety appliance act was concerned, it was inapposite, as reliance upon that law by the plaintiff had been disclaimed, and second, because, under the facts, it was open to find the existence of assumption of the risk depending upon conditions of fact not involved in the safety appliance act. But we fail to see the pertinency of this objection, as there is now no contention concerning the correctness of the charge as to assumption of the risk upon which the case was submitted to the jury for their verdict. At best, therefore, the error asserted simply amounts to contending that because the court below may have inaccurately expressed in one respect its reasons for affirmance, that inaccuracy gives rise to the duty of [228] reversing

judgment although no reversible error exists.

3. It is contended that the court erred in charging the jury that, in the event they found the plaintiff guilty of contributory negligence, they should "reduce his damages in proportion to the amount of negligence which is attributable to him," since the court did not define the word "proportion," and hence failed to fix any standard by which the damages should be measured. The charge is clearly distinguishable from the instruction disapproved in Seaboard Air Line R. Co. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653, which is relied upon, since in that case the jury were in effect instructed to diminish the damages according to their conception of what was reasonable. The instruction given is almost in the identical language of the statute, and while definition might have further conduced to an appreciation by the jury of the standard established by the statute, we think there was no error in the charge given, especially as the railroad company made no request for a charge clarifying any obscurity on the subject which it deemed existed. It is true the company made a request on the subject which the court declined to give, but that request, we are of opinion, taken as a whole, instead of clarifying any ambiguity deemed to exist in the instruction which the court gave would have served to obscure it. There was no error, therefore, leaving aside the question whether the requested instruction did not contain matters which, if given, would have been erroneous.

Although we have examined the whole record, and, as the result of that examination, conclude there is no ground for reversal, we have not particularly noticed subjects embraced by some of the assignments, but not pressed in argument, and others not embraced by the assignments, but indirectly referred to in the argument.

Affirmed.

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[229] RALPH B. JACOBS, Plff. in Err.,
v.
SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 229-237.)

Master and servant — employers' liability — assumption of risk.

1. The express declaration by the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), § 4, that an employee shall not be held to have assumed the risks of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to his injury or death, must be deemed to leave in force in all other cases the defense of the assumption of risk of the carrier's negligence, notwithstanding the provision of the 3d section of that act that the contributory negligence of the employee "shall not bar a recovery," and of the 5th section, precluding the carrier from exempting itself from liability.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — knowledge and appreciation of danger.

2. A railway fireman injured by stumbling over a pile of cinders between the tracks while attempting to board a moving engine with a can of drinking water in his hands assumes the risk of the situation where he knows of the custom to deposit cinders between the tracks, and knows of their existence, although he may have forgotten their existence at the time, and does not notice them.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

Error to state court — objections to instruction — general or specific.

3. The objection that an instruction, in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), on the assumption of risk, did not state as an element the appreciation by the employee of the danger of the situation as necessary to his assumption of risk, is not available on writ of error from the Federal Supreme Court to a state court, where the objection made at the trial was the general one that the instruction did not correctly state the common-law doctrine of assumption of risk, and in the state court of last resort the attack was based upon the sole ground that assumption of risk was not available as a defense under the Federal statute.

[For other cases, see Appeal and Error, VI. a, 3, in Digest Sup. Ct. 1908.]

[No. 326.]

Argued April 27, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which refused a writ of error to the Circuit Court of Brunswick County to review a judgment of that court in favor of defendant in an action under the Fed-

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Note.—On error to state court in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Generally, as to a servant's assumption of risk—see notes to Pidcock v. Union P. R.

eral employers' liability act, rendered on a second trial after the judgment of that court on the first trial had been reversed by the Virginia Court of Appeals. Affirmed.

See same case below, 116 Va. 189, 81 S. E. 99.

The facts are stated in the opinion.

Mr. **Edward P. Buford** argued the cause and filed a brief for plaintiff in error:

The plaintiff was injured as a result of a dangerous condition created by the negligence of the defendant's officers, agents, or employees in another department of the service.

Kansas City, Ft. S. & G. R. Co. v. Kier, 41 Kan. 671, 21 Pac. 770.

The defendant's effort to acquit itself of the charge of negligence on the part of those of its servants who were charged with knowledge of the danger is inconsistent with its contention that the plaintiff, whose duty as a fireman was not concerned with the accumulation of cinders, was himself chargeable with knowledge of the danger. As a locomotive fireman he was under no duty to examine the consistency of the heap of cinders. He was entitled to assume that the yard was free from such a danger as that which caused his injury.

Texas & P. R. Co. v. Harvey, 228 U. S. 319–321, 57 L. ed. 852–855, 33 Sup. Ct. Rep. 518; Kirbo v. Southern R. Co. — Ga. App. —, 84 S. E. 491; Baltimore & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 160.

An instruction is erroneous which directs a verdict on a partial view of the evidence.

38 Cyc. 1627; Greenleaf v. Birth, 9 Pet. 292, 9 L. ed. 132.

The plaintiff's positive testimony that he was not aware of the danger precludes the contention that he assumed the risk.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51–59, 49 L. ed. 382–387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422.

To charge a servant with assumption of risk, as a matter of law, the danger must be so obvious and imminent that a person of ordinary prudence would not undertake the service. When the danger is not of that character the question of assumption of risk is one of fact for the jury.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64–68, 48 L. ed. 96–100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Phœnix Mut. L. Ins. Co. v. Doster, 106 U. S. 32, 27 L. ed. 66, 1 Sup. Ct. Rep. 18.

To charge the servant with assumption of risk the evidence (1) must show that he was chargeable with knowledge of the material conditions which were the immediate cause of his injury, and (2) must establish his appreciation of the dangers produced by the abnormal conditions.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130, 3 Labatt, Mast. & S. § 1190, pp. 3207–3211; Graseth v. Northwestern Knitting Co. 128 Minn. 245, 150 N. W. 804; Campbell v. Chicago G. W. R. Co. 108 Minn. 104, 28 L.R.A.(N.S.) 346, 133 Am. St. Rep. 417, 121 N. W. 429; Baltimore & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060.

Unless plaintiff in error not only knew the conditions, but also knew of the dangers arising therefrom, he could not be charged with negligence in failing to avoid them.

Holcomb v. Norman, 47 Ind. App. 87, 91 N. E. 625.

Since knowledge of the danger which produces the injury is "not only an element or factor, but a very important one" (Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356, 49 S. E. 489; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449) in contributory

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Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374, and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On *volenti non fit injuria* as defense to action by injured servant—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

As to whether servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

As to servant's assumption of risk of dangers imperfectly appreciated—see note to Tuckett v. American Steam & Hand Laundry, 4 L.R.A.(N.S.) 990.

On the assumption by train employee of risks due to defects in track or roadbed—see notes to Smith v. Chicago, R. I. & P. R. Co. 28 L.R.A.(N.S.) 1255, and Luebben v. Wisconsin Traction, Light, Heat & P. Co. 49 L.R.A.(N.S.) 517.

negligence, it is difficult to conceive of an instruction on that subject which does not embrace the element of knowledge.

Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321; Herrick v. Quigley, 41 C. C. A. 294, 101 Fed. 187.

Assumption of risk defeats the policy of the act.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1–51, 56 L. ed. 327–346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 149, 57 L. ed. 1127, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 107 Minn. 260, 21 L.R.A.(N.S.) 138, 120 N. W. 360.

There is no common law of the United States.

Wheaton v. Peters, 8 Pet. 658, 8 L. ed. 1079; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 563, 14 L. ed. 268; Smith v. Alabama, 124 U. S. 465–483, 31 L. ed. 508–514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Moore v. United States, 91 U. S. 270, 23 L. ed. 346; Gatton v. Chicago, R. I. & P. R. Co. 95 Iowa, 112, 28 L.R.A. 556, 63 N. W. 589; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Kansas v. Colorado, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 406, 54 L. ed. 1088, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815.

While the phrase "assumption of risk" in its modern acceptation includes the ordinary risks as well as those due to the employer's negligence, the words "risks of his employment" refer only to the ordinary risks, the existence of which implies no negligence on the part of the master.

5 Labatt, Mast. & S. § 1647; Morgan v. Vale of Neath R. Co. 5 Best & S. 570, 33 L. J. Q. B. N. S. 260, 12 Week. Rep. 1032, affirmed in L. R. 1 Q. B. 149, 5 Best & S. 736, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144; Texas & P. R. Co. v. Harvey, 228 U. S. 319–321, 57 L. ed. 852–855, 33 Sup. Ct. Rep. 518.

The phrase "assumption of risk" in its original significance embraced only such risks as were inherent, or at least involved no breach of common-law duty. In this sense, the risks included are synonymous with those embraced in the phrase "risks of his employment." In its secondary application the phrase "assumption of risk" was extended to embrace the enhanced risks due to the employer's negligence, and thus was made to include two legal conceptions essentially different.

Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1221, note.

The negligence of a fellow servant is not the violation of any statute enacted for the safety of employees unless the liability act is itself such a statute.

Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L.R.A.1915C, 39, 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725.

An early, if not the earliest, application of the phrase "assumption of the risk," was the establishment of the exception to the liability of a master for the negligence of a servant when the person injured was a fellow servant of the negligent man.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407.

The risk of injury from the negligence of the fellow servant is a risk of his employment, which, at common law, is assumed by the employee (Norfolk & W. R. Co. v. Nuckols, 91 Va. 193, 21 S. E. 342), while the risk of injury from the employer's negligence, whatever may be the basis of its assumption at common law, is not a risk of his employment assumed by the employee.

3 Labatt, Mast. & S. § 804.

Continuance in the service with knowledge of the danger is the common and essential factor of both assumption of risk and contributory negligence.

Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 77, 37 C. C. A. 505, 96 Fed. 298.

The confusion in efforts to distinguish between assumption of risk and contributory negligence results from a lack of classification of the different phases of the two defenses, which are sought to be contrasted or defined. Such a classification demonstrates the impossibility of reconciling with the 3d section of the employers' liability act that form of assumption of risk which, at common law, bars recovery when the employee continues in service with knowledge of an abnormal danger superadded by the master's negligence.

St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495, 15 Am. Neg. Rep. 476; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298; Northern P. R. Co. v. Mares, 123 U. S. 710–720, 31 L. ed. 296–301, 8 Sup. Ct. Rep. 321; Kane v. Northern C. R. Co. 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; Shearm. & Redf. Neg. § 211;

Francis v. Kansas City, St. J. & C. B. R. Co. 127 Mo. 658, 28 S. W. 842, 30 S. W. 129, 26 Cyc. 1211; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; Southern P. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436; Graham v. Newburg Orrel Coal & Coke Co. 38 W. Va. 272, 18 S. E. 584; Chicago G. W. R. Co. v. Crotty, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; 3 Labatt, Mast. & S. §§ 1182, 1205, 1210, 1219, 1221, 1226, 1233, 1234; A. L. Clark Lumber Co. v. Johns, 98 Ark. 217, 135 S. W. 892; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356, 49 S. E. 489; Buckner v. Richmond & D. R. Co. 72 Miss. 873, 18 So. 449; Pennsylvania Co. v. Cole, 131 C. C. A. 244, 214 Fed. 948; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

This defense, if its basis is an implied contract, renders nugatory the 5th section of the act, that any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void.

Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L.R.A.1915C, 39, 220 U. S. 608, 55 L. ed. 607, 31 Sup. Ct. Rep. 725; McMurray v. Brown, 91 U. S. 257, 23 L. ed. 321; Richardson v. Norfolk & W. R. Co. 37 W. Va. 641, 17 S. E. 195; Wilson v. Taylor, 89 Ala. 368, 8 So. 149; Mornan v. Carroll, 35 Iowa, 22; Sprague v. Haines, 68 Tex. 216, 4 S. W. 371.

It is the policy of the law to protect, so far as possible, those pursuing, and oftentimes necessarily pursuing, so hazardous an employment. It is enough that they must assume the intrinsic risks of their calling without compelling them to assume the negligence of their employers.

Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, L.R.A.1915C, 39.

Since the maxim, when applicable, is a common-law defense to an action by a stranger, it is recognized by the English courts as a defense, to that extent, under the English statute.

Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660; Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516; Yarmouth v. France, L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, 17 Eng. Rul. Cas. 217; Osborne v. London & N. W. R. Co. L. R. 21 Q. B. Div. 220, 57 L. J. Q. B. N. S. 618, 59 L. T. N. S. 227, 36 Week. Rep. 809, 52 J. P. 806; Williams v. Birmingham Battery & Metal Co. [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, 47 Week. Rep. 680, 81 L. T. N. S. 62, 15 Times L. R. 468.

The established doctrine of the English courts is, however, that the maxim is not synonymous with *scienti non fit injuria*, and that whether or not the servant voluntarily assumed the risk is a question of fact for the jury,—a doctrine which is being accepted by the American courts.

New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 126 C. C. A. 632, 210 Fed. 118.

The maxim *volenti non fit injuria* has in the law no independent field of operation. It covers no ground not covered by contractual assumption of risk and contributory negligence.

O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161, and notes, III. and IX. 158 Mass. 135, 32 N. E. 1119; 3 Labatt, Mast. & S. §§ 1287, 1288.

Actual knowledge of the danger must be shown, or, in the absence of positive evidence on the subject, its obvious character must be so conclusively established that, as a matter of fact, his knowledge must be presumed, before the doctrine of assumption of risk can be invoked.

Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

Assumption of risk is a matter of general, not local, jurisprudence. Before the enactment of the employers' liability act—while the subject was within the police power of the state in the absence of legislation by Congress—this court applied its own interpretation of the common-law principle.

Smith v. Alabama, 124 U. S. 465, 476, 31 L. ed. 508–512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

By the act of Congress the subject is withdrawn from the police power of the state.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

In no conceivable view of the evidence would the jury have been warranted in any other conclusion than that the plaintiff, a locomotive fireman, charged only with duties connected with the operation of the train, inadvertently came in contact with a danger, of the existence of which he had no knowledge. On these facts, the court may

say, as a matter of law, he did not assume the risk.

Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130.

All courts agree that assumption of risk is not available as a defense when the injury results in whole or in part from the negligence of the officers, agents, or employees of the carrier, as distinguished from a defect or insufficiency due to its negligence in its physical appliances.

Second Employers' Liability Cases, supra; Easter v. Virginian R. Co. — W. Va. —, 86 S. E. 37; Portland Terminal Co. v. Jarvis, 141 C. C. A. 562, 227 Fed. 8; Grybowski v. Erie R. Co. — N. J. L. —, 95 Atl. 764; Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836, affirmed in 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

The words of the 4th section, "risks of his employment," mean the risks normally incident to the employment, the existence of which does not charge the employer with actionable negligence. They do not include risks occasioned by the employer's negligence.

Texas & N. O. R. Co. v. Kelly, 98 Tex. 123, 80 S. W. 79; Atchison, T. & S. F. R. Co. v. Mills, 49 Tex. Civ. App. 349, 108 S. W. 480; New Omaha Thomson-Houston Electric Light Co. v. Rombold, 73 Neb. 259, 102 N. W. 475, 106 N. W. 213; Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645; 5 Labatt, Mast. & S. § 1647; 3 Labatt, Mast. & S. § 894; Morgan v. Vale of Neath R. Co. 5 Best & S. 570, 33 L. J. Q. B. N. S. 260, 12 Week. Rep. 1032, affirmed in L. R. 1 Q. B. 149, 5 Best & S. 736, 35 L. J. Q. B. N. S. 23, 13 L. T. N. S. 564, 14 Week. Rep. 144; Texas & P. R. Co. v. Harvey, 228 U. S. 319–321, 57 L. ed. 852–855, 33 Sup. Ct. Rep. 518; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75, note.

Mr. William Leigh Williams argued the cause, and, with Mr. L. E. Jeffries, filed a brief for defendant in error:

The instruction attacked correctly states the common-law doctrine of assumption of risk.

Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746.

Assumption of risk is a good defense to an action under the Federal employers' liability act except where the carrier's default consists in a violation of some statute enacted for the safety of employees, and such default has contributed to the injury or death of the employee.

Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151; Neal v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1034; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Central Vermont R. Co. v. Bethune, 124 C. C. A. 528, 206 Fed. 868; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580.

Mr. Justice McKenna delivered the opinion of the court:

Action under the Federal employers' liability act, as amended, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657; 36 Stat. at L. 291, chap. 143.

Plaintiff in error, who was also plaintiff in the trial court, and we shall so designate him, was in the service of [230] the railway company, in interstate commerce, as a fireman. He received injuries while attempting to get on a moving locomotive. He charged negligence against the company and sued for the sum of $20,000 damages. The negligence charged was the causing and permitting to be within dangerous proximity to the tracks of the company a pile of loose cinders over which plaintiff stumbled and slipped, and was drawn under the locomotive.

The railway company, among other defenses, pleaded the following:

"That the said plaintiff was guilty of gross contributory negligence in attempting to board the engine with a water cooler filled with water in his arms, and was also guilty of gross contributory negligence in attempting to board the engine from a pile of cinders along the track; and was also guilty of gross contributory negligence in running along the track, and in attempting to board the engine without looking and seeing the pile of cinders, which could have been observed with any caution and care on his part; that the said pile of cinders had been allowed to accumulate in the same manner and in the same place as they were at the time of the accident for many years prior to the accident, and that these facts were well known to the plaintiff, and that he assumed the risk of danger from

said pile of cinders, if there was any danger in allowing them to remain there."

There were two trials of the action. The first trial resulted in a verdict for plaintiff for $12,000, upon which judgment was entered. The judgment was reversed by the supreme court of appeals for error in the instructions.

Upon the second trial the verdict was for defendant. The court refused to set it aside and grant a new trial, but ordered judgment in accordance therewith. The supreme court of appeals refused a writ of error and supersedeas, the effect of which was to affirm the judgment of the trial court.

[231] The facts are practically undisputed. Plaintiff was engaged with a crew in shifting cars in the railway company's yard at Lawrenceville, Virginia. He descended from the engine at the depot to get drinking water for himself and the engineer. He returned with a can of water to mount the engine, and then as to what took place he testified as follows: "I came down the railroad road . . . and came across the track on the crossing. At the time the train was pulling out of the last track. So I waited until the train was pulling up there, and aimed to catch it, and when I aimed to catch it I made three or four steps to get on it, you know, and I got to the cinder pile before I knew it, and I tripped, and went under the engine. . . . The cinder pile tripped me." The train was moving "just about as fast as anybody could walk; that is, pretty peart walking; not over 3 or 4 miles an hour at the most." He further testified that it had been customary ever since he had been on the road "for the trainmen to get on and off the engine when it was going that way;" had seen it done hundreds of times a day and had never seen any rule forbidding it. He was about 7 feet from the cinder pile when he "aimed to" catch the engine, and the cinder pile was about 18 or 24 inches deep, and he indicated its length to be about as long as the court room and as wide as the distance from himself to a person he indicated. Describing how the cinders caused him to fall, he said they were piled "right up against the rail" and "sloped from the rail up. As I caught the engine, I made several steps, and as I hit the cinder pile they commenced miring just like mud, and it caused me to fall, and when I fell in the cinder pile the journal box kept hitting and I couldn't get up. I tried, but I couldn't. . . . Every time I made an effort the cinder pile gave way with me. . . . I fell down behind the cinder pile. The cinder pile was sloping, and I fell down by the journal box, and the train [232] was passing, and I rolled down next to the rail." He further testified that if he had fallen from some other cause, he could have got out of danger; and that, when he started to get on the engine, he was not conscious of any danger from coming in contact with the pile of cinders; that it was not in his mind at all. But he testified: "I had knowledge of it, of the cinders being there, but I did not know that it was dangerous. I had forgotten them being there at the time. I was watching when I was going to step on the engine—watching my feet, where I was going to step, and was not noticing the cinder pile. . . . It was not in my mind."

It is not disputed that it was customary, and had been for eleven or twelve years, for the ashpans of the engine to be cleaned upon the tracks, and the ashes then drawn out from the tracks, and, when a lot had accumulated, taken away. The piles were of irregular height.

Plaintiff contends that upon this evidence he was entitled to recover under proper instructions, and that the trial court followed the decision of the supreme court of appeals in giving an instruction at the second trial which it had refused to give at the first trial. The instruction is as follows:

"The court instructs the jury that if they believe from the evidence that the existence of the cinder pile was known to the plaintiff, or that he had been working for the Southern Railway at Lawrenceville for more than a year, and that the cinders had been piled at the same place in the way described by the witnesses for many years prior to the accident, and that the plaintiff had failed to show that he had made complaint or objection on account of the cinder pile, then he assumed the risk of danger from the cinder pile, if there was any danger in it, and the act of Congress approved April 22, 1908, permits this defense, and the jury should find their verdict for the defendant." [116 Va. 195, 81 S. E. 99.]

[233] This instruction, it is contended, became "the law of the case" by the decision of the supreme court of appeals, and precluded the instructions which plaintiff asked, and which otherwise would have been correct, it is insisted, and should have been given.

The instructions refused presented these propositions: (1) The unsafe character or condition of the railway was of itself no defense to the injury caused thereby. (2) Knowledge of it by plaintiff might constitute contributory negligence and diminish the amount of recovery. (3) If the company suffered or permitted the cinders to be placed and to accumulate alongside of its main line in dangerous proximity to the railroad track or road, and plaintiff's injury resulted in whole or in part from such negli-

gence, or if the cinders constituted a defect or insufficiency in the railroad track, the verdict should be for plaintiff. (4) Knowledge of the existence of the cinders would not bar recovery, but it might be considered with other evidence in determining whether plaintiff was guilty of contributory negligence; and, if guilty, recovery would not be barred, but the amount of recovery would be diminished in proportion to such negligence. (5) To charge plaintiff with contributory negligence he must not only have known of the cinders, but also the danger occasioned by them, or that the danger was so obvious that a man of ordinary prudence would have appreciated it and not have attempted to get upon the engine at the time and under the circumstances disclosed by the evidence.

The rulings of the trial court and supreme court of appeals upon the instruction given and those refused make the question here and represent the opposing contentions of the parties. The railway company contends that plaintiff's knowledge of the cinder pile and his conduct constituted assumption of risk and a complete defense to the action. The plaintiff, on the other hand, insists that such knowledge and conduct amounted, at the utmost, [234] to no more than contributory negligence, and should not have barred recovery, though it might have reduced the amount of recovery. Indeed, plaintiff goes farther and contends that, whatever might have been the evidence respecting his knowledge or lack of knowledge of the danger, he did not assume the risk if the company was negligent; and, further, that employees' continuance in service with knowledge of a dangerous condition and without complaint does not bar recovery under the act of Congress. He concedes, however, that he encounters in opposition to his contentions the ruling in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, and therefore asks a review of that case, asserting that "the considerations upon which the true construction of the act depends were not suggested to the court."

The argument to sustain the assertion and to present what he deems to be the true construction of the act is elaborate and involved. It would extend this opinion too much to answer it in detail. He does not express his contention in any pointed proposition. He makes it through a comparison of the sections of the act, and insists that to retain the common-law doctrine of the assumption of risk is to put the 4th section in conflict with the other sections. The basis of the contention is that the act was intended to be punitive of negligence, and does not cast on the employees of carriers the assumption of risk of any condition or situation caused by such negligence. This is manifest, it is insisted, from the provisions of the 3d section of the act, which provides that the contributory negligence of the employee "shall not bar a recovery;" and of the 5th section, which precludes the carrier from exempting itself from liability. This purpose is executed, and can only be executed, it is urged, by construing the words of § 4 (which we shall presently quote) to apply to "the ordinary risks inherent in the business,—the unavoidable risks which are intrinsic notwithstanding [235] the performance by the carrier of its personal duties. They do not include the 'secondary and ulterior' risks arising from abnormal dangers due to the employer's negligence." And, further: "The object of this section was not to adopt by *implication* the common-law defense of assumption of risk of such abnormal dangers. Its object was in *express terms* to exclude the defense which, before the passage of the act, was available to the carrier in determining what are the 'risks of his employment' assumed by the employee."

These, then, are the considerations which plaintiff says were not submitted to the court in the Horton Case, and which he urges to support his contention that assumption of risk has been abolished absolutely.

We are unable to concur. The contention attributes to Congress the utmost confusion of thought and language, and makes it express one meaning when it intended another.

The language of § 4 demonstrates its meaning. It provides that in any action brought by an employee he "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." It is clear, therefore, that the assumption of risk as a defense is abolished only where the negligence of the carrier is in violation of some statute enacted for the safety of employees. In other cases, therefore, it is retained. And such is the ruling in the Horton Case, made upon due consideration and analysis of the statute and those to which it referred. It was said: "It seems to us that § 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action." And there was a comparison made of § 4 with the other [236] sections, and the relation and meaning of each determined, and the preservation by the statute of the distinction between as-

sumption of risk and contributory negligence, which was pronounced "simple" although "sometimes overlooked." Cases were cited in which the distinction was recognized and applied (p. 504).

It is, however, contended that the conditions of the application of assumption of risk were not established, and that "to charge a servant with assumption of risk the evidence (1) must show that he was 'chargeable with knowledge of the material conditions which were the immediate cause of his injury,' and (2) must establish his 'appreciation of the dangers produced by the abnormal conditions.'" The testimony of plaintiff is adduced to show that these conditions did not exist in his case.

He admitted a knowledge of the "material conditions," and it would be going very far to say that a fireman of an engine who knew of the custom of depositing cinders between the tracks, knew of their existence, and who attempted to mount an engine with a vessel of water in his hands holding "not over a gallon," could be considered as not having appreciated the danger and assumed the risk of the situation because he had forgotten their existence at the time and did not notice them. We think his situation brought him within the rule of the cases. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 102, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229.

It is objected, however, that instruction A, "viewed wholly with reference to common-law principles," is erroneous in that it omitted to state as an element the appreciation by plaintiff of the danger of the situation as necessary to his assumption of risk. But that objection was not made at the trial. The objection made was general, that the instruction did "not correctly state the common-law doctrine of assumption of risk." It was therefore very indeterminate, and we cannot say that the court considered that it was directed to the omission [237] to express or to bring into promience the appreciation by plaintiff of the danger he incurred.

The instruction was refused by the trial court upon objection by plaintiff. It was considered by the supreme court of appeals, and plaintiff contended against it there only upon the ground that the assumption of risk was not available as a defense under the act of Congress. He made the contention there that he does here, and which we have already considered, that the act of Congress precludes the defense of assumption of risk of any condition or situation caused by the negligence of a carrier. And this was the full extent of plaintiff's contention. Had he made the specific one now made, the supreme court of appeals would have dealt with it, for the opinion of the court shows a clear recognition of the elements necessary to the doctrine of assumption of risk, and the trial court as well must have understood them; and we cannot suppose that the court discerned in plaintiff's general objection the specification which he now contends was necessary, and which it was error to refuse.

Judgment affirmed.

KINDRED BAUGHAM, Administrator of Richard T. Baugham, Deceased, Plff. in Err.,

v.

NEW YORK, PHILADELPHIA, & NORFOLK RAILROAD COMPANY.

(See S. C. Reporter's ed. 237-241.)

Error to state court — following decision below — assumption of risk.

1. The concurrent determination of the state trial and appellate courts that the evidence showed that a deceased railway employee, for whose death an action was brought under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), assumed the risk of the danger which resulted in his injury and death, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — assumption of risk.

2. The express declaration by the Fed-

NOTE.—On error to state court in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

Generally, as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374, and Southern P. R. Co. v. Seley, 38 L. ed. U. S. 391.

On *Volenti non fit injuria* as defense to action by injured servant—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

As to whether servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

eral employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), § 4, that an employee shall not be held to have assumed the risk of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to his injury or death, must be deemed to leave in force in all other cases the defense of the assumption of risk of the carrier's negligence, notwithstanding the provision of the 3d section of that act, that the contributory negligence of the employee "shall not bar a recovery," and that of the 5th section, precluding the carrier from exempting itself from liability.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

[No. 327.]

Argued April 27, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment denying a writ of error to the Circuit Court of Norfolk County, in that state, to review a judgment in favor of defendant in an action for death, brought under the Federal employers' liability act. Affirmed.

The facts are stated in the opinion.

Mr. **Edward P. Buford** argued the cause and filed for plaintiff in error.

Mr. **Thomas H. Willcox** argued the cause, and, with Mr. Francis I. Gowen, filed a brief for defendant in error:

Mr. Justice **McKenna** delivered the opinion of the court:

Action for damages under the Federal employers' liability act [35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657, 36 Stat. at L. 291, chap. 143], brought in the circuit court of Norfolk county, state of Virginia, by plaintiff in error (we shall call him plaintiff), administrator of the estate of Richard T. Baugham.

The ground of action was that the railroad company, an interstate carrier, caused by its negligence the death of plaintiff's intestate while he was employed and engaged in such commerce.

Richard T. Baugham was between the ages of eighteen and twenty years, and was engaged by the railroad company to act as brakeman in its yard at Port Norfolk, Virginia. On the second day of his employment, while mounting a freight car that was being transferred from the wharf of the company to a barge moored at the wharf, [239] he was killed by being crushed between that car and other cars which were upon the barge.

There were four tracks on the barge. Between the outside and center tracks, of which there were two, there was sufficient space for an employee to mount in safety cars moving between those tracks. There was also sufficient space between the center tracks for some distance from where they entered the barge from the wharf. But these tracks gradually converged until the space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track. The roofs of the cars would sometimes touch.

By reason of this proximity of the cars it is alleged that serious and deadly injury would be inflicted upon the servants and employees of the company if they should be caught between the cars. Plaintiff's intestate was so caught and received injuries from which he died.

It was the duty of the company, it was alleged, to have admonished and warned the deceased of the difficulties, dangers, and perils attendant upon his service and duties as brakeman, so that he might safely have performed them; but that the company wholly failed to do so, and that in consequence the deceased, in the performance of his duties as brakeman on trains being transferred from the wharf to the barge, and while ascending one of the cars, was caught and confined between the eaves of the roof of the car which he was ascending and the eaves of the roof or roofs of another car or cars and fatally injured.

Damages were prayed in the sum of $50,000.

The company pleaded not guilty, and, as special defenses, that the deceased was guilty of contributory negligence, and that he "assumed, when he entered the employment of the company, the risk of being injured in the manner charged in the declaration."

The case was tried to a jury. Upon the conclusion of [240] the testimony the company demurred to the evidence, and plaintiff joined in the demurrer; whereupon, the jury being required to say what damages the plaintiff sustained if judgment should be given for plaintiff upon the evidence, responded, "that if, upon the demurrer to the evidence, the law be for the plaintiff, then we find for the plaintiff, and assess the damages which he ought to recover at $10,000."

The demurrer to the evidence was sustained, and it was adjudged that plaintiff take nothing by his suit. The judgment was affirmed by the supreme court of appeals.

The tracks on the barge and the operation of the cars can easily be visualized. There were four tracks, two center ones and two

outside ones, the former converging as they approached until they came so close together that any one caught between cars moving upon them would be crushed. The deceased, while ascending a moving car, was caught between it and a car standing on the barge and fatally injured. The inquiry is—and upon it rests the determination of the case—What knowledge had the deceased of this situation, and what was the effect of that knowledge upon the liability, if any, of the company?

Plaintiff makes two contentions: (1) That the company failed to warn deceased of the danger to which he was exposed, and that such failure was negligence on the part of the company. (2) That the convergence of the tracks on the barge was a defect or insufficiency due to the negligence of the company in its track, roadbed, barge, and equipment.

The railroad company opposes plaintiff's contentions and insists that the deceased assumed the risk of the danger which resulted in his injury and death. A determination of these contentions depends upon the evidence, and, considering it, the state courts, trial and appellate, decided against the contentions of plaintiff, and in so doing in effect held that the conditions of the assumption [241] of risk by deceased were satisfied. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 102, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229.

We have considered the evidence, and we cannot say that the conclusion was palpably erroneous, and following the rule expressed in Great Northern R. Co. v. Knapp, 240 U. S. 464, 466, ante, 745, 751, 36 Sup. Ct. Rep. 399, and, as having analogy, Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 70, we announce our concurrence without discussion.

It is further contended "that, as a matter of law, the common-law assumption of risk is not a defense in bar of an action under the act of Congress." The contention is untenable. Jacobs v. Southern R. Co. 241 U. S. 229, ante, 970, 36 Sup. Ct. Rep. 588.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
ASA P. CARNAHAN.

(See S. C. Reporter's ed. 241-245.)

Jury — infringement of right — number of jurors — action under Federal statute.

1. A party to an action in a state court under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), is not entitled to a jury of twelve men, where the local practice permits a jury of less than that number, because of the requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, *i. e.*, by a jury of twelve.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Trial — instructions — employers' liability.

2. Instructing the jury in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143), that they may take into consideration, in assessing the damages, the "pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not, however, in excess of $35,000, as to them may seem just and fair," is not objectionable as permitting the jury to indulge in speculation as to future results, and as leaving the amount of damages to conjecture without regard to the evidence, where the court explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the defendant's negligence, and the reference to the sum mentioned was a limitation of the amount stated in the declaration.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

[No. 743.]

Argued and submitted April 19 and 20, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Circuit Court of Hanover County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, — Va. —, 86 S. E. 863.

The facts are stated in the opinion.

NOTE.—On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Mr. David H. Leake argued the cause, and, with Mr. Walter Leake, filed a brief for plaintiff in error:

Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of previous decisions of the Federal courts in all substantive matters, such as, for instance, the rule as to burden of proof where contributory negligence is relief upon.

Central Vermont R. Co. v. White, 238 U. S. 512, 59 L. ed. 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

A substantive right or defense arising under the Federal law cannot be lessened or destroyed by a rule of procedure.

Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75.

By the instruction complained of the plaintiff is allowed to recover, among other things, for the injury received by him and its effects upon his future. By this language the jury were given occasion for indefinite speculation, and they were invited to a consideration of elements wholly irrelevant to the true problem presented,—to indulge in conjecture instead of weighing established facts.

Norfolk & W. R. Co. v. Holbrook, 235 U. S. 630, 59 L. ed. 393, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814; Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 269, 37 L. ed. 728, 731, 15 Sup. Ct. Rep. 837; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830.

In order that a recovery for future pain and suffering be allowable, there must be evidence tending to show that such pain was reasonably certain to result from the injury.

Kennon v. Gilmer, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 584, 37 L. ed. 289, 13 Sup. Ct. Rep. 557; McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709; Smith v. Milwaukee Builders' & T. Exch. 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Shultz v. Griffith, 103 Iowa, 150, 40 L.R.A. 117, 72 N. W. 445; Norfolk R. & Light Co. v. Spratley, 103 Va. 388, 49 S. E. 502; Watson, Damages for Personal Injuries, § 604, p. 720.

It is not the province of a jury to allow such damages as seem to them just and fair, but they can only give the damages proved by the evidence to have been the natural and proximate result of the negligent act complained of.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Vance v. W. A. Vandercook Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; Allison v. Fredericksburg, 112 Va. 243, 48 L.R.A.(N.S.) 93, 71 S. E. 525; Fowlkes v. Southern R. Co. 96 Va. 742, 32 S. E. 464.

Messrs. David H. Leake and Walter Leake also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Messrs. C. W. Allen and Homan W. Walsh submitted the cause for defendant in error:

A court cannot assume that the jury disregarded an instruction.

Graham v. United States, 231 U. S. 474, 58 L. ed. 319, 34 Sup. Ct. Rep. 148; Pennsylvania Co. v. Roy, 102 U. S. 451, 458, 26 L. ed. 141, 145, 10 Am. Neg. Cas. 593; Southern P. Co. v. Hall, 41 C. C. A. 58, 100 Fed. 760.

Future damages must be recovered in this one action. The injury is entire, and it is the duty of the jury to assess the plaintiff's entire loss, past and future. While it may be true that any particular loss in future may not be considered, as being speculative and remote, it is also true that the jury should consider his loss in future.

Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728, 731, 13 Sup. Ct. Rep. 837; Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 34, 100 Fed. 738; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Chesapeake & O. R. Co. v. Hoffman, 109 Va. 44, 66, 63 S. E. 432.

Direct evidence of future pain and suffering is not essential to justify the jury in considering future pain and suffering in their estimate of damages.

District of Columbia v. Woodbury, 136 U. S. 450, 457, 34 L. ed. 472, 475, 10 Sup. Ct. Rep. 990; Kennon v. Gilmer, 131 U. S. 22, 24, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Watson, Damages for Personal Injuries, § 387.

It is contended the mention of the sum in excess of which the jury might not find, stamped that sum with judicial approval as a sum they should find. But so to say is to strike out the clause "as to them may seem just and fair." For that clause relegated the amount of the damages to the jury, and by it the court expressly disclaims any suggestion as to the amount to be found,—any intimation in the matter.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 119, 57 L. ed. 1096, 1100, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

The phrase "as to them may seem just and fair" is altogether usual, and it precisely sets forth the true measure of damages in cases of this kind.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574; St. Louis, I. M. & S. R. Co. v. Needham, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371.

The amount of the verdict is a fact with which this court does not concern itself.

St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754.

At the same time, it may not be improper to call attention to the fact that there is nothing in the amount of the verdict to show that the jury were guided in arriving at the sum awarded by any improper motives. The amount is large in one sense, but the injury and pain experienced were most severe and intense; and comparatively, the verdict is not startling.

Ibid.; Great Northern R. Co. v. Otos, 239 U. S. 352, ante, 324, 36 Sup. Ct. Rep. 126. Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, ante, 324, 36 Sup. Ct. Rep. 126.

Messrs. C. W. Allen and Homan W. Walsh also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment in favor of defendant in error for $25,000 damages for injuries sustained through the asserted negligence of plaintiff in error.

The action was at law under the employers' liability act of Congress. 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657; 36 Stat. at L. 291, chap. 143. In accordance with the state law it was tried to a jury of seven. This is assigned as error. The only other assignment is upon an instruction of the court as to the elements of damage. There is no dispute as to the fact of injury, or that it was received in interstate commerce, and by the negligence of plaintiff in error.

(1) The first assignment of error is based upon a challenge by the railway company to the array of jurors on the ground that the jury was not summoned, selected, formed, and constituted as provided by the Constitution of the United States. In other words, the contention is "that in the trial of cases under the employers' liability act of Congress the parties are entitled to a common-law jury of twelve men, as provided for by the 7th Amendment to the Constitution of the United States."

The assignment is without foundation. Minneapolis & St. L. R. Co. v. Bombolis, decided this day [241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595].

[243] (2) The instruction which is the basis of the second assignment of error is as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, they may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000, as to them may seem just and fair." [— Va. —, 86 S. E. 863.]

It is objected (a) that the instruction permitted a recovery in damages not only for those which proximately resulted from the injury, but also for "its effects upon the future," which involved a consideration of consequences which might be essentially speculative and remote. (b) The instruction directed the jury that the damages might be in such sum not in excess of $35,000 as to them might seem just and fair. By the instruction the court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove.

The injury received is pertinent to the consideration of the instruction. In the collision of two trains defendant in error, who was a fireman, "was caught" (we quote from the opinion of the supreme court) "from his knee of his right leg down, between the tank on the tender and the boiler head in the cab of his engine, and remained pinned in that position for forty-five or fifty minutes before he was extricated by the efforts of his fellow workmen. His leg was so badly mashed and burned that it eventually had to be amputated at a point between the knee and the thigh, and it is

for these injuries and his consequent sufferings that he sues to recover damages."

[244] The supreme court expressed the view that the speculation of future results which the railway company professed to apprehend was not left by the instruction for the jury to indulge, nor did the instruction commit the amount of damages to the conjecture of the jury independently of the evidence in the case. The contention made here was explicitly rejected, *viz.*, that the instruction permitted the jury to take into consideration the "possible future physical effects from the injury, such as future suffering in the absence of evidence as to the probability of such." The court remarked that it would be a strained construction of the language of the instruction "to hold that it referred to future suffering, and that damages not the proximate result of the injuries received were included under" it, and that, besides, such conclusion was precluded by an instruction given at the request of the railway company, which was "that in order for the plaintiff to recover in this case he must prove by a preponderance of the evidence that the injuries he sustained were the direct and proximate result of the negligence of the defendant."

The comment of the court is accurate and we can add nothing to it. The principle is established that when the evidence in a case shows that there will be future effects from an injury, an instruction which justifies an inclusion of them in an award of damages is not error. Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner), 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162, 26 Sup. Ct. Rep. 709.

It is also objected that the instruction "allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000, and allowed the jury to give such sum as damages as to them might 'seem just and fair' without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of."

The objection is untenable. As we have seen, the court [245] explicitly enjoined upon the jury that there must be a proximate and causal relation between the damages and the negligence of the company, and the reference to the sum of $35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction. Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 119, 57 L. ed. 1096, 1100, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

Judgment affirmed.

PACIFIC MAIL STEAMSHIP COMPANY, Petitioner,
v.
ED. SCHMIDT.

(See S. C. Reporter's ed. 245-251.)

Seamen — wages — penalty for default in payment.

The penalty imposed by U. S. Rev. Stat. § 4529, as amended by the act of December 21, 1898 (30 Stat. at L. 756, chap. 28, Comp. Stat. 1913, § 8320), § 4, upon a shipowner for each day during which, "without sufficient cause," he neglects or refuses to pay a seaman's wages after certain specified periods, is not incurred during the delay in payment occasioned by an attempt to secure a revision in a Federal circuit court of appeals of doubtful questions of law and fact by an appeal from a decree of a district court for such wages and penalties for delay.

[For other cases, see Seamen, in Digest Sup. Ct. 1908.]

[No. 323.]

Argued April 25 and 26, 1916. Decided May 22, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed, with increased penalties, a decree of the District Court for the Northern District of California in favor of the libellant in a libel filed by a seaman against a shipowner for wages and penalties for default in payment. Reversed and decree of District Court affirmed.

See same case below, 130 C. C. A. 657, 214 Fed. 513.

The facts are stated in the opinion.

Mr. William R. Harr argued the cause, and, with Mr. Charles H. Bates, filed a brief for petitioner.

Mr. James W. Ryan, by special leave, argued the cause, and, with Mr. John L. McNab, filed a brief for respondent.

Mr. Justice Holmes delivered the opinion of the court:

This is a libel *in personam* for $30.33, wages and victualing money from September 24 to October 1, 1913, and for a sum equal to one day's pay for every day during which payment had been or should be delayed. The libel was filed on October 20, 1913. On November 5, 1913, the district court entered a decree for $151.59 with interest from the date of its decree, and $36.25 costs. 209 Fed. 264. The libellee, the present petitioner, appealed, but without success, and on May 18, 1914, the decree was affirmed with directions to add one day's pay for every day since the

former decree. On October 6, 1914, an order was made by the circuit court of appeals that the petitioner should pay to the proctor for the appellee the amount of the judgment of the district court with costs and proctor's fee as allowed, and should pay to the clerk of the district court the additional amount to the date of deposit of the penalty adjudged to be continuing; to abide the result of an application to this court for a writ of certiorari, and that upon such payment the running of the penalty should cease so far as the judgment of the circuit court of appeals was concerned.

The facts are these: On July 24, 1913, the libellant shipped as chief steward, under articles, from San Francisco to Ancon, Canal Zone, and such other ports as the master might direct, and back to a final port of discharge in San Francisco, for a term of time not exceeding six calendar months. The vessel returned to San Francisco [249] on September 23, and on September 24, 1913, the libellant was paid in full by the shipping commissioner, and that date noted as the date of termination of voyage on the articles. As seems to have been usual, however, the libellant remained on board, working, and, in the ordinary course, probably would have signed new articles for the next voyage, but on October 1 was notified that he was discharged. On his demanding his wages for his services in port he was told that silverware to the amount of $32.90 was missing, that he was accountable for it, and this sum offset his claim. There is no doubt that this offset, which was alleged again in the pleadings, was set up in good faith, but as both the courts below have found that it was not made out, we assume that it was not proved.

The statute under which the penalty was imposed is Rev. Stat. § 4529, as amended by the act of December 21, 1898, chap. 28, § 4, 30 Stat. at L. 756, Comp. Stat. 1913, § 8320. By that act "the master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or *vice versa*, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens. . . . Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods." We assume, not only, as we have said, that the claim of offset was not established, but the more doubtful proposition that it did not furnish sufficient cause for the delay. We assume, therefore, that the petitioner did not sufficiently justify putting the libellant to a suit.

[250] But it is far less clear that the district court was justified in treating the case as within the penalties of the act. The statute deals with voyages. The voyage for which the libellant shipped was at an end, *viz.*, from San Francisco out and back to that port, or till the end of six months, whichever first happened. On the return to San Francisco within the time the libellant was paid all that was due to him, and he himself lays his employment as beginning in San Francisco on September 25, after the voyage described in the articles was at an end. No new articles had been signed, and it would seem on the allegations of the libel, coupled with the admitted facts, that the libellant's legal standing was under an oral contract for a few days in port while hoping to be reshipped. It seems to us a very strong thing to say that any fair construction of the facts brings the case within the act. But, as the two courts have agreed upon this proposition also, and as the writ would not have been granted to reopen the inquiry into those particular facts, we assume that upon this also they were right.

It is a very different thing, however, to say that the delay occasioned by the appeal was not for sufficient cause. Even on the assumption that the petitioner was wrong, it had strong and reasonable ground for believing that the statute ought not to be held to apply. So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is "neglect . . . without sufficient cause." The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practised by the states. Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. There was sufficient cause for the neglect to pay after the decree of the district court, since the payment of [251] the original wages without the penalty that was reasonably in dispute would neither have been accepted nor allowed.

Not only so, but there was further rea-

sonable cause for the delay by appeal in the fact that victualing money was included in the wages by which the penalty was measured. Seeing that the petitioner was held as if the articles still were in force, the question arises how the wages could be estimated at more than the articles fixed. The so-called port pay which added a dollar a day for food was an arrangement altogether outside the articles, and the demand for it and the allowance of it not only raised a new question, but intensified the doubt as to how it could be said that the voyage was not ended and that the penalty could be applied. See Palace Shipping Co. v. Caine [1907] A. C. 386, 76 L. J. K. B. N. S. 1079, 23 Times L. R. 731, 9 Ann. Cas. 526. We shall allow the decree of the district court to stand, as we have stated, but there was ample justification for the appeal, and on both the above grounds sufficient reason for the delay. We need not consider whether, if there had been no such reason, there would be any escape from Atty. Gen. v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889, where, under a similar statute, it seems to have been held that the penalty stopped with the decree below.

Decree reversed.

Decree of District Court affirmed.

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[252] TERMINAL TAXICAB COMPANY, Incorporated, Appt.,
v.
CHARLES W. KUTZ, Oliver P. Newman, and Louis Brownlow, Commissioners of the District of Columbia, Constituting as such Commissioners the Public Utilities Commission of the District of Columbia, et al.

(See S. C. Reporter's ed. 252-257.)

Public service corporations — taxicab company — governmental control.

1. A taxicab company is a common carrier within the meaning of the act of March 4, 1913 (37 Stat. at L. 938, chap. 150), § 8, and hence subject to the jurisdiction of the Public Utilities Commission of the District of Columbia as a "public utility" in respect of its exercise of its exclusive right under lease from the Washington Terminal Company, the owner of the Washington Union Railway station, to solicit livery and taxicab business from persons passing to or from trains, and of its exclusive right under contracts with certain Washington hotels to solicit taxicab business from guests, but that part of its business which consists in furnishing automobiles from its central garage on individual orders, generally by telephone, cannot be regarded as a public utility, and the rates charged for such service are therefore not open to inquiry by the Commission.

Constitutional law — discrimination — governmental control of taxicab company.

2. The jurisdiction of the Public Utilities Commission of the District of Columbia over a public utility under the act of March 4, 1913 (37 Stat. at L. 938, chap. 150), § 8, cannot be defeated because such jurisdiction has not been assumed over other similar concerns, where the excuse offered by the Commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act, and there is nothing to impeach the good faith of the Commission, or to give the concern included just cause for complaint.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 348.]

Argued May 2 and 3, 1916. Decided May 22, 1916.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, dismissing the bill in a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company. Modified so as to restrain the exercise of jurisdiction over the rates charged by the company at its garage, and as so modified, affirmed.

See same case below, 43 App. D. C. 120.

The facts are stated in the opinion.

Mr. G. Thomas Dunlop argued the cause and filed a brief for appellant:

The act in question is essentially a penal statute, and must be strictly construed.

Butts v. Merchants' & M. Transp. Co. 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct. Rep. 964; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Com. v. Goldman, 205 Mass. 400, 91 N. E. 392; New York C. & H. R. R. Co. v. Sheeley, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; Chicago, R. I. & P. R. Co. v. People, 217 Ill. 164, 75 N. E. 368; Fahnestock v. State, 102 Ind. 156, 1 N. E. 372; Marion County v. Center Twp. 105 Ind. 422, 2 N. E. 368; Com. v. Macomber, 3 Mass. 254; Com. v. Barlow, 4 Mass. 439; Meister v. People, 31 Mich. 99, 1 Am. Crim. Rep. 91; Howell v. Stewart, 54 Mo. 400; State v. Reid, 125 Mo. 43, 28 S. W. 172; State v. Gritzner, 134 Mo. 512, 36 S. W. 39; Rixke v. Western U. Teleg. Co. 96 Mo. App. 406, 70 S. W. 265; State ex rel. McPherson v. St. Louis & S. F.

NOTE.—On the law governing automobiles, generally—see note to Christy v. Elliott, 1 L.R.A.(N.S.) 215.

On the regulation of jitney buses—see note to Memphis v. State, L.R.A.1916B, 1156.

R. Co. 105 Mo. App. 207, 79 S. W. 714; Pollard v. Missouri & K. Teleph. Co. 114 Mo. App. 533, 90 S. W. 121; McCormick Harvesting Mach. Co. v. Mills, 64 Neb. 166, 89 N. W. 621; State v. Dailey, 76 Neb. 770, 107 N. W. 1004; Health Dept. v. Owen, 94 App. Div. 425, 88 N. Y. Supp. 184, affirming 42 Misc. 221, 85 N. Y. Supp. 397; First Nat. Bank v. National Live Stock Bank, 13 Okla. 719, 76 Pac. 130.

And this is true even though the statute itself provides in a general way that it is to be liberally construed.

O'Connor v. State, — Tex. Civ. App. —, 71 S. W. 409.

It would seem to be evident from the general scope and purposes of the act in question that it was never intended by Congress to apply to such concerns as taxicab or livery companies and proprietors. In brief, the act in question has no relevancy or pertinency to such concerns as the taxicab companies here, and the business in which they are engaged.

Omaha & C. B. R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; New York C. & H. R. R. Co. v. Sheeley, 57 N. Y. S. R. 766, 27 N. Y. Supp. 185; Brown v. New York C. & H. R. R. Co. 75 Hun, 355, 27 N. Y. Supp. 69; Yellow Taxicab Co. v. Gaynor, 82 Misc. 94, 143 N. Y. Supp. 279, affirmed in 159 App. Div. 893, 144 N. Y. Supp. 299.

To be a common carrier the person or corporation must exercise the business of carrying as a public employment, and must undertake to carry goods (or passengers) for all persons indiscriminately.

The Neaffie, 1 Abb. (U. S.) 465, Fed. Cas. No. 10,063; Ivins & Mason, Control of Public Utilities, p. 35; 6 Cyc. 364, 639; Faucher v. Wilson, 68 N. H. 338, 39 L.R.A. 431, 38 Atl. 1002; Allen v. Sackrider, 37 N. Y. 342; Meisner v. Detroit, B. I. & W. Ferry Co. 154 Mich. 545, 19 L.R.A.(N.S.) 873, 129 Am. St. Rep. 493, 118 N. W. 14; The Wildenfels, 89 C. C. A. 58, 161 Fed. 864; Central of Georgia R. Co. v. Lippman, 110 Ga. 665, 50 L.R.A. 673, 36 S. E. 202, 8 Am. Neg. Rep. 13; Trout v. Watkins Livery & Undertaking Co. 148 Mo. App. 621, 130 S. W. 136; Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 433; Fish v. Chapman, 3 Ga. 353, 46 Am. Dec. 393; Jones, Bailm. 3d London ed. p. 103, D. note; Brind v. Dale, 8 Car. & P. 207, 2 Moody & R. 80; Ross v. Hill, 2 C. B. 877, 3 Dowl. & L. 788, 15 L. J. C. P. N. S. 182, 10 Jur. 435; Moore, Carr. pp. 20, 60, §§ 1, 21; Hutchinson, Carr. 3d ed. § 57, p. 53; Wyman, Pub. Serv. Corp. § 107; Burlington v. Unterkircher, 99 Iowa, 401, 68 N. W. 795; Copeland v. Draper, 157 Mass. 558, 19 L.R.A. 283, 34 Am. St. Rep. 314, 32 N. E. 944; Atlantic City v. Dehn, 69 N J. L. 233, 54 Atl. 220; Forbes v. Reinman, 112 Ark. 417, 51 L.R.A.(N.S.) 1164, 166 S. W. 563; Orr v. Boockholdt, 10 Ala. App. 331, 65 So. 430; Tap Line Cases (United States v. Louisiana & P. R. Co.) 234 U. S. 1, 24, 58 L. ed. 1185, 1194, 34 Sup. Ct. Rep. 741.

The livery service for which the hotel contracts, as in this case, is strictly a private service, and not such as the public has an interest in.

Wyman, Pub. Serv. Corp. § 499.

So far as its contract with the Washington Terminal Company is concerned, and the service which it thereby supplies at the Union Station, it is such a private service, under the complete control of the Washington Terminal Company, as is sanctioned by law in the line of cases of which Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91, is the leading and conclusive authority.

If the act is to be construed as permitting the Commission to single out the appellant company for regulation and control from among others of the same class, it is unconstitutional and void.

Yick Wo v. Hopkins, 118 U. S. 371, 374, 30 L. ed. 226, 227, 6 Sup. Ct. Rep. 1064; Williams v. Mississippi, 170 U. S. 225, 42 L. ed. 1016, 18 Sup. Ct. Rep. 583; Cotting v. Kansas City Stock Yards Co. (Cotting v. Goddard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

Mr. **Conrad H. Syme** argued the cause and filed a brief for appellees:

The Terminal Taxicab Company, by reason of the nature and character of its business, is within the jurisdiction of the Public Utilities Commission, and subject to its orders under the public utilities law.

Hargrave's Law Tracts, 78; Munn v. Illinois, 94 U. S. 123, 24 L. ed. 83; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; Snell v. Clinton Electric Light, Heat & P. Co. 196 Ill. 626, 58 L.R.A. 284, 89 Am. St. Rep. 341, 63 N. E. 1082; Cross v. Andrews, Cro. Eliz. pt. 2, p. 622; Albion Lumber Co. v. De Nobra, 19 C. C. A. 347, 44 U. S. App. 347, 72 Fed. 739; Lloyd v. Haugh & K. Storage & Transfer Co. 223 Pa. 148, 21 L.R.A.(N.S.) 188, 72 Atl. 516; Sears v. Eastern R. Co. 14 Allen, 433, 92 Am. Dec. 780; Schloss v. Wood, 11 Colo. 287, 17 Pac. 910.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit to restrain the Public Utilities Commission of the District of Columbia from exercising jurisdiction over the plaintiff. The Commission was created and its powers established by a section (§ 8) of an appropriation act, divided into numbered paragraphs. Act of March 4, 1913, chap. 150, § 8, 37 Stat. at L. 938, 974. By ¶ 2 of the section "every public utility is hereby required to obey the lawful orders of the Commission," and by ¶ 1 "public utility" embraces every common carrier, which phrase in turn is declared to include "express companies and every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire." Steam railroads, some other companies, and the Washington Terminal Company, are declared not to be within the words. The main question is whether the plaintiff is a common carrier under the definition in the act. The bill was dismissed by the supreme court, and the decree was affirmed by the court of appeals: 43 App. D. C. 120.

The facts are agreed. The plaintiff is a Virginia corporation, authorized by its charter, with copious verbiage, to build, buy, sell, let, and operate automobiles, taxicabs, and other vehicles, and to carry passengers and goods by such vehicles; but not to exercise any of the powers of a public service corporation. It does business in the District, [254] and the important thing is what it does, not what its charter says. The first item, amounting to about thirty-five hundredths of the whole, is done under a lease for years from the Washington Terminal Company, the owner of the Union Railroad Station in Washington, which we have mentioned as excluded from the definition of common carriers. By this lease the plaintiff has the exclusive right to solicit livery and taxicab business from all persons passing to or from trains in the Union Station, and agrees in its turn to provide a service sufficient in the judgment of the Terminal Company to accommodate persons using the station, and is to pay over a certain percentage of the gross receipts. It may be assumed that a person taking a taxicab at the station would control the whole vehicle both as to contents, direction, and time of use, although not, so far as indicated, in such a sense as to make the driver of the machine his servant, according to familiar distinctions. The last facts, however, appear to be immaterial and in no degree to cast doubt upon the plaintiff's taxicabs, when employed as above stated, being a public utility by ancient usage and understanding (Munn v. Illinois, 94 U. S. 113, 125, 24 L. ed. 77, 84), as well as common carriers by the manifest meaning of the act. The plaintiff is "an agency for public use for the conveyance of persons," etc.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about [255] the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. But the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand. We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612. The public does not mean everybody all the time. See Peck v. Tribune Co. 214 U. S. 185, 190, 53 L. ed. 960, 962, 29 Sup. Ct. Rep. 554, 16 Ann. Cas. 1075.

The rest of the plaintiff's business, amounting to four tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service, and no doubt would do so if the pay was uncertain, but it advertises extensively, and, we must assume, generally accepts any seemingly solvent customer. Still, the bargains are individual, and however much they may tend towards uniformity in price, probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the station and hotels. There is no contract with a third person to serve the public generally. The question whether, as to this part of its business, it is an agency

for public use within the meaning of the statute, is more difficult. Whether it is or not, the jurisdiction of the Commission is established by what we have said, and it would not be necessary to decide the question if the bill, in addition to an injunction against taking jurisdiction, did not pray that order No. 44 of the Commission be declared void. That order, [256] after declaring that the plaintiff was engaged in the business of a common carrier within the meaning of the act, and so was within the jurisdiction of the Commission, required the plaintiff to furnish the information called for in a circular letter of April 12, 1913. What this information was does not appear with technical precision, but we assume that it was in substance similar to a later requirement of a schedule showing all rates and charges in force for any service performed by the plaintiff within the District, or any service in connection therewith. If we are right, this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 211, 56 L. ed. 729, 736, 32 Sup. Ct. Rep. 436. Although I have not been able to free my mind from doubt, the court is of opinion that this part of the business is not to be regarded as a public utility. It is true that all business, and, for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But, however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive (233 U. S. 407), it is assumed that such a calling is not public as the word is used. In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates.

[257] Complaint is made that jurisdiction has not been assumed over some other concerns that stand on the same footing as the plaintiff. But there can be no pretense that the act is a disguised attempt to create preferences, or that the principle of Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, applies. The ground alleged by the Commission is that it did not consider that the omitted concerns did business sufficiently large in volume to come within the meaning of the act. There is nothing to impeach the good faith of the Commission, or to give the plaintiff just cause for complaint. The decree, so far as it asserts the jurisdiction of the Commission, is affirmed, but it must be modified so to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same.

Decree modified as above set forth.

AMERICAN WELL WORKS COMPANY, Plff. in Err.,
v.
LAYNE & BOWLER COMPANY and Mahlon E. Layne.

(See S. C. Reporter's ed. 257-260.)

Federal courts — jurisdiction — suit arising under patents.

A suit by the owner, manufacturer, and seller of a pump, who alleges that he has, or has applied for, a patent therefor, to recover the damages caused to his business by defendant's libel or slander of his title by statements to various persons that plaintiff was infringing defendant's patent, and that defendant would sue both seller and buyer if the plaintiff's pump was used, arises under the law of the state rather than under the patent laws of the United States, and is therefore not within the exclusive jurisdiction of the Federal courts.

[For other cases, see Courts, 553-569, in Digest Sup. Ct. 1908.]

[No. 376.]

Argued and submitted May 5, 1916. Decided May 22, 1916.

IN ERROR to the District Court of the United States for the Eastern District of Arkansas to review an order dismissing a suit for want of jurisdiction on the ground that the state court from which the case had been removed was without jurisdiction because the cause of action arose under the patent laws. Reversed.

The facts are stated in the opinion.

Mr. David A. Gates submitted the cause for plaintiff in error:

The only question to be decided in this cause is whether or not plaintiff's suit is one arising under the patent laws of the United States. If it is, we concede that the state circuit court had no original jurisdiction, and that the ruling of the district court was right. If it is not, the state circuit court had jurisdiction, and the ruling

of the district court was error, calling for reversal.

Carleton v. Bird, 94 Me. 182, 47 Atl. 154; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 286–295, 46 L. ed. 913–917, 22 Sup. Ct. Rep. 681; Flint v. Hutchinson Smoke Burner Co. 38 Fed. 546; Healy v. Sea Gulf Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658; Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co. 13 Blatchf. 375, Fed. Cas. No. 2,543; Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410; Wade v. Lawder, 165 U. S. 625, 41 L. ed. 851, 17 Sup. Ct. Rep. 425.

The case is not one arising under the patent laws of the United States.

Flint v. Hutchinson Smoke Burner Co. 38 Fed. 546; Carleton v. Bird, 94 Me. 182, 47 Atl. 154; Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 286–295, 46 L. ed. 913–917, 22 Sup. Ct. Rep. 681; Wade v. Lawder, 165 U. S. 625, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 57 L. ed. 716, 33 Sup. Ct. Rep. 410; Healy v. Sea Gull Specialty Co. 237 U. S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658; Briggs v. United Shoe Machinery Co. 239 U. S. 48, ante, 138, 36 Sup. Ct. Rep. 6.

Mr. **Paul Synnestvedt** argued the cause, and, with Messrs. J. M. Moore and Coke K. Burns, filed a brief for defendants in error:

The cause of action set up in the complaint arises under the patent laws of the United States.

Hovey v. Rubber Tip Pencil Co. 57 N. Y. 120, 15 Am. Rep. 470; Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; Moyes v. Stirling Co. 71 Fed. 433; Cousins v. Merrill, 16 U. C. C. P. 114; Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co. 13 Blatchf. 382, Fed. Cas. No. 2,543; Flint v. Hutchinson Smoke Burner Co. 38 Fed. 546; American Solid Leather Button Co. v. Empire State Nail Co. 47 Fed. 741; Germ Proof Filter Co. v. Pasteur Chamberland Filter Co. 81 Hun, 49, 30 N. Y. Supp. 584; Pratt v. Paris Gaslight & Coke Co. 168 U. S. 259, 42 L. ed. 460, 18 Sup. Ct. Rep. 62; Brown v. Shannon, 20 How. 56, 15 L. ed. 827; New Marshall Engine Co. v. Marshall Engine Co. 223 U. S. 473, 56 L. ed. 513, 32 Sup. Ct. Rep. 238.

An action which raises a question of infringement is a case arising under the Federal laws.

Littlefield v. Perry, 21 Wall. 205, 22 L. ed. 577; White v. Rankin, 144 U. S. 628, 36 L. ed. 569, 12 Sup. Ct. Rep. 768; Excelsior *Wooden Pipe Co.* v. Pacific Bridge Co. 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; Rupp & W. Co. v. Elliott, 65 C. C. A. 544, 131 Fed. 732; Atherton Mach. Co. v. Atwood-Morrison Co. 43 C. C. A. 72, 102 Fed. 949.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a suit begun in a state court, removed to the United States court, and then, on motion to remand by the plaintiff, dismissed by the latter court, on the ground that the cause of action arose under the patent laws of the United States, that the state court had no jurisdiction, and that therefore the one to which it was removed had none. There is a proper certificate and the case comes here direct from the district court.

Of course the question depends upon the plaintiff's declaration. The Fair v. Kohler Die & Specialty Co. 228 U. S. 22, 25, 57 L. ed. 716, 717, 33 Sup. Ct. Rep. 410. That may be summed up in a few words. The plaintiff alleges that it owns, manufactures, and sells a certain pump, has or has applied for a patent for it, and that the pump is known as the best in the market. It then alleges that the defendants have falsely and maliciously libeled and slandered the plaintiff's title to the pump by stating that the pump and certain parts thereof are infringements upon the defendant's pump and certain parts thereof, and that without probable cause they have brought suits against some parties who are using the plaintiff's pump, and that they are threatening suits against all who use it. The allegation of the defendants' libel or slander is repeated in slightly varying form, but it all comes to statements to various people that the plaintiff was infringing the defendants' patent, and that the defendant [259] would sue both seller and buyer if the plaintiff's pump was used. Actual damage to the plaintiff in its business is alleged to the extent of $50,000, and punitive damages to the same amount are asked.

It is evident that the claim for damages is based upon conduct; or, more specifically, language, tending to persuade the public to withdraw its custom from the plaintiff, and having that effect to its damage. Such conduct, having such effect, is equally actionable whether it produces the result by persuasion, by threats, or by falsehood (Moran v. Dunphy, 177 Mass. 485, 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125), and it is enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. If the conduct complained of is persuasion, it may be justified by the fact that the defendant is a competitor, or by

good faith and reasonable grounds. If it is a statement of fact, it may be justified, absolutely or with qualifications, by proof that the statement is true. But all such justifications are defenses, and raise issues that are no part of the plaintiff's case. In the present instance it is part of the plaintiff's case that it had a business to be damaged; whether built up by patents or without them does not matter. It is no part of it to prove anything concerning the defendants' patent, or that the plaintiff did not infringe the same—still less to prove anything concerning any patent of its own. The material statement complained of is that the plaintiff infringes,—which may be true notwithstanding the plaintiff's patent. That is merely a piece of evidence. Furthermore, the damage alleged presumably is rather the consequence of the threat to sue than of the statement that the plaintiff's pump infringed the defendants' rights.

A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact,—that the defendant has a [260] patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates the cause of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. If the state adopted for civil proceedings the saying of the old criminal law: the greater the truth, the greater the libel, the validity of the patent would not come in question at all. In Massachusetts the truth would not be a defense if the statement was made from disinterested malevolence. Rev. Laws, chap. 173, § 91. The state is master of the whole matter, and if it saw fit to do away with actions of this type altogether, no one, we imagine, would suppose that they still could be maintained under the patent laws of the United States.

Judgment reversed.

Mr. Justice McKenna dissents, being of opinion that the case involves a direct and substantial controversy under the patent laws.

60 L. ed.

[261] LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased. (No. 485.)

JEANETTE STEWART, as Administratrix of the Estate of William H. Stewart, Deceased, Plff. in Err.,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY. (No. 904.)

(See S. C. Reporter's ed. 261–264.)

Error to state court — second appeal — reinstating verdict at first trial.

1. A verdict found on the first trial of an action for death under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), upon an instruction that the jury should find, if anything, "such a sum as will fairly compensate his estate for his death," cannot be reinstated by the Federal Supreme Court on a cross writ of error to a state court of last resort which, having set aside a verdict for plaintiff, rendered on the first trial, and the judgment based upon it, affirmed, on a second appeal, a judgment for plaintiff in a lesser amount, rendered on the second trial.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

2. The requirement of U. S. Const. 7th

NOTE.—On error to state court in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

Generally, as to a servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374, and Southern P Co. v. Seley, 38 L. ed. U. S. 391.

On *volenti non fit injuria* as defense to action by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 161.

As to whether servant may assume the rick of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

Amend., that trials by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may therefore give effect, in actions under that statute, to a local practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Appeal — supersedeas — damages on affirmance — employers' liability.

3. Ten per cent damages may be added by a state court of last resort in affirming a judgment for plaintiff in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where the defendant obtained a supersedeas, and the local law makes 10 per cent the cost of it to all persons if the judgment is affirmed.

[For other cases, see Appeal and Error, IX. h, in Digest Sup. Ct. 1908.]

Appeal — interest on judgment — employers' liability.

4. Interest may be allowed by a state upon a judgment for plaintiff under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), from the time when it was rendered if it provides appellate proceedings and the judgment is affirmed, as, but for such proceedings, interest would run as of course until the judgment was paid.

[For other cases, see Appeal and Error, IX. g, in Digest Sup. Ct. 1908.]

Error to state court — following decision below — question for jury.

5. The refusal of a state trial court, sustained by the state court of last resort, to take from the jury an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), by directing a verdict for defendant, will not be disturbed by the Federal Supreme Court on writ of error unless clearly erroneous.

[For other cases, see Appeal and Error, VIII. m, 6, in Digest Sup. Ct. 1908.]

Trial — instructions — assumed risk — employers' liability.

6. An instruction that a freight engineer assumed the risk, under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), of shock from the sudden application of the air brakes by the rear brakeman while the train was backing on a siding, if the application of the brakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, is properly qualified by excepting the case of an emergency brought about by the railway company's employees in the negligent operation of the train before the brakes were applied, where the jury might have found that the conductor did not manage the train with due care, and so made the application of the brakes necessary.

[For other cases, see Trial, VII. a, in Digest Sup. Ct. 1908.]

[Nos. 485 and 904.]

Argued April 19 and 20, 1916. Decided May 22, 1916.

CROSS WRITS of Error to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Circuit Court of Warren County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, first appeal, 156 Ky. 550, 161 S. W. 557, 157 Ky. 642, 163 S. W. 755; second appeal, 163 Ky. 823, 174 S. W. 744.

The facts are stated in the opinion.

Mr. **Benjamin D. Warfield** argued the cause, and, with Messrs. James C. Sims and John B. Rodes, filed a brief for the Louisville & Nashville Railroad Company:

There is no provision in the Federal employers' liability act authorizing the allowance of interest and damages in addition to compensation for loss of pecuniary benefits. We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 66, 57 L. ed. 417, 419, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national Constitution.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1–53, 56 L. ed. 327–347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, supra; St. Louis & S. F. R. Co. v. Seale, 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Winfield v. New York C. & H. R. R. Co. 216 N. Y. 284, L.R.A. —, —, 110 N. E. 614, Ann. Cas. 1916A, 817, 10 N. C. C. A. 916.

The Federal employers' liability act may not be supplemented by state law so as to authorize damages and interest such as is authorized by the law of the state in which the case is tried.

Norton v. Erie R. Co. 163 App. Div. 468, 148 N. Y. Supp. 771.

There is no evidence that Stewart was injured as a result of the negligence of the defendant, and a peremptory instruction to find in its favor should have been given. And this is a Federal question.

St. Louis, I. M. & S. R. Co. v. McWhirter,

229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Moore, 228 U. S. 434, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

The Federal employers' liability act made no change in the substantive law of negligence. Actionable negligence for which the master is liable must be proved since, just as before, the act.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

In an action by a servant to recover damages for injuries while in the master's employment, there is no presumption that the master was negligent. The doctrine *res ipsa loquitur* is not applicable.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Northern P. R. Co. v. Dixon, 71 C. C. A. 555, 139 Fed. 737, 19 Am. Neg. Rep. 637; Midland Valley R. Co. v. Fulgham, L.R.A. —, —, 104 C. C. A. 151, 181 Fed. 91; Montbriand v. Chicago, St. P. M. & O. R. Co. 191 Fed. 988.

The opinion on the former appeal is the law of the case on subsequent appeals.

Stewart v. Louisville & N. R. Co. 136 Ky. 717, 125 S. W. 154; Western U. Teleg. Co. v. Sutton, 140 Ky. 729, 131 S. W. 773; Goff v. Lowe, 141 Ky. 799, 133 S. W. 995.

Hill (brakeman) was not negligent. If he was not, then, manifestly the trial court erred in submitting the case to the jury as to the alleged negligence of Hill. And inasmuch as it is impossible to say that the jury would have found for plaintiff at all, or that their verdict would have been the same if the court had withdrawn the case from the jury as to Hill, and had submitted it only as to Jones (conductor), it necessarily follows that the judgment was erroneous and should be reversed, even though the court should be of opinion that Jones was negligent as to Stewart on that occasion (Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481). But for the erroneous ruling of the trial court in submitting the case to the jury as to Hill, the result of the action of the jury might have been different (North Carolina R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109).

The case should not have been submitted to the jury as to Jones. Even if he should not have signaled the train back until Hill had thrown the south switch for the main track, and even though this would have been negligence as to some other person if he had been injured, it was not negligence as to Stewart, because: (a) the risk of being injured from that cause was one which Stewart assumed in entering and remaining in defendant's service; and (b) the injury to Stewart was one which Jones could not reasonably have foreseen as a consequence of his causing the train to be backed.

St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 59 L. ed. 1290, 35 Sup. Ct. Rep. 785; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858.

The matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 121, 122, 57 L. ed. 1096, 1100, 1101, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Seaboard Air Line R. Co. v. Tilgham, 237 U. S. 499, 59 L. ed. 1069, 35 Sup. Ct. Rep. 653.

The judgment of the court of appeals of Kentucky on the first appeal, which plaintiff is seeking to have reviewed here, was not a final judgment and is not reviewable by this court.

3 Foster, Fed. Pr. § 695, p. 2421; Tracy v. Holcombe, 24 How. 426, 16 L. ed. 742; Brown v. Union Bank, 4 How. 465, 11 L. ed. 1058; Pepper v. Dunlap, 5 How. 51, 12 L. ed. 46; McComb v. Knox County, 91 U. S. 1, 23 L. ed. 185; Moore v. Robbins, 18 Wall. 588, 21 L. ed. 758; Johnson Keith, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; Houston v. Moore, 3 Wheat. 433, 4 L. ed. 428; Mower v. Fletcher, 114 U. S. 127, 29 L. ed. 117, 5 Sup. Ct. Rep. 799; Parcels v. Johnson, 20 Wall. 653, 22 L. ed. 410; Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; Chesapeake

& O. R. Co. v. McCabe, 213 U. S. 207, 53 L. ed. 765, 29 Sup. Ct. Rep. 430.

If there had been no other error in the first judgment of the Warren circuit, it should have been reversed by the court of appeals because of the error in the measure-of-damage instruction; and therefore plaintiff was not deprived of any Federal right to which she was entitled by the action of the court of appeals in reversing a judgment secured under a measure-of-damage instruction which is condemned by every utterance of this court on that subject.

Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814; Garrett v. Louisville & N. R. Co. 235 U. S. 308, 59 L. ed. 242, 35 Sup. Ct. Rep. 32.

The cases are conclusive in our favor against plaintiff's proposition that we had no right to complain of the instructions which the court of appeals condemned on the first appeal because we did not offer correct instructions in their stead.

Louisville & N. R. Co. v. Harrod, 115 Ky. 877, 75 S. W. 233; Chesapeake & O. R. Co. v. Dwyer, 157 Ky. 590, 163 S. W. 752; Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 820, 139 S. W. 1073; South Covington & C. Street R. Co. v. Core, 29 Ky. L. Rep. 836, 96 S. W. 562.

Defendant's exceptions satisfied the requirements of the Kentucky practice.

Louisville & N. R. Co. v. McCoy, 81 Ky. 403; Meaux v. Meaux, 81 Ky. 475; Helfrich Saw & Planing Mill Co. v. Everly, 17 Ky. L. Rep. 795, 32 S. W. 750; American Ins. Co. v. Austin, 18 Ky. L. Rep. 632, 37 S. W. 678; Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 820, 139 S. W. 1073.

Under the law of Kentucky, if the case was to go to the jury at all, defendant was entitled to have all of the issues of fact submitted to the jury.

John King Co. v. Louisville & N. R. Co. 131 Ky. 53, 114 S. W. 308.

It is not essential that there should have been direct evidence in order to raise an issue of fact for the jury on the question of contributory negligence.

Watkins v. Henderson, 168 Ky. 622, 182 S. W. 837.

It is the duty of the jury to fix the damages under proper instructions, and the court cannot say that the jury's verdict would have been the same if a correct measure-of-damage instruction had been given, instead of one that was incorrect.

Covington Saw Mill & Mfg. Co. v. Drexilius, 120 Ky. 493, 117 Am. St. Rep. 593, 87 S. W. 266.

If the argument of plaintiff were sound, a judgment would never be reversed because of an erroneous measure-of-damage instruction, with the result that the courts would be fixing the amount of the damages, instead of juries, who are the constitutional triers of such questions.

Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

A person is only responsible for the consequences which may reasonably be expected to flow from his acts.

21 Am. & Eng. Enc. Law, 486; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S 249, 26 L. ed. 1070; Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949, 7 Am. Neg. Cas. 478; Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155; Addison, Torts, § 6; Gilson v. Delaware & H. Canal Co. 65 Vt. 213, 36 Am. St. Rep. 802, 26 Atl. 70; Gosney v. Louisville & N. R. Co. 169 Ky. 323, L.R.A. 1916E, —, 183 S. W. 538.

Mr. Benjamin D. Warfield also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. George H. Lamar argued the cause, and, with Messrs. B. F. Procter, C. U. McEllory, and D. W. Wright, filed a brief for Jeanette Stewart, administratrix:

However this court may be disposed to treat Kentucky verdicts of less than twelve, we submit that, even under the most extreme view which the court might take of the applicability of the 7th Amendment to the trial of Federal employers' liability act cases in the state courts, the actual unanimous verdict of twelve jurors, as in the case at bar, would hardly be disturbed.

Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, post, 1117 36 Sup. Ct. Rep. 630, 161 Ky. 655, 171 S. W. 185.

It will hardly be claimed that a party who has asserted a right, privilege, or immunity under a Federal statute, and has been deprived thereof by judgment of a state court, can be deprived of a right to a re-

view by writ of error from this court to the appropriate state court.

Nutt v. Knutt, 200 U S. 12, 50 L. ed. 348, 26 Sup. Ct. Rep. 216.

Even where the right was erroneously asserted under the Federal employers' liability act, this court will hear and determine the case on its merits.

Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, ante, 436, 36 Sup. Ct. Rep. 188.

The judgment of February 27, 1914, reversing the judgment for $20,000 of April 11, 1912, remanding the case to the trial court for a new trial and for further proceedings consistent with the opinion and modified opinion therein, was not a final decision or judgment within the meaning of the statute, and no writ of error from this court to the state court would then have been allowed.

Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 Sup. Ct. Rep. 430; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 102, 57 L. ed. 138, 140, 33 Sup. Ct. Rep. 78; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654.

It is within the power and duty of this court to take jurisdiction under the writ of error, and if the errors assigned are sustained, to proceed by appropriate judgment to restore to the original plaintiff in the action the rights of which she and those whom she represents have been deprived by the reversal of the original judgment for $20,000.

Louisiana Nav. Co. v. Oyster Commission and Chesapeake & O. R. Co. v. McCabe, supra; Campbell v. Northwest Eckington Improv. Co. 229 U. S. 561, 585, 57 L. ed. 1330, 1340, 33 Sup. Ct. Rep. 796; Perkins v. Northern P. R. Co. 118 C. C. A. 150, 199 Fed. 712; Coit v. Sistare, 85 Conn. 573, 84 Atl. 119, Ann. Cas. 1913C, 248; Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 28 L.R.A.(N.S.) 1068, 30 Sup. Ct. Rep. 682, 20 Ann. Cas. 1061; Ragan v. Cuyler, 24 Ga. 400; Hull v. West Chicago Park Comrs. 185 Ill. 150, 57 N. E. 1; Cahill v. Lillienthal, 30 Misc. 429, 62 N. Y. Supp. 524; Muse v. Stern, 82 Va. 33, 3 Am. St. Rep. 77; Green County v. Thomas, 211 U. S. 598, 602, 603, 53 L. ed. 343, 345, 346, 29 Sup. Ct. Rep. 168; Jones Nat. Bank v. Yates, 240 U. S. 541, ante, 788, 36 Sup. Ct. Rep. 449.

Where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment.

Rogers v. Hennepin County, 239 U. S. 621, ante, 469, 36 Sup. Ct. Rep. 217.

The failure of the trial court particularly to specify in its charge in an action under the Federal employers' liability act of April 22, 1908, some matters to which its attention was not suitably called, is not ground for reversal.

Illinois C. R. Co. v. Skaggs, 240 U. S. 66, ante, 528, 36 Sup. Ct. Rep. 249.

There was no error in the instructions on the measure of damages prejudicial to the railroad company.

Chesapeake & O. R. Co. v. Dwyer, 157 Ky. 590, 163 S. W. 752; Michigan C. R. Co. v. Vreeland, 227 U. S. 71, 57 L. ed. 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The railroad company will not be granted by this court immunity from that part of the judgment below denominated as costs, interest on the judgment, and damages under the state supersedeas statute.

Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696.

The application of the air brake without warning, especially in violation of the rules, constitutes negligence within the meaning of the employers' liability act.

Chesapeake & O. R. Co. v. Savage, 150 Ky. 263, 150 S. W. 350; Roberts, Injuries to Interstate Employees on Railroads, pp. 55, 56.

And in such cases the jury is free to infer negligence even in the face of the testimony of other members of the train crew to the effect that the train was handled in the usual and ordinary way, without any unnecessary force or jar.

Ft. Worth & D. C. R. Co. v. Stalcup, — Tex. Civ. App. —, 167 S. W. 279.

There was ample evidence to go to the jury on the subject of negligence of the company; and the refusal of the trial court to give the jury a peremptory instruction in favor of the railroad, and the failure of the court of appeals to reverse the judgment by reason of its failure so to do, cannot supply any genuine basis for review by this court on writ of error under § 237 of the Judicial Code.

Great Northern R. Co. v. Knapp, 240 U. S. 464, ante, 745, 36 Sup. Ct. Rep. 399.

The qualifying clause of the instruction was made necessary and appropriate by the peculiar facts in the case.

Louisville & N. R. Co. v. Street, 139 Ky. 186, 139 Am. St. Rep. 471, 129 S. W. 570; Perkins v. Northern P. R. Co. 118 C. C. A. 150, 199 Fed. 712; Transit Development Co. v. Cheatham Electric Switching Device Co. 114 C. C. A. 599, 194 Fed. 963; Galveston, H. & S. A. R. Co. v. Bosher, — Tex. Civ. App. —, 165 S. W. 93; Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834; Pennsylvania R. Co. v. Goughnour, 126 C. C. A. 39, 208

Fed. 964; Louisville & N. R. Co. v. Gilliam, 24 Ky. L. Rep. 1536, 71 S. W. 863; Louisville & N. R. Co. v. Gordon, 24 Ky. L. Rep. 1819, 72 S. W. 311.

Messrs. George H. Lamar, B. F. Procter, C. U. McEllory, and D. W. Wright also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, post, 1117.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought under the employers' liability act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, against the railroad company for negligently causing the death of the plaintiff's intestate, her husband. There were two trials. A verdict and judgment for the plaintiff at the first were set aside by the court of appeals. 156 Ky. 550, 161 S. W. 557; 157 Ky. 642, 163 S. W. 755. A judgment for a less amount at the second trial was sustained. 163 Ky. 823, 174 S. W. 744. The railroad company seeks to overthrow the last judgment; the plaintiff, by her cross writ, seeks to reinstate the first; but, failing that, contends that the last should be affirmed; denying, that is, that there are any grounds for the railroad company's writ.

The object of the plaintiff's writ of error was to go behind the second trial and reinstate the first judgment. But the verdict was found upon an instruction that the jury should find, if anything, "such a sum as will fairly compensate his estate for his death,"—given, it would seem, in forgetfulness that the case arose under the act of Congress. See 157 Ky. 642. This instruction was excepted to, and neither justice nor law would permit the verdict and judgment based upon it to be reinstated after the state court had set it aside. We therefore examine the arguments in 904 no farther, and do not consider whether if, in our opinion, there had been no error of Federal law at the first trial, the plaintiff could have had the relief that she asks. Fairfax v. Hunter, 7 Cranch, 603, 628, 3 L. ed. 453, 461; [263] Jones Nat. Bank v. Yates, 240 U. S. 541, 563, ante, 788, 801, 36 Sup. Ct. Rep. 429.

The railroad company had for its principal object in bringing the case here to set up the 7th Amendment, and to deny jurisdiction in any state court where a verdict of nine or more out of the twelve men on the jury was allowed by the local law. The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least, as between the United States and a state, unless by procedure identical with that of the first, is disposed of in Minneapolis & St. L. R. Co. v. Bombolis [241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595].

The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. So, the state may allow interest upon a judgment from the time when it is rendered, if it provides appellate proceedings and the judgment is affirmed, as, but for such proceedings, interest would run as of course until the judgment was paid.

The railroad company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion of both courts below and the jury were against it, and as we agree with their judgment, we shall not discuss this assignment of error at length. Great Northern R. Co. v. Knapp, 240 U. S. 464, 466, ante, 745, 751, 36 Sup. Ct. Rep. 399. The facts were these: Stewart, the deceased, was engineer on a north-bound freight train upon a single track, that had to go upon a siding to make way for a south-bound freight train. There were cars already on the siding which Stewart's train pushed ahead, and this [264] train and the cars more than filled the siding. Therefore they pushed forward onto the main track to the rear of the south-bound train, and the latter went on its way. It still, however, was necessary to keep the main track clear for another south-bound train, and therefore Stewart's train began to back so as to free the main track north of the switch, which would be the first point reached by the expected train. While it was backing and approaching the southerly end of the switch, the rear brakeman suddenly applied the air brakes, and the sudden shock caused the engineer to strike his head against the cab, by reason of which he died. The conductor in charge of the movement testified that he intended not to cross the southerly point of the switch, and it could be found that the brakeman's act was a breach of duty, that it manifestly would cause a sudden shock, and that, although the particular position of, or specific damage to, Stewart, was unknown to the brake-

man, generically it was the kind of thing that was likely to happen, and that he and his employers were liable for consequences of that sort. The jury was instructed that Stewart assumed the risks incident to his employment, and that, if the application of the air brakes was made upon a reasonable belief that it was necessary to apply them in order to avoid injury to property, they should find for the defendant unless they found that the emergency was brought about by the defendant's servants in the negligent operation of the train before the brakes were applied. As an abstract proposition the qualification was correct, and the jury might have found that the conductor did not manage the train with due care, and so made the application necessary. Whatever might have been our opinion had we been in the jury's place, we do not feel warranted in saying that they had no evidence to go upon, or that the instructions were wrong.

Judgment affirmed.

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[265] UNITED STATES, Plff. in Err.,
v.
FORTY BARRELS and Twenty Kegs of Coca Cola, the Coca Cola Company of Atlanta, Georgia, Complainant.

(See S. C. Reporter's ed. 265-290.)

Food and drugs — proprietary food — adulteration — added harmful ingredient.

1. A poisonous or deleterious ingredient called for as a constituent by a secret formula for a food product sold under its own distinctive name may still be an added ingredient within the meaning of the provisions of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," and the provisos in § 8 that food mixtures or compounds "which may be now or from time to time hereafter known as articles of food under their own distinctive names" are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious ingredients," and that nothing in the act shall be construed to require manufacturers of proprietary foods "which contain no unwholesome added ingredient" to disclose their trade formulas except as the provisions of the act may require to secure freedom from adulteration or misbranding.

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

NOTE.—As to what constitutes adulteration within food and drugs acts—see note to United States v. Lexington Mill & Elevator Co. L.R.A.1915B, 774.

60 L. ed.

Food and drugs — adulteration — proprietary food — abstracting harmful ingredient.

2. The elimination of a harmful ingredient from a proprietary food which, without such ingredient, would not be the same, does not constitute an adulteration under the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), § 7, by the abstraction of a "valuable constituent."

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Food and drugs — adulteration — added harmful ingredient — caffeine.

3. Caffeine introduced into a syrup during the second or third melting is an "added" ingredient within the meaning of the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," although it is called for as a constituent by the secret formula under which the syrup is compounded.

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Trial — question for jury — adulteration — added harmful ingredient.

4. Whether caffeine added to a food product is a poisonous or deleterious ingredient which may render the article deleterious to health, within the meaning of the act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), condemning as adulterated any article of food that contains "any added poisonous or other added deleterious ingredient which may render such article injurious to health," is a question of fact for the jury, where the evidence on that point is conflicting.

[For other cases, see Trial, VI. c, in Digest Sup. Ct. 1908.]

Food and drugs — misbranding — coca cola — distinctive or descriptive name.

5. The name "Coca Cola" cannot be said as a matter of law to be distinctive rather than descriptive of a compound with coca and cola ingredients, so as to escape condemnation under the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), § 8, as misbranded in case of the absence of either coca or cola, on the theory that it was within the protection of the proviso in that section that an article of food shall not be deemed to be misbranded in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names," if the distinctive name of another article is not used or imitated, and the name on the label or brand is accompanied with a statement of the place of production.

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

Food and drugs — misbranding — coca cola — secondary significance of name.

6. A secondary significance cannot be

attributed to the name "Coca Cola," as descriptive of a product known to be destitute of either of the products indicated by its primary meaning, so as to save it from condemnation under the food and drugs act of June 30, 1906 (34 Stat. at L. 768, chap. 3915, Comp. Stat. 1913, § 8717), § 8, on the theory that it is within the protection accorded by the proviso in that section to food mixtures or compounds known under their own distinctive names.

[Pure food laws, see Food and Drugs, in Digest Sup. Ct. 1913 Supp.]

[No. 562.]

Argued February 29, 1916. Decided May 22, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Tennessee, entered upon a directed verdict in favor of the claimant in a libel for condemnation under the food and drugs act. Reversed and remanded for further proceedings.

See same case below, 132 C. C. A. 47, 215 Fed. 535.

The facts are stated in the opinion.

Assistant Attorney General **Underwood** argued the cause, and, with Mr. Elliott Cheatham, filed a brief for plaintiff in error:

This act was primarily a health measure.

United States v. Morgan, 222 U. S. 274, 281, 56 L. ed. 198, 200, 32 Sup. Ct. Rep. 81; Hall-Baker Grain Co. v. United States, 117 C. C. A. 318, 198 Fed. 614; French Silver Dragee Co. v. United States, 103 C. C. A. 316, 179 Fed. 824; United States v. Johnson, 177 Fed. 313; United States v. 5 Boxes of Asafœtida, 181 Fed. 561; United States v. Morgan, 181 Fed. 587; United States v. 1,950 Boxes of Macaroni, 181 Fed. 427; Galt v. United States, 39 App. D. C. 470.

It should be, as it and other remedial statutes have been, construed liberally to accomplish its purpose.

Southern R. Co. v. Crockett, 234 U. S. 725, 735, 58 L. ed. 1564, 1568, 34 Sup. Ct. Rep. 897; United States v. Antikamnia Chemical Co. 231 U. S. 654, 655, 58 L. ed. 419, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Interstate Commerce Commission v. Goodrich Transit Co. 224 U. S. 194, 213, 56 L. ed. 729, 737, 32 Sup. Ct. Rep. 436; United States v. Baltimore & O. R. Co. 225 U. S. 306, 324, 56 L. ed. 1100, 1106, 32 Sup. Ct. Rep. 817; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

This court assumed in the case of United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 58 L. ed. 658, L.R.A.1915B,774, 34 Sup. Ct. Rep. 337, that it was unlawful to transport in interstate commerce flour which contained nitrites enough to make it injurious to health. Under the construction given the act by the circuit court of appeals such flour, though shown to be poisonous to consumers, might freely move in interstate commerce provided its manufacturers gave it the distinctive name "Lexingtonia." Similarly, the macaroni which was condemned in the case of United States v. 1,950 Boxes of Macaroni, 181 Fed. 427, because colored with martius yellow, would have, under this construction, escaped condemnation if only a distinctive name had been given to the article, and the martius yellow included in its formula. It is inconceivable that this could have been the purpose of Congress in framing this great remedial statute,—that its authors were fascinated by mere names, and satisfied with shadows instead of substance.

United States v. Louisville & N. R. Co. 235 U. S. 314, 326, 59 L. ed. 245, 253, 35 Sup. Ct. Rep. 113.

There is nothing in the meaning of the word "added" to demand such a construction, and to so interpret the act will destroy its efficacy.

United States v. Baltimore & O. R. Co. 225 U. S. 306, 324, 56 L. ed. 1100, 1106, 32 Sup. Ct. Rep. 817.

The standard used in determining whether a particular brand of food is adulterated is the sum total of all the elements, whatever they may be, of the particular combination.

United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 58 L. ed. 658, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337; United States v. Mayfield, 177 Fed. 765; Com. v. Kevin, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594.

The act forbids the suggestive and misleading use of names of known articles, whether used in combination or not, and whether the deception be about the article itself or its ingredients.

Steinhardt Bros. & Co. v. United States, 112 C. C. A. 284, 191 Fed. 798; Libby, McNeill & Libby v. United States, 127 C. C. A. 14, 210 Fed. 148; United States v. 300 Cases of Mapleine (D. C. N. D. Wis.); United States v. Morgan, 181 Fed. 587, affirmed in 222 U. S. 274, 56 L. ed. 198, 32

Sup. Ct. Rep. 81; United States v. 7 Cases of Buffalo Lithia Water, Federal Food & Drug Act & Dec. p. 697; Clinton E. Worden & Co. v. California Fig Syrup Co. 187 U. S. 516, 47 L. ed. 282, 23 Sup. Ct. Rep 161; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; United States v. 2 Cases of Sulpho-Napthol, 213 Fed. 519; United States v. 2 Cases of Chloro-Naptholeum Disinfectant, 217 Fed. 477.

Messrs. **Harold Hirsch** and **J. B. Sizer** argued the cause, and, with Messrs. A. W. Chambliss and W. D. Thompson, filed a brief for defendant in error:

In construing a statute, every section, provision, and clause should be explained by reference to every other; and, if possible, every clause and provision shall avail, and have the effect contemplated by the legislature.

Montclair Twp. v. Ramsdell, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; Bend v. Hoyt, 13 Pet. 263, 10 L. ed. 154; Peck v. Jenness, 7 How. 612, 623, 12 L. ed. 841, 845; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B,774, 34 Sup. Ct. Rep. 337; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219, 20 Sup. Ct. Rep. 155; Washington Market Co. v. Hoffman, 101 U. S. 112, 25 L. ed. 782; United States v. Antikamnia Chemical Co. 231 U. S. 654, 665, 58 L. ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; Hall-Baker Grain Co. v. United States, 117 C. C. A. 318, 198 Fed. 614.

This statute was not to prevent the manufacture and sale of foods, but to prevent the adulteration and misbranding thereof.

Savage v. Jones, 225 U. S. 501, 530, 56 L. ed. 1182, 1193, 32 Sup. Ct. Rep. 715; Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; United States v. 65 Casks Liquid Extracts, 170 Fed. 449; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; United States v. 40 Barrels & 20 Kegs of Coca-Cola, 132 C. C. A. 47, 215 Fed. 535.

The statute contemplates a standard.

Gruley, Food & Drugs Act, pp. 8, 22; Wilson v. Wilson, 86 J. P. 175, 41 Scot. L. R. 195; Von Bremen v. United States, 113 C. C. A. 296, 192 Fed. 905; People v. Jennings, 132 Mich. 662, 94 N. W. 216; Nave-McCord Mercantile Co. v. United States, 104 C. C. A. 486, 182 Fed. 47; United States v. St. Louis Coffee & Spice Mills, 189 Fed. 193; United States v. Frank, 189 Fed. 195; 200 Chests of Tea, 9 Wheat. 431, 6 L. ed. 128; Hudson Mfg. Co. v. United States, 113 C. C. A. 625, 192 Fed. 920; Libby, McNeill & Libby v. United States, 127 C. C. A. 14, 210 Fed. 148; United States v. Sweet Valley Wine Co. 208 Fed. 85; United States v. 75 Boxes of Alleged Pepper, 198 Fed. 934; Weeks v. United States, 139 C. C. A. 626, 224 Fed. 64; Cadwalader v. Zeh, 151 U. S. 171, 38 L. ed. 115, 14 Sup. Ct. Rep. 288; United States v. 420 Sacks of Flour, 180 Fed. 518.

The evidence conclusively shows what Coca Cola is,—that it contains, and has always contained, caffeine. Can it, then, be contended that the caffeine is added?

Washburn v. United States, 140 C. C. A. 81, 224 Fed. 395.

The term "added ingredient" means something foreign to the article to which it is added; and therefore an ingredient which is a constituent element, and is not foreign, is not an added one.

St. Louis v. Judd, 236 Mo. 1, 139 S. W. 441; Com. v. Kevin, 202 Pa. 23, 90 Am. St. Rep. 613, 51 Atl. 594; Hall-Baker Grain Co. v. United States, 117 C. C. A. 318, 198 Fed. 614; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 58 L. ed. 658, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; Price v. Illinois, 238 U. S. 446, 59 L. ed. 1400, 35 Sup. Ct. Rep. 892; United States v. 11,150 Pounds of Butter, 115 C. C. A. 463, 195 Fed. 657. See also Weeks v. United States, 139 C. C. A. 626, 224 Fed. 64; Curtice Bros. Co. v. Barnard, 126 C. C. A. 411, 209 Fed. 591.

If the presence of the substance would not have an appreciable effect, then its elimination would not operate as an appreciable change.

People v. Jennings, 132 Mich. 663, 94 N. W. 216.

A defendant in whose favor a verdict has been rendered by direction of the court is entitled to support such verdict upon any ground permitted by the evidence in the record of which he has not by his conduct waived the right to avail himself.

Whitney v. New York, N. H. & H. R. Co. 50 L.R.A. 615, 43 C. C. A. 19, 102 Fed. 850.

When a defeated party has been permitted to present, and has introduced, all the legal evidence which he offered, has rested his case, and the court has instructed the jury to return a verdict against him upon a specified but untenable ground, its action is error without prejudice, and will not warrant a reversal of the judgment, where it is clear beyond doubt, from a bill of exceptions which contains all the evidence, that it would not sustain any other verdict.

Bank of Havelock v. Western U. Teleg. Co. 4 L.R.A.(N.S.)181, 72 C. C. A. 580,

141 Fed. 522, 5 Ann. Cas. 515; United States v. Norton, 46 C. C. A. 387, 107 Fed. 412; Currier v. Dartmouth College, 54 C. C. A. 430, 117 Fed. 44; 38 Cyc. 1592; W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483, 41 L. ed. 524, 17 Sup. Ct. Rep. 158; Sullivan v. Iron Silver Min. Co. 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555.

A trademark can be distinctive in its original signification, or it may have become so by association.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 323, 20 L. ed. 581, 583; Amoskeag v. Trainer, 101 U. S. 51, 25 L. ed. 993; Lawrence Mfg. Co. v. Tennessee, 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550.

Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same or like articles of production. This may, in many cases, be done by a name, a mark, or a device, well known, but not previously applied to the same article.

Delaware & H. Canal Co. v. Clark, 13 Wall. 322, 20 L. ed. 583; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 25 L. ed. 993; United States v. Steffens, 100 U. S. 82, 25 L. ed. 550.

It is possible to devest a geographical, descriptive term or symbol of its original signification.

Re Tolle (1872) C. D. 219.

Where a name has a well-defined, arbitrary meaning, it should not be refused registration because it appears in dictionaries.

Ex parte Van Eyck (1903) C. D. 43.

Does the tradename overshadow the geographical?

Ex parte Indiana Bicycle Co. (1895) C. D. 66.

If the primary meaning has been transcended by the secondary meaning, it is a distinctive name.

Ex parte Jewell Bottling Co. (1904) C. D. 150; Siegert v. Gandolfi, 79 C. C. A. 142, 149 Fed. 100.

If a name has acquired a secondary meaning, it has become distinctive.

Jacobs v. Beecham, 221 U. S. 263, 55 L. ed. 729, 31 Sup. Ct. Rep. 555; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; Baglin v. Cusenier Co. 221 U. S. 580, 55 L. ed. 863, 31 Sup. Ct. Rep. 669; Montgomery v. Thompson, 8 Rep. Pat. Cas. 361; Wotherspoon v. Currie, L. R. 5 H. L. 508, 42 L. J. Ch. N. S. 130, 27 L. T. N. S. 393; Birmingham Vinegar Co. v. Powell [1897] A. C. 710, 76 L. T. N. S. 792, 66 L. J. Ch. N. S. 763; Reddaway v. Banham, 12 Rep. Pat. Cas. 83, 13 Rep. Pat. Cas. 218, [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 44 Week. Rep. 638, 74 L. T. N. S. 289; Thaddeus Davids Co. v. Davids Mfg. Co. 233 U. S. 461, 466, 58 L. ed. 1046, 1049, 34 Sup. Ct. Rep. 648, Ann. Cas. 1915B, 322.

Use must, of necessity, make a mark distinctive.

Re Crosfield & Sons, 26 Rep. Pat. Cas. 846, [1910] 1 Ch. 130, 79 L. J. Ch. N. S. 212, 101 L. T. N. S. 587, 26 Times L. R. 100, 54 Sol. Jo. 100; Re Registered Trademarks, Nos. 538, 1807 & 158, 839, 32 Rep. Pat. Cas. 40, [1914] W. N. 451, 31 Times L. R. 62, 59 Sol. Jo. 128; Re Slazengers, 31 Rep. Pat. Cas. 501; Re Cadbury Bros. 32 Rep. Pat. Cas. 9, [1915] 1 Ch. 331, 84 L. J. Ch. N. S. 242, 112 L. T. N. S. 235, [1914] W. N. 463; Re Berna Commercial Motors, 32 Rep. Pat. Cas. 113, [1915] 1 Ch. 414, 84 L. J. Ch. N. S. 416, 112 L. T. N. S 980, [1915] W. N. 36, 59 Sol. Jo. 316; Woodward v. Boulton Macro, 32 Rep. Pat. Cas. 173, 112 L. T. N. S. 1112, [1915] W. N. 124, 31 Times L. R. 269; United States v. 30 Cases, 199 Fed. 932; United States v. 100 Barrels of Calcium Phosphate (D. C. N. D. Cal.); United States v. Von Bremen (D. C. S. D. N. Y.); Lemy v. Watson, 32 Rep. Pat. Cas. 508, [1915] 3 K. B. 731, 84 L. J. K. B. N. S. 1999, 13 L. G. R. 1323, 31 Times L. R. 612; Fowler v. Cripps [1906] 1 K. B. 21, 75 L. J. K. B. N. S. 72, 70 J. P. 21, 54 Week. Rep. 299, 93 L. T. N. S. 808, 22 Times L. R. 73; Rex v. Butcher, 99 L. T. N. S. 622, 72 J. P. 454, 24 Times L. R. 797, 52 Sol. Jo. 716, 21 Cox, C. C. 697.

The name is necessarily distinctive because it is not, and never has been, applied to anything except this product, and no one has the right to apply it to anything else.

Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E. 476; Carnrick, K. & Co. v. Morson (1877) Law Journal Notes on Cases, p. 71; Re La Societe Le Ferment, 81 L. J. Ch. N. S. 724, [1912] W. N. 187, 107 L. T. N. S. 515, 28 Times L. R. 490, 29 Rep. Pat. Cas. 497, 29 Rep. Pat. Cas. 149, 28 Times L. R. 175.

Coco Cola is not sold under the distinctive name of another article.

Nashville Syrup Co. v. Coca Cola Co. 132 C. C. A. 39, 215 Fed. 527, Ann. Cas. 1915B, 358; Coca-Cola Co. v. American Druggists' Syndicate, 200 Fed. 107.

Mr. Justice Hughes delivered the opinion of the court:

This is a libel for condemnation under the food and drugs act (June 30, 1906, chap. 3915, 34 Stat. at L. 768, Comp. Stat. 1913,

§ 8717), of a certain quantity of a food product known as "Coca Cola" transported for sale, from Atlanta, Georgia, to Chattanooga, Tennessee. It was alleged that the product was adulterated and misbranded. The allegation of adulteration was, in substance, that the product contained an added poisonous or added deleterious ingredient, caffeine, [271] which might render the product injurious to health. It was alleged to be misbranded in that the name "Coca Cola" was a representation of the presence of the substances coca and cola; that the product "contained no coca and little if any cola" and thus was an "imitation" of these substances and was offered for sale under their "distinctive name." We omit other charges which the government subsequently withdrew. The claimant answered, admitting that the product contained as one of its ingredients "a small portion of caffeine," but denying that it was either an "added" ingredient, or a poisonous or a deleterious ingredient which might make the product injurious. It was also denied that there were substances known as coca and cola "under their own distinctive names," and it was averred that the product did contain "certain elements or substances derived from coca leaves and cola nuts." The answer also set forth, in substance, that "Coca Cola" was the "distinctive name" of the product under which it had been known and sold for more than twenty years as an article of food, with other averments negativing adulteration and misbranding under the provisions of the act.

Jury trial was demanded, and voluminous testimony was taken. The district judge directed a verdict for the claimant (191 Fed. 431), and judgment entered accordingly was affirmed on writ of error by the circuit court of appeals (132 C. C. A. 47, 215 Fed. 535). And the government now prosecutes this writ.

First. As to "*adulteration*." The claimant, in its summary of the testimony, states that the article in question "is a syrup manufactured by the claimant . . . and sold and used as a base for soft drinks both at soda fountains and in bottles. The evidence shows that the article contains sugar, water, caffeine, glycerine, lime juice, and other flavoring matters. As used by the consumer, about 1 ounce of this syrup is taken in a glass mixed with [272] about 7 ounces of carbonated water, so that the consumer gets in an 8-ounce glass or bottle of the beverage, about 1.21 grains of caffeine." It is said that in the year 1886 a pharmacist in Atlanta "compounded a syrup by a secret formula, which he called Coca-Cola Syrup and Extract;'" that the claimant acquired "the formula, name, label, and good will for the product" in 1892, and then registered "a trademark for the syrup consisting of the name Coca Cola," and has since manufactured and sold the syrup under that name. The proportion of caffeine was slightly diminished in the preparation of the article for bottling purposes. The claimant again registered the name "Coco Cola" as a trademark in 1905, averring that the mark had been "in actual use as a trademark of the applicant for more than ten years next preceding the passage of the act of February 20, 1905," and that it was believed such use had been exclusive. It is further stated that, in manufacturing in accordance with the formula, "certain extracts from the leaves of the coca shrub and the nut kernels of the cola tree were used for the purpose of obtaining a flavor," and that "the ingredient containing these extracts," with cocaine eliminated, is designated as "Merchandise No. 5." It appears that in the manufacturing process water and sugar are boiled to make a syrup; there are four meltings; in the second or third the caffeine is put in; after the meltings the syrup is conveyed to a cooling tank and then to a mixing tank, where the other ingredients are introduced and the final combination is effected; and from the mixing tank the finished product is drawn off into barrels for shipment.

The questions with respect to the charge of "adulteration" are (1) whether the caffeine in the article was an added ingredient within the meaning of the act (§ 7, subdiv. 5th), and, if so, (2) whether it was a poisonous or deleterious ingredient which might render the article injurious to health. The decisive ruling in the courts below resulted [273] from a negative answer to the first question. Both the district judge and the circuit court of appeals assumed for the purpose of the decision that as to the second question there was a conflict of evidence which would require its submission to the jury. (191 Fed. 433, 132 C. C. A. 47, 215 Fed. 540.) But it was concluded, as the claimant contended, that the caffeine—even if it could be found by the jury to have the alleged effect—could not be deemed to be an "added ingredient" for the reason that the article was a compound, known and sold under its own distinctive name, of which the caffeine was a usual and normal constituent. The government challenges this ruling and the construction of the statute upon which it depends; and the extreme importance of the question thus presented with respect to the application of the act to articles of food sold under tradenames is at once apparent. The government insists that the fact that a formula has been made up and followed and a distinctive name

adopted does not suffice to take an article from the reach of the statute; that the standard by which the combination in such a case is to be judged is not necessarily the combination itself; that a poisonous or deleterious ingredient with the stated injurious effect may still be an added ingredient in the statutory sense, although it is covered by the formula and made a constituent of the article sold.

The term "food," as used in the statute, includes "all articles used for food, drink, confectionery, or condiment . . . whether simple, mixed, or compound" (§ 6). An article of "food" is to be deemed to be "adulterated" if it contain "any added poisonous or other added deleterious ingredient which may render such article injurious to health." (§ 7, subdiv. 5th [1]). With this [274] section is to be read the proviso in § 8, to the effect that "an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names," if the distinctive name of another article is not used or imitated, and the name on the label or brand is accompanied with a statement of the place of production. And § 8 concludes with a further proviso that nothing in the act shall be construed "as requiring or compelling proprietors or manufacturers of proprietary foods which [275] contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."[2]

[276] In support of the ruling below, emphasis is placed upon the general purpose of the act, which, it is said, was to prevent deception, rather than to protect the public health by prohibiting traffic in articles which might be determined to be deleterious. But a description of the purpose of the statute would be inadequate which failed to take account of the design to protect the public from lurking dangers caused by the introduction of harmful ingredients, or which assumed that this end was sought to be achieved by simply requiring certain disclosures. The statute is entitled, "An Act for Preventing the Manufacture, Sale, or Transportation of Adulterated or Misbranded or Poisonous or Deleterious Foods, Drugs, Medicines, and Liquors," etc. In the case of confectionery, we find that is is to be deemed to be adulterated if it contains certain specified substances "or other ingredient deleterious or detrimental to health." So, under § 7, subdivision 6th, there may be adulteration of food in case the article consists in whole or in part of "any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." In United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B, 774, 34

[1] Section 7, with respect to "confectionery" and 'food" is as follows:

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated:

. . .

"In the case of confectionery:

"If it contains terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

"In the case of food:

"First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted.

"Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

"Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health: Provided, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

"Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

[2] Section 8 provides:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, . . .

"That for the purposes of this act an article shall also be deemed to be misbranded:

. . . . . .

"In the case of food:

"First. If it be an imitation of or offered

Sup. Ct. Rep. 337, it was said that "the statute upon its face shows that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation [277] in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was, and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers." See also United States v. Antikamnia Co. 231 U. S. 654, 665, 58 L. ed. 419, 424, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; H. R. Report, No. 2118, 59th Cong., 1st Sess., 6-9. It is true that in executing these purposes Congress has limited its prohibitions (Savage v. Jones, 225 U. S. 501, 529, 532, 56 L. ed. 1182, 1193, 1194, 32 Sup. Ct. Rep. 715), and has specifically defined what shall constitute adulteration or misbranding; but, in determining the scope of specific provisions, the purpose to protect the public health, as an important aim of the statute, must not be ignored.

Reading the provisions here in question in the light of the context, we observe:

(a) That the term "adulteration" is used in a special sense. For example, the product of a diseased animal may not be adulterated in the ordinary or strict meaning of the word, but by reason of its being that product the article is adulterated within the meaning of the act. The statute with respect to "adulteration" and "misbranding" has its own glossary. We cannot, therefore, assume that simply because a prepared "food" has its formula and distinctive name, it is not, as such, "adulterated." In the case of confectionery, it is plain that the article may be "adulterated" although it is made in strict accordance with some formula and bears a fanciful tradename, if in fact it contains an "ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug." And the context clearly indicates that, [278] with respect to articles of food, the ordinary meaning of "adulteration" cannot be regarded as controlling.

(b) The provision in § 7, subdivision 5th, assumes that the substance which renders the article injurious, and the introduction of which causes "adulteration," is an ingredient of the article. It must be an "added" ingredient; but it is still an ingredient. Component parts, or constituents, of the article which is the subject of the described traffic, are thus not excluded, but are included in the definition. The article referred to in subdivision 5th is the article sought to be made an article of commerce, —the article which "contains" the ingredient.

(c) "Adulteration" is not to be confused

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for sale under the distinctive name of another article.

"Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

"Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: Provided, That the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

with "misbranding." The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid "misbranding," does not limit the explicit provisions of § 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining "adulteration." It is "any" added poisonous or "other added deleterious ingredient," provided it "may render such article injurious to health."

(d) Proprietary foods, sold under distinctive names, are within the purview of the provision. Not only is "food" defined as including articles used for food or drink, "whether simple, mixed, or compound," but the intention to include "proprietary foods" sold under distinctive names is manifest from the provisos in § 8 which the claimant invokes. "Mixtures or compounds" which satisfy the first paragraph of the proviso are not only "articles of food," but are to enjoy the stated immunity only in case they do "not contain any added poisonous or deleterious [279] ingredients." By the concluding clause of § 8, it is provided that nothing in the act shall be construed to require manufacturers of "proprietary foods" to disclose "their trade formulas" except in so far as the provisions of the act "may require to secure freedom from adulteration or misbranding;" and the immunity is conditioned upon the fact that such foods "contain no unwholesome added ingredient." Thus the statute contemplates that mixtures or compounds manufactured by those having trade formulas, and bearing distinctive names, may nevertheless contain "added ingredients" which are poisonous or deleterious and may make the article injurious, and, if so, the article is not taken out of the condemnation of § 7, subdiv. 5th.

(e) Again, articles of food, including "proprietary foods" which fall within this condemnation, are not saved because they were already on the market when the statute was passed. The act makes no such distinction; and it is to be observed that the proviso of § 8 explicitly refers to "mixtures or compounds which may be now or from time to time hereafter known as articles of food." Nor does the length of the period covered by the traffic, or its extent, affect the question if the article is in fact adulterated within the meaning of the act.

Having these considerations in mind we deem it to be clear that, whatever difficulties there may be in construing the provision, the claimant's argument proves far too much. We are not now dealing with the question whether the caffeine did, or might, render the article in question injurious; that is a separate inquiry. The fundamental contention of the claimant, as we have seen, is that a constituent of a food product having a distinctive name cannot be an "added" ingredient. In such case, the standard is said to be the food product itself which the name designates. It must be, it is urged, this "finished product" that is "adulterated." In that view, there would [280] seem to be no escape from the conclusion that, however poisonous or deleterious the introduced ingredient might be, and however injurious its effect, if it be made a constituent of a product having its own distinctive name it is not within the provision. If this were so, the statute would be reduced to an absurdity. Manufacturers would be free, for example, to put arsenic or strychnine or other poisonous or deleterious ingredients with an unquestioned injurious effect into compound articles of food, provided the compound were made according to formula and sold under some fanciful name which would be distinctive. When challenged upon the ground that the poison was an "added" ingredient, the answer would be that without it the so-called food product would not be the product described by the name. Further, if an article purporting to be an ordinary food product, sold under its ordinary name, were condemned because of some added deleterious ingredient, it would be difficult to see why the same result could not be attained with impunity by composing a formula and giving a distinctive name to the article with the criticized substance as a component part. We think that an analysis of the statute shows such a construction of the provision to be inadmissible. Certain incongruities may follow from any definition of the word "added," but we cannot conclude that it was the intention of Congress to afford immunity by the simple choice of a formula and a name. It does not seem to us to be a reasonable construction that in the case of "proprietary foods" manufactured under secret formulas Congress was simply concerned with additions to what such formulas might embrace. Undoubtedly, it was not desired needlessly to embarrass manufacturers of "proprietary foods" sold under distinctive names, but it was not the purpose of the act to protect articles of this sort regardless of their character. Only such food products as contain "no unwholesome added ingredient" are within the saving clause, and [281] in using the words quoted we are satisfied that Congress did not make the proprietary article its own standard.

Equally extreme and inadmissible is the suggestion that where a "proprietary food" would not be the same without the harmful ingredient, to eliminate the latter would constitute an "adulteration" under § 7, subdivision 3d, by the abstraction of a "valuable constituent." In that subdivision Congress evidently refers to articles of food which normally are not within the condemnation of the act. Congress certainly did not intend that a poisonous or deleterious ingredient which made a proprietary food an enemy to the public health should be treated as a "valuable constituent," or to induce the continued use of such injurious ingredients by making their elimination an adulteration, subject to the penalties of the statute.

It is apparent, however, that Congress, in using the word "added," had some distinction in view. In the Senate bill (for which the measure as adopted was a substitute) there was a separate clause relating to "liquors," providing that the article should be deemed to be adulterated if it contained "any added ingredient of a poisonous or deleterious character;" while in the case of food (which was defined as excluding liquors) the article was to be deemed to be "adulterated" if it contained "any added poisonous or other ingredient which may render such article injurious to human health." Cong. Rec., 59th Cong., 1st Sess. vol. 40, p. 897. In explaining the provision as to "liquors," Senator Heyburn, the chairman of the Senate committee having the bill in charge, stated to the Senate (Id., p. 2647): "The word 'added,' after very mature consideration by your committee, was adopted because of the fact that there is to be found in nature's products as she produces them, poisonous substances to be determined by analysis. Nature has so combined them that they are not a danger or an evil,—that is, so long as they are left in [282] the chemical connection in which nature has organized them; but when they are extracted by the artificial processes of chemistry they become a poison. You can extract poison from grain or its products and when it is extracted it is a deadly poison; but if you leave that poison as nature embodied it in the original substances, it is not a dangerous poison or an active agency of poison at all. So, in order to avoid the threat that those who produce a perfectly legitimate article from a natural product might be held liable because the product contained nature's poison, it was thought sufficient to provide against the adding of any new substance that was in itself a poison, and thus emphasizing the evils of existing conditions in nature's product. That is the reason the word 'added' is in the bill. Fusel oil is a poison. If you extract it, it becomes a single active agency of destruction, but allow it to remain in the combination where nature has placed it, and, while it is nominally a poison, it is a harmless one, or comparatively so." For the Senate bill, the House of Representatives substituted a measure which had the particular provisions now under consideration in substantially the same form in which they were finally enacted into law. (§ 7, subdiv. 5th; § 8, subdiv. 4th, provisos.) And the committee of the House of Representatives, in reporting this substituted measure, said (H. R. Report, No. 2118, 59th Cong., 1st Sess., pp. 6, 7, 11): "The purpose of the pending measure is not to compel people to consume particular kinds of foods. It is not to compel manufacturers to produce particular kinds or grades of foods. One of the principal objects of the bill is to prohibit in the manufacture of foods intended for interstate commerce the addition of foreign substances poisonous or deleterious to health. The bill does not relate to any natural constituents of food products which are placed in the foods by nature itself. It is well known that in many kinds of foods in their natural state some quantity of poisonous [283] or deleterious ingredients exist. How far these substances may be deleterious to health when the food articles containing them are consumed may be a subject of dispute between the scientists, but the bill reported does not in any way consider that question. If, however, poisonous or deleterious substances are added by man to the food product, then the bill declares the article to be adulterated, and forbids interstate traffic."

This statement throws light upon the intention of Congress. Illustrations are given to show possible incongruous results of the test,but they do not outweigh this deliberate declaration of purpose; nor do we find in the subsequent legislative history of the substituted measure containing the provision any opposing statement as to the significance of the phrase. It must also be noted that some of the illustrations which are given lose their force when it is remembered that the statutory ban (§ 7, subdiv. 5th) by its explicit terms only applies where the added ingredient may render the article injurious to health. See United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337. It is urged that whatever may be said of natural food products, or simple food products, to which some addition is made, a "proprietary food" must necessarily be "something else than the simple or natural article;" that it is an "artificial preparation." It is

insisted that every ingredient in such a compound cannot be deemed to be an "added" ingredient. But this argument, and the others that are advanced, do not compel the adoption of the asserted alternative as to the saving efficacy of the formula. Nor can we accept the view that the word "added" should be taken as referring to the quantity of the ingredient used. It is added ingredient which the statute describes, not added quantity of the ingredient, although of course quantity may be highly important in determining whether the ingredient may render the article harmful, and experience in the use of ordinary articles of [284] food may be of greatest value in dealing with such questions of fact.

Congress, we think, referred to ingredients artificially introduced; these it described as "added." The addition might be made to a natural food product or to a compound. If the ingredient thus introduced was of the character and had the effect described, it was to make no difference whether the resulting mixture or combination was or was not called by a new name or did or did not constitute a proprietary food. It is said that the preparation might be "entirely new." But Congress might well suppose that novelty would probably be sought by the use of such ingredients, and that this would constitute a means of deception and a menace to health from which the public should be protected. It may also have been supposed that, ordinarily, familiar food bases would be used for this purpose. But, however the compound purporting to be an article of food might be made up, we think that it was the intention of Congress that the artificial introduction of ingredients of a poisonous or deleterious character which might render the article injurious to health should cause the prohibition of the statute to attach.

In the present case, the article belongs to a familiar group; it is a syrup. It was originally called "Coco-Cola Syrup and Extract." It is produced by melting sugar,—the analysis showing that 52.64 per cent of the product is sugar and 42.63 per cent is water. Into the syrup thus formed by boiling the sugar, there are introduced coloring, flavoring, and other ingredients, in order to give the syrup a distinctive character. The caffeine, as has been said, is introduced in the second or third "melting." We see no escape from the conclusion that it is an "added" ingredient within the meaning of the statute.

Upon the remaining question whether the caffeine was a poisonous or deleterious ingredient which might render the article injurious to health, there was a decided conflict [285] of competent evidence. The government's experts gave testimony to the effect that it was, and the claimant introduced evidence to show the contrary. It is sufficient to say that the question was plainly one of fact which was for the consideration of the jury. See 443 Cans of Frozen Egg Product v. United States, 226 U. S. 172, 183, 57 L. ed. 174, 179, 33 Sup. Ct. Rep. 50.

Second. As to "*misbranding.*" In the second count it was charged that the expression "Coca Cola" represented the presence in the product of the substances coca and cola, and that it contained "no coca and little if any cola." So far as "cola" was concerned, the charge was vague and indefinite, and this seems to have been conceded by the government at the beginning of the trial. With respect to "coca," there was evidence on the part of the government tending to show that there was nothing in the product obtained from the leaves of the coca plant, while on behalf of the claimant it was testified that the material called "Merchandise No. 5" (one of the ingredients) was obtained from both coca leaves and cola nuts. It was assumed on the motion for a peremptory instruction that there might be a disputed question of fact as to whether the use of the word "coca" is to be regarded "intrinsically and originally" as stating or suggesting the presence of "some material element or quality" derived from coca leaves, and it was also assumed that the evidence might be deemed to be conflicting with respect to the question whether the product actually contained anything so derived. 191 Fed. 438, 439. But these issues of fact were considered not to be material. On this branch of the case, the claimant succeeded upon the ground that its article was within the protection of the proviso in § 8 as one known "under its own distinctive name." 132 C. C. A. 47, 215 Fed. 544.

Section 8 (ante, p. 1000), in its 4th specification as to "food," provides that the article shall be deemed to be "misbranded" "if the package containing it or its label shall [286] bear any statement, design, or device regarding the ingredients or the substances contained therein, which . . . shall be false or misleading in any particular." Then follows the proviso in question that an article not containing any added poisonous or deleterious ingredients "shall not be deemed to be . . . misbranded" in the case of "mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article," if the name is

accompanied with a statement of the place where the article has been produced.[1]

A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, *e. g.*, [287] coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a familiar trade description of an article which now, as is well known, rarely contains soda in any form. Such a name is not to be deemed either "misleading" or "false," as it is in fact distinctive. But unless the name is truly distinctive, the immunity cannot be enjoyed; it does not extend to a case where an article is offered for sale "under the distinctive name of another article." Thus, that which is not coffee, or is an imitation of coffee, cannot be sold as coffee; and it would not be protected by being called "X's Coffee." Similarly, that which is not lemon extract could not obtain immunity by being sold under the name of "Y's Lemon Extract." The name so used is not "distinctive," as it does not appropriately distinguish the product; it is an effort to trade under the name of an article of a different sort. So, with respect to "mixtures or compounds," we think that the term "another article" in the proviso embraces different compounds from the compound in question. The aim of the statute is to prevent deception, and that which appropriately describes a different compound cannot secure protection as a "distinctive name."

A "distinctive name" may also, of course, be purely arbitrary or fanciful, and thus, being the trade description of the particular thing, may satisfy the statute, provided the name has not already been appropriated for something else so that its use would tend to deceive.

If, in the present case, the article had been named "Coca," and it were found that the name was actually descriptive in the sense that it fairly implied that the article was derived from the leaves of the coca plant, it could not be said that this was "its own distinctive name" if in fact it contained nothing so derived. The [288] name, if thus descriptive, would import a different product from the one to which it was actually affixed. And, in the case supposed, the name would not become the "distinctive name" of a product without any coca ingredient unless in popular acceptation it came to be regarded as identifying a product known to be of that character. It would follow that the mere sale of the product under the name "Coca," and the fact that this was used as a trade designation of the product, would not suffice to show that it had ceased to have its original significance if it did not appear that it had become known to the public that the article contained nothing derived from coca. Until such knowledge could be attributed to the public, the name would naturally continue to be descriptive in the original sense. Nor would it be controlling that at the time of the adoption of the name the coca plant was known only to foreigners and scientists; for if the name had appropriate reference to that plant and to substances derived therefrom, its use would primarily be taken in that sense by those who did know or who took pains to inform themselves of its meaning. Mere ignorance on the part of others as to the nature of the composition would not change the descriptive character of the designation. The same conclusion would be reached if the single name "Cola" had been used as the name of the product, and it were found that in fact the name imported that the product was obtained from the cola nut. The name would not be the distinctive name of a product not so derived until in usage it achieved that secondary significance.

We are thus brought to the question whether, if the names coca and cola were

[1] Among the departmental regulations (adopted in October, 1906, pursuant to § 3, for the enforcement of the act) is regulation 20 with respect to "distinctive names" under § 8, as follows:

"(a) A 'distinctive name' is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture, or compound from any other food product, mixture, or compound.

"(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

"(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

"(d) A distinctive name shall give no false indication of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product."

Regulation 27 is as follows:

"(a) The terms 'mixtures' and 'compounds' are interchangeable, and indicate the results of putting together two or more food products.

"(b) These mixtures or compounds shall not be imitations of other articles, whether simple, mixt, or compound, or offered for sale under the name of other articles. They shall bear a distinctive name and the name of the place where the mixture or compound has been manufactured or produced.

"(c) If the name of the place be one which is found in different states, territories, or countries, the name of the state, territory, or country, as well as the name of the place, must be stated."

respectively descriptive, as the government contends, a combination of the two names constituted a "distinctive name" within the protection of the proviso in case either of the described ingredients was absent. It is said that "coca" indicates one [289] article, and "cola" another, but that the two names together did not constitute the distinctive name of any other substance or combination of substances. The contention leads far. To take the illustration suggested in argument, it would permit a manufacturer, who could not use the name chocolate to describe that which was not chocolate, or vanilla to describe that which was not vanilla, to designate a mixture as "Chocolate-Vanilla," although it was destitute of either or both, provided the combined name had not been previously used. We think that the contention misses the point of the proviso. A mixture or compound may have a name descriptive of its ingredients or an arbitrary name. The latter (if not already appropriated) being arbitrary, designates the particular product. Names, however, which are merely descriptive of ingredients, are not primarily distinctive names save as they appropriately describe the compound with such ingredients. To call the compound by a name descriptive of ingredients which are not present is not to give it "its own distinctive name,"—which distinguishes it from other compounds,—but to give it the name of a different compound. That, in our judgment, is not protected by the proviso, unless the name has achieved a secondary significance as descriptive of a product known to be destitute of the ingredients indicated by its primary meaning.

In the present case we are of opinion that it could not be said as matter of law that the name was not primarily descriptive of a compound with coca and cola ingredients, as charged. Nor is there basis for the conclusion that the designation had attained a secondary meaning as the name of a compound from which either coca or cola ingredients were known to be absent; the claimant has always insisted, and now insists, that its product contains both. But if the name was found to be descriptive, as charged, there was clearly a conflict of evidence with respect to the presence of any coca ingredient. We conclude [290] that the court erred in directing a verdict on the second count.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

SEABOARD AIR LINE RAILWAY, Plff. in Err.,
v.
J. T. RENN.

(See S. C. Reporter's ed. 290-295.)

Error to state court — Federal question —employers' liability — amendment of pleading.

1. Whether or not the two years' limitation prescribed by the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), for actions under that act, was in effect disregarded by permitting the amendment of the complaint so as to state distinctly that, at the time of the injury, the defendant was engaged and the plaintiff employed in interstate commerce, is a Federal question subject to re-examination by writ of error to a state court, however much the allowance of the amendment otherwise might have rested in discretion, or have been a matter of local procedure.

[For other cases, see Appeal and Error, 1751-1797, in Digest Sup. Ct. 1908.]

Limitation of actions — suspension by suit — amendment — new cause of action — employers' liability.

2. Allegations in the complaint in a suit in a North Carolina court by a railway employee to recover for personal injuries suffered through the railway company's negligence, that the railway company was operating a railway in Virginia, North Carolina, and elsewhere, that plaintiff was in its employ, and that, when injured, he was in the line of duty, and that the injury occurred in Virginia by reason of a defect in the right of way, point, although imperfectly, to a cause of action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), so that an amendment stating distinctly that, at the time of the injury, defendant was engaged and plaintiff employed in interstate commerce, did not introduce a new cause of action which would

NOTE.—On error to state courts in cases arising under the Federal employers' liability act—see note to Great Northern R. Co. v. Knapp, ante, 745.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On relation of new pleadings to statute of limitations—see notes to Missouri, K. & T. R. Co. v. Bagley, 3 L.R.A.(N.S.) 259; Bourdreaux v. Tucson Gas, E. L. & P. Co. 33 L.R.A.(N.S.) 196; and Philadelphia, B. & W. R. Co. v. Gatta, 47 L.R.A.(N.S.) 932.

On amendment of pleading after limitation period by changing from common law to statute, or *vice versa*, or from statute of one jurisdiction to statute of another—see note to Allen v. Tuscarora Valley R. Co. 30 L.R.A.(N.S.) 1096.

be barred, because the two years' limitation prescribed by § 6 had then elapsed, but such amendment merely expanded or amplified what was alleged in support of the cause of action, and related back to the commencement of the suit.

[For other cases, see Limitation of Actions, 599–602, in Digest Sup. Ct. 1908.]

[No. 773.]

Argued April 4, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Wake County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, — N. C. —, 86 S. E. 964.

The facts are stated in the opinion.

Mr. **Murray Allen** argued the cause and filed a brief for plaintiff in error:

Cases from the state courts involving the operation and effect of the Federal employers' liability act are reviewable by the Supreme Court on writ of error.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 292, 52 L. ed. 1066, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 483, 56 L. ed. 1174, 32 Sup. Ct. Rep. 790; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, ante, 324, 36 Sup. Ct. Rep. 126.

The complaint does not state a cause of action under the Federal statute.

Chicago & E. R. Co. v. Hamerick, 50 Ind. App. 425, 96 N. E. 649; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; Shade v. Northern P. R. Co. 206 Fed. 353; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Morrison v. Baltimore & O. R. Co. 40 App. D. C. 395, Ann. Cas. 1914C, 1026; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109; Walton v. Southern R. Co. 179 Fed. 175.

The court will look only to the pleadings to determine the basis of the plaintiff's cause of action.

Hall v. Louisville & N. R. Co. 157 Fed. 464; Smith v. Buttner, 90 Cal. 95, 27 Pac. 29; Chamblin v. Blair, 58 Ill. 385; 4 Enc. Pl. & Pr. 746; Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Haley v. Hobson, 68 Me. 167; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 460, 43 L. ed. 766, 767, 49 Sup. Ct. Rep. 451; Western U. Teleg. Co. v. Southern & St. L. R. Co. 125 C. C. A. 466, 208 Fed. 266; Minnesota v. Northern Securities Co. 194 U. S. 48, 64, 48 L. ed. 870, 878, 24 Sup. Ct. Rep. 598; Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. Rep. 231.

The cause of action created by the Federal statute is separate and distinct from the cause of action created by the state statute, or arising under the common law.

Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754; Illinois C. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 34 Sup. Ct. Rep. 646, Ann. Cas. 1914C, 163; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 150, 57 L. ed. 1127, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 34 Sup. Ct. Rep. 350, 6 N. C. C. A. 436; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Seaboard Air Line R. Co. v. Koennecke, 239 U. S. 352, ante, 324, 36 Sup. Ct. Rep. 126; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Flanders v. Georgia, S. & F. R. Co. 68 Fla. 479, 67 So. 68; Kamboris v. Oregon-Washington R. & Nav. Co. 75 Or. 358, 146 Pac. 1097; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; Thornton, Federal Employers' Liability Act, 2d ed. § 140; McAuliffe v. New York C. & H. R. R. Co. 164 App. Div. 846, 150 N. Y. Supp. 512.

The plaintiff had the selection of the basis of his action.

St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, 33 Sup. Ct. Rep. 703.

The court had no power to allow an amendment stating for the first time a cause of action under the Federal act after the expiration of the period fixed by the act for the commencement of such action.

Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75; Bennett v. North Carolina R. Co. 159 N. C. 345, 74 S. E. 883; Nelson v. First Nat. Bank, 139 Ala. 586, 101 Am. St. Rep. 52, 36 So. 707; Anderson v. Wetter, 103 Me. 257, 15 L.R.A.(N.S.) 1003, 69 Atl. 105; Henderson v. Graham, 84 N. C. 496; Martin v. Young, 85 N. C. 157; Gillam v. Life Ins. Co. 121 N. C. 369, 28 S. E. 470; Christmas v. Mitchell, 38 N. C. (3 Ired. Eq.) 535; Cogdell v. Exum, 69 N. C. 464, 12 Am. Rep. 657; Patterson v. Wadsworth, 94 N. C. 538; Sams v. Price, 121 N. C. 392, 28 S. E. 486; Hall v. Southern R. Co. 149 N. C. 108, 62 S. E. 899; Morrison v. Baltimore & O. R. Co. 40 App. D. C. 391, Ann. Cas. 1914C, 1026; Mohr v. Lemle, 69 Ala. 180; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 313; Union P. R. Co. v. Wyler, 158 U. S. 293, 39 L. ed. 989, 15 Sup. Ct. Rep. 877; Atlantic & P. R. Co. v. Laird, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120; United States v. Dalcour, 203 U. S. 408, 51 L. ed. 248, 27 Sup. Ct. Rep. 58; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; St. Louis, I. M. & S. R. Co. v. Hesterly, supra; Patillo v. Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 680; Moliter v. Wabash R. Co. 180 Mo. App. 84, 168 S. W. 250; Hughes v. New York, O. & W. R. Co. 158 App. Div. 443, 143 N. Y. Supp. 603; Findley v. Coal & Coke R. Co. — W. Va. —, 87 S. E. 198; Hall v. Louisville & N. R. Co. 157 Fed. 464; Creteau v. Chicago & N. W. R. Co. 113 Minn. 418, 129 N. W. 855.

The amendment allowed by the court states a new cause of action, which is barred by the expiration of the period of limitation fixed by the act creating the right of action.

Roberts, Injuries to Interstate Employees, 1915, §§ 162, 163; Allen v. Tuscarora Valley R. Co. 229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34; Moliter v. Wabash R. Co. 180 Mo. App. 84, 168 S. W. 250; Hughes v. New York, O. & W. R. Co. 158 App. Div. 443, 143 N. Y. Supp. 603; Findley v. Coal & Coke R. Co. — W. Va. —, 87 S. E. 198.

Messrs. **Robert N. Simms** and **William C. Doulass** argued the cause, and, with Mr. Clyde A. Douglass filed a brief for defendant in error:

The original complaint contains sufficient allegations under the Federal act.

Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790.

If the complaint was insufficient, it was only a defective statement of a good cause.

Allen v. Carolina R. Co. 120 N. C. 548, 27 S. E. 76; Seaboard Air Line R. Co. v. Main, 132 N. C. 452, 43 S. E. 930.

The allowance of the amendment involved only a question of local practice, and presents no Federal question.

Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

It is, of course, fundamental that if the amendment did not state a new cause of action, its allowance was in the discretion of the court, and the plea of the statute of limitations was not available against it, the original complaint having been filed and the action commenced before the bar of the statute. It is also fundamental that when an amendment is properly allowed, it is operative and construed as if it had been made at the commencement of the action.

Note to Union P. R. Co. v. Wyler, 39 L. ed. 983; Wynne v. London & G. Ins. Co. 71 N. C. 121; Ely v. Early, 94 N. C. 1; Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Woodcock v. Bostic, 128 N. C. 243, 38 S. E. 881.

Defendant in error especially relies upon Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134.

Mr. Justice **Van Devanter** delivered the opinion of the court:

This was an action by an employee of a railroad company to recover from the latter for personal injuries suffered through its negligence. The plaintiff had a verdict and judgment under the employers' liability act of Congress (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657; chap. 143, 36 Stat. at L. 291), the judgment was affirmed (— N. C. —, 86 S. E. 964), and the defendant brings the case here.

The original complaint was exceedingly brief and did [293] not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the

defendant sought some advantage from this, and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6 that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." Whether in what was done this restriction was in effect disregarded is a Federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure. Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. Texas & P. R. Co. v. Cox, 145 U. S. 593, 603, 604, 36 L. ed. 829, 832, 833, 12 Sup. Ct. Rep. 905; Atlantic & P. R. Co. v. Laird, 164 U. S. 393, 41 L. ed. 485, 17 Sup. Ct. Rep. 120; Hutchinson v. Otis, 190 U. S. 552, 555, 47 L. ed. 1179, 1181, 23 Sup. Ct. Rep. 778; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Crotty v. Chicago G. W. R. Co. 95 C. C. A. 91, 169 Fed. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running [294] of the limitation was not theretofore arrested. Sicard v. Davis, 6 Pet. 124, 140, 8 L. ed. 342, 348; Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; United States v. Dalcour, 203 U. S. 408, 423, 51 L. ed. 248, 251, 27 Sup. Ct. Rep. 58. The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere; that the plaintiff was in its employ; that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit, which was before the limitation had expired.

Error is assigned upon a refusal to instruct the jury, as matter of law, that there was no evidence of actionable negligence on the part of the defendant, and that the evidence conclusively established an assumption by the plaintiff of the risk resulting in his injury. Both courts, trial and appellate, held against the defendant upon these [295] points. They involve an appreciation of all the evidence and the inferences which admissibly might be drawn therefrom; and it suffices to say that we find no such clear or certain error as would justify disturbing the concurring conclusions of the two courts upon these questions. Great Northern R. Co. v. Knapp, 240 U. S. 464; ante, 745, 36 Sup. Ct. Rep. 399; Baugham v. New York, P. & N. R. Co. decided this day [241 U. S. 237, ante, 977, 36 Sup. Ct. Rep. 592].

Complaint also is made of the instructions given upon the measure of damages. The criticism is directed against mere fragments of this part of the charge, and the objections made at the time were not such as were calculated to draw the trial court's attention to the particular complaint now urged. The inaccuracies were not grave and the charge as a whole was calculated to give the jury a fair understanding of the subject. The defendant, therefore, is not in a position to press the complaint, especially as it was not dealt with in the opinion of the appellate court. See Magniac v. Thompson, 7 Pet. 348, 390, 8 L. ed. 709, 723; McDermott v. Severe, 202 U. S. 600, 610, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; Illinois C. R. Co. v. Skaggs, 240 U. S. 66, ante, 528, 36 Sup. Ct. Rep. 249.

Judgment affirmed.

BANKERS TRUST COMPANY, as Trustee, Appt.,
v.
TEXAS & PACIFIC RAILWAY COMPANY and New Orleans Pacific Railway Company.

(See S. C. Reporter's ed. 295–310.)

Federal courts — jurisdiction — suits by or against Federal corporation.

1. No exceptional or privileged Federal jurisdiction of suits by and against a railway corporation created and existing under the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), and its amendments, was established by the provision of § 1 of that act that such company "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States." All that was intended by that provision was to render the corporation capable of suing and being sued by its corporate name in any court of law or equity—Federal, state, or territorial—whose jurisdiction, as otherwise competently defined, was adequate to the occasion.

[For other cases, see Courts, 576–596, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — suits by or against Federal corporation.

2. Since the enactment of the act of January 28, 1915 (38 Stat. at L. 803, chap. 22), § 5, providing that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress," no suit by or against such a railway company can be regarded, for jurisdictional purposes, as arising under the laws of the United States unless there be some adequate ground for so regarding it other than that the company was thus incorporated, *i. e.*, derived its existence, facilities, and powers from such act of Congress.

[For other cases, see Courts, 576–596, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — suits by or against Federal corporation.

3. A suit to foreclose a mortgage given by a railway company which was incorporated and exists under Federal legislation does not arise under the laws of the United States apart from the Federal incorporation so as to be justiciable in the Federal courts, since the enactment of the act of January 28, 1915 (38 Stat. at L. 803, chap. 22), § 5, although the mortgage may have been given under a power conferred by the Federal charter.

[For other cases, see Courts, 576–596, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — diverse citizenship — Federal corporation not citizen of state.

4. A railway company incorporated under an act of Congress to carry on its activities and operations in different states cannot be regarded as a citizen of any particular state for the purpose of giving a Federal district court jurisdiction of a suit against it on grounds of diversity of citizenship.

[For other cases, see Courts, 637–675, in Digest Sup. Ct. 1908.]

[No. 889.]

Argued April 12 and 13, 1916. Decided May 22, 1916.

APPEAL from the District Court of the United States for the Northern District of Texas to review a decree dismissing, for want of jurisdiction, a suit to foreclose a railway mortgage. Affirmed.

The facts are stated in the opinion.

Mr. **Maurice E. Locke** argued the cause, and, with Mr. William W. Green, filed a brief for appellant:

Jurisdiction to hear and determine such suits as this against the Texas & Pacific Railway Company was expressly vested in the appropriate Federal courts by the act of Congress incorporating the company.

Smith v. Union P. R. Co. 2 Dill. 278, Fed. Cas. No. 13,121; Bauman v. Union P. R. Co. 3 Dill. 367, Fed. Cas. No. 1,117; Pacific R. Removal Cases, 115 U. S. 1, 24, 29 L. ed. 319, 327, 5 Sup. Ct. Rep. 1113; Re Dunn, 212 U. S. 374, 384, 53 L. ed. 558, 562, 29 Sup. Ct. Rep. 299; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Magill v. Parsons, 4 Conn. 317.

As a matter of practical fact, with which Congress could deal as such, Federal incorporation is a ground of Federal jurisdiction.

Magee v. Union P. R. Co. 2 Sawy. 447, Fed. Cas. No. 8,945; Union P. R. Co. v. McComb, 17 Blatchf. 510, 1 Fed. 799; Texas & P. R. Co. v. McAllister, 59 Tex. 349; Myers v. Union P. R. Co. 16 Fed. 292; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; Butler v. National Home, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. 160 U. S. 77, 40 L. ed. 346, 16 Sup. Ct. Rep. 231; Texas & P. R. Co. v. Cody, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703, 1 Am. Neg. Rep. 763; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Texas & P. R. Co. v. Arch-

Note.—Generally as to diverse citizenship as ground of Federal jurisdiction—see notes to Seddon v. Virginia, T. & C. Steel & I. Co. 1 L.R.A. 108; Myers v. Murray, N. & Co. 11 L.R.A. 216; Emory v. Greenough, 1 L. ed. U. S. 640; Strawbridge v. Curtiss, 2 L. ed. U. S. 435; M'Donald v. Smalley, 7 L. ed. U. S. 287; and Roberts v. Lewis, 36 L. ed. U. S. 579.

ibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 47 L. ed. 905, 23 Sup. Ct. Rep. 622, 13 Am. Neg. Rep. 695; Charnock v. Texas & P. R. Co. 194 U. S. 432, 48 L. ed. 1057, 24 Sup. Ct. Rep. 671; Texas & P. R. Co. v. Dashiell, 198 U. S. 521, 49 L. ed. 1150, 25 Sup. Ct. Rep. 737, 18 Am. Neg. Rep. 679; Texas & P. R. Co. v. Gentry, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681; Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564; Texas & P. R. Co. v. Howell, 224 U. S. 577, 56 L. ed. 892, 32 Sup. Ct. Rep. 601; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Texas & P. R. Co. v. Stewart, 228 U. S. 357, 57 L. ed. 875, 33 Sup. Ct. Rep. 548; Texas & P. R. Co. v. Rosborough, 235 U. S. 429, 59 L. ed. 299, 35 Sup. Ct. Rep. 117; Texas & P. R. Co. v. Hill, 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575; Texas & P. R. Co. v. Bigger, 239 U. S. 330, ante, 310, 36 Sup. Ct. Rep. 127.

A general act will not be held to repeal a provision of an earlier special act, unless the intention of Congress to accomplish such repeal is unmistakably manifest.

Potter's Dwarr. Stat. 2d ed. 532; Sedgw. Stat. & Const. Law, 2d ed. 97; Maxwell, Interpretation of Statutes, 5th ed. 131, 285, 291; Beal's Rules of Legal Interpretation, 2d ed. 463; Endlich, Interpretation of Statutes, §§ 223, 228, 229; 1 Sutherland, Stat. Constr. 2d ed. §§ 274, 275; Black, Constr. & Interpretation of Laws, 2d ed. 328; Broom, Legal Maxims, 8th ed. 19; Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; United States v. Nix, 189 U. S. 199, 47 L. ed. 775, 23 Sup. Ct. Rep. 495.

For the purpose of ascertaining the intent of Congress, it is proper to consider the development of the act itself, the reports of committees relative thereto, and other similarly definite and reliable indicia.

Church of the Holy Trinity v. United States, 143 U. S. 457, 464, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Binns v. United States, 194 U. S. 486, 495, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; United States v. Nakashima, 87 C. C. A. 646, 160 Fed. 842; Symonds v. St. Louis & S. E. R. Co. 192 Fed. 353.

It also is proper, in interpreting a statute, to consider the environment, the history of the times, and the particular evil which was pressing upon the attention of Congress, and for which it was seeking a remedy. For this purpose the court may avail itself of all accessible sources of information, including the proceedings and debates in Congress.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 464, 36 L. ed. 226, 229, 230, 12 Sup. Ct. Rep. 511; Standard Oil Co. v. United States, 221 U. S. 1, 50, 55 L. ed. 619, 641, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. Union P. R. Co. 91 U. S. 72, 79, 23 L. ed. 224, 228; Taylor v. United States, 81 C. C. A. 197, 152 Fed. 1; Symonds v. St. Louis & S. E. R. Co. 192 Fed. 353; Maxwell, Interpretation of Statutes, 5th ed. 37; Black, Constr. & Interpretation of Laws, 2d ed. § 91.

A railroad company has only such power to mortgage its property essential to the performance of its public duties as its charter and other governing laws confer, expressly or by necessary implication.

Jones, Corporate Bonds & Mortgages, §§ 1–4; Baldwin, Am. R. Law, 463; Com. v. Smith, 10 Allen, 448, 87 Am. Dec. 672.

Authority for each provision relied upon by the plaintiff in a suit to enforce a railway mortgage, either shown by express averment or judicially noticed by the court, is an essential element of the plaintiff's bill.

Frye v. Bank of Illinois, 10 Ill. 332; International & G. N. R. Co. v. Underwood, 67 Tex. 589, 4 S. W. 216; East Line & R. River R. Co. v. Rushing, 69 Tex. 307, 6 S. W. 834, 6 Am. Neg. Cas. 554.

A question determinable by the interpretation and application of an act of Congress is a Federal question.

Ames v. Kansas, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; Howard v. United States, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Male v. Atchison, T. & S. F. R. Co. 240 U. S. 97, ante, 544, 36 Sup. Ct. Rep. 351; Oregon v. Three Sisters Irrig. Co. 158 Fed. 346; Bowers v. First Nat. Bank, 190 Fed. 676; McGoon v. Northern P. R. Co. 204 Fed. 998.

It is not essential to the existence of Federal jurisdiction by reason of the presence of a Federal question that the litigation finally turn upon such question.

Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Re Metropolitan R. Receivership (Re Reisenberg) 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. Rep. 219; Male v. Atchison, T. & S. F. R. Co. 240 U. S. 97, ante, 544, 36 Sup. Ct. Rep. 351; Walker v. Windsor Nat. Bank, 5 C. C. A.

421, 5 U. S. App. 423, 56 Fed. 76; Huff v. Union Nat. Bank, 173 Fed. 333.

Congress has taken away from the Federal courts their jurisdiction of the litigations of national banks, resting upon the sole ground that such banks are organized under an act of Congress, by acts which differ widely in form from the act of January 28, 1915, but to which this court has attributed in this respect the same net result that is literally expressed in the act of 1915.

Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 525; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Bowers v. First Nat. Bank, 190 Fed. 676; Walker v. Windsor Nat. Bank, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 76; Huff v. Union Nat. Bank, 173 Fed. 333.

The diversity of citizenship is sufficiently shown by the record.

Sun Printing v. Pub. Asso. v. Edwards, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696; Marshall v. Baltimore & O. R. Co. 16 How. 314, 14 L. ed. 953; Baltimore & O. S. W. R. Co. v. Davis, 79 C. C. A. 139, 149 Fed. 191; Mathieson Alkali Works v. Mathieson, 80 C. C. A. 129, 150 Fed. 241.

The Texas & Pacific Railway Company is a citizen of Texas for the purpose of jurisdiction of the Federal courts in this cause.

Bank of United States v. Deveaux, 5 Cranch, 61, 3 L. ed. 38; Hope Ins. Co. v. Boardman, 5 Cranch, 57, 3 L. ed. 36; Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 11 L. ed. 353; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 233, 15 L. ed. 896, 898; Shaw v. Quincy Min. Co. 145 U. S. 444, 451, 36 L. ed. 768, 772, 12 Sup. Ct. Rep. 935; St. Louis Nat. Bank v. Allen, 2 McCrary, 92, 5 Fed. 551; Manufacturers' Nat. Bank v. Baack, 8 Blatchf. 137, Fed. Cas. No. 9,052; Orange Nat. Bank v. Traver, 7 Sawy. 210, 7 Fed. 146; National Park Bank v. Nichols, 2 Biss. 146, Fed. Cas. No. 10,047; Main v. Second Nat. Bank, 6 Biss. 26, Fed. Cas. No. 8,976; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, 10 Am. Neg. Cas. 585; Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Re Dunn, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299.

Messrs. George Thompson and Henry C. Coke argued the cause, and, with Messrs. Arthur J. Shores, Thomas J. Freeman, and Alexander S. Coke, filed a brief for appellees:

Can jurisdiction be maintained by virtue of a grant thereof in the charter of the Texas & Pacific Railway Company?

Bank of United States v. Deveaux, 5 Cranch, 61, 3 L. ed. 38; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; Smith v. Union P. R. Co. 2 Dill. 278, Fed. Cas. No. 13,121.

Can jurisdiction be maintained by virtue of a Federal question?

Butler v. Shafer, 67 Fed. 161; Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; Fitzgerald v. Missouri P. R. Co. 45 Fed. 812; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Huff v. Union Nat. Bank, 173 Fed. 333; Herrmann v. Edwards, 238 U. S. 107, 59 L. ed. 1224, 35 Sup. Ct. Rep. 839; Joy v. St. Louis, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478; Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 30 L. ed. 816, 7 Sup. Ct. Rep. 777; Lovell v. Newman, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375; McGoon v. Northern P. R. Co. 204 Fed. 998; Norton v. Whiteside, 239 U. S. 144, ante, 186, 36 Sup. Ct. Rep. 97; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; South Carolina v. Virginia-Carolina Chemical Co. 117 Fed. 727; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; Washington v. Island Line Co. 117 Fed. 777; Foster, Fed. Pr. § 24.

Can jurisdiction be maintained on the ground of diversity of citizenship?

Abercrombie v. Dupuis, 1 Cranch, 343, 2 L. ed. 129; Bingham v. Cabot, 3 Dall. 383, 1 L. ed. 646; Brown v. Keene, 8 Pet. 112, 8 L. ed. 885; Re Dunn, 212 U. S. 374, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; Dade Coal Co. v. Haslett, 83 Ga. 549, 10 S. E. 435; Grace v. American Cent. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; Jossey v. Georgia & A. R. Co. 102 Ga. 706, 28 S. E. 273; National Park Bank v. Nichols, 4 Biss. 315, Fed. Cas. No. 10,048; New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, 4 Inters. Com. Rep. 408, 6 C. C. A. 653, 20 U. S. App. 1, 57 Fed. 948.

Messrs. Winslow S. Pierce and Lawrence Greer also filed a brief on behalf of appellee the Texas & Pacific Railway Company.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a suit to foreclose a railroad mortgage and for other incidental relief. It was brought in the district court for the northern district of Texas December 27, 1915, was dismissed by that court for want of jurisdiction, and is here upon a direct appeal under § 238 of the Judical Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, § 1215].

The bill alleges that the plaintiff, the trustee under the mortgage, is a New York corporation and "a citizen of said state;" that the Texas & Pacific Railway Company, one of the defendants, is a corporation created and existing under the laws of the United States, has its principal place of business and its principal operating and general offices in the northern district of Texas, and "is a resident and inhabitant" of that district; that the New Orleans Pacific Railway Company, the other defendant, [302] is a Louisiana corporation and "a citizen of said state;" that one of the acts of Congress under which the Texas & Pacific Railway Company was created and now exists (act March 3, 1871, chap. 122, § 1, 16 Stat. at L. 573) provides that such company "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States;" that under that act and designated amendatory and supplemental acts of Congress (May 2, 1872, chap. 132, 17 Stat. at L. 59; March 3, 1873, chap. 257, 17 Stat. at L. 598; June 22, 1874, chap. 406, 18 Stat. at L. 197) said company came to own and hold on February 1, 1888, certain railroad properties and interests in Texas and Louisiana; that on that date said company, "acting in pursuance of due authority conferred upon it by said acts of Congress," the relevant portions of which are copied into the bill, and the New Orleans Pacific Railway Company, acting in pursuance of authority conferred upon it by the laws of Louisiana, executed and delivered the mortgage in suit covering these railroad properties and interests, a substantial part of which is situate in the northern district of Texas; that the mortgage was duly filed and recorded in the Department of the Interior pursuant to such acts of Congress; that the mortgagors have defaulted in the performance of the terms and conditions of the mortgage, and that the suit involves the requisite jurisdictional amount and "arises under the Constitution and laws of the United States."

By a motion to dismiss, the Texas & Pacific Railway Company challenged the jurisdiction of the district court upon the grounds that the act of January 28, 1915, chap. 22, § 5, 38 Stat. at L. 803, provides: "No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress;" and that, apart from the Texas & Pacific Railway [303] Company's incorporation under congressional enactments, the suit is not one arising under the Constitution or any law of the United States, and is not one between citizens of different states. The motion was sustained and the bill was dismissed as to both defendants.

The plaintiff insists that, in refusing to entertain the suit, the district court erred because (1) the provision before quoted from § 1 of the act of March 3, 1871, enables the Texas & Pacific Railway Company to sue and be sued in any court of law or equity within the United States; (2) the bill shows that the suit is one arising under the laws of the United States apart from the incorporation of the Texas & Pacific Railway Company under acts of Congress, and therefore the act of January 28, 1915, is not controlling, and (3) the bill shows that the suit is between citizens of different states.

1. Upon reading § 1 of the act of 1871 it is plain that the words "by that name . . . shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States" were not intended in themselves to confer jurisdiction upon any court. As the context shows, Congress was not then concerned with the jurisdiction of courts, but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name in any court of law or equity—Federal, state, or territorial—whose jurisdiction as otherwise competently defined was adequate to the occasion. Had there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy, and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words. The case of Bank of United States v. Deveaux, 5 Cranch, 61, 85, 3 L. ed. 38, 44, is well in point. A [304] provision in the act incorporating the bank (chap. 10, § 3, 1 Stat. at L. 191), much like that here relied upon, was invoked as in itself entitling the bank to sue in a circuit court of the United States, but that view was rejected in an opinion by Chief Justice Marshall, wherein it was said:

"That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it 'to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever.' This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be."

Afterwards, when the second bank of the United States was established, a provision was inserted in the incorporating act (chap. 44, § 7, 3 Stat. at L. 266), enabling the bank to sue and be sued "in all state courts having competent jurisdiction, and in any circuit court of the United States;" and in Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, it was held (pp. 816-818) that this provision, unlike that in the prior act, amounted to an express grant of jurisdiction to the circuit courts, and (pp. 823 et seq.) was within the power of Congress under the Constitution. It was in the light of these differing precedents in legislation and of the resulting difference in their interpretation that Congress framed the act of 1871. While that act does not literally follow either precedent, its words have the same generality and natural import as did those in the earlier bank act, and this strengthens the conclusion that Congress intended thereby to give to the Texas & [305] Pacific Railway Company only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion, and not to establish an exceptional or privileged jurisdiction.

2. Under the Constitution Congress undoubtedly possesses power to invest the subordinate Federal courts with original jurisdiction of all suits at law or in equity arising under the Constitution, laws, or treaties of the United States, and, if the act of February 13, 1801, chap. 4, § 11, 2 Stat. at L. 89, be not noticed because of its early repeal (chap. 8, § 1, 2 Stat. at L. 132), it is true, as sometimes has been said,[1] that this power was broadly exercised for the first time by the act of March 3, 1875, chap. 137, § 1, 18 Stat. at L. 470. By that act Congress in express terms gave the circuit courts original jurisdiction, concurrent with the courts of the several states, of all suits of that nature, where the value of the matter in dispute, exclusive of costs, was in excess of $500, and this jurisdiction remained with the circuit courts until January 1, 1912, when they were abolished, save as the act of March 3, 1887, chap. 373, § 1, 24 Stat. at L. 552, required that the value of the matter in dispute, exclusive of interest and costs, be in excess of $2,000. Upon the discontinuance of the circuit courts this jurisdiction was transferred to the district courts by § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991], subject to a restriction that thereafter the value of the matter in controversy should exceed $3,000, exclusive of interest and costs.

As long ago as Osborn v. Bank of United States, supra, it was settled that a suit by or against a corporation chartered by an act of Congress is one arising under a law of the United States, and this because, as was said in that case, pp. 823, 825: "The charter of incorporation [306] not only creates it [the corporation], but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. . . . The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter."

After the act of March 3, 1875, extended the jurisdiction of the circuit courts to cases arising under the laws of the United States, the ruling just quoted was uniformly followed and applied in suits by and

[1] Tennessee v. Union & Planters' Bank, 152 U. S. 454, 459, 38 L. ed. 511, 513, 14 Sup. Ct. Rep. 654; Continental Nat. Bank v. Buford, 191 U. S. 119, 122, 48 L. ed. 119, 120, 24 Sup. Ct. Rep. 54.

against Federal corporations (Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Petri v. Commercial Nat. Bank, 142 U. S. 644, 648, 35 L. ed. 1144, 1145, 12 Sup. Ct. Rep. 325; Butler v. National Home, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; Northern P. R. Co. v. Amato, 144 U. S. 465, 471, 36 L. ed. 506, 508, 12 Sup. Ct. Rep. 740; Texas & P. R. Co. v. Cox, 145 U. S. 593, 601, 36 L. ed. 823, 832, 12 Sup. Ct. Rep. 905; Washington & I. R. Co. v. Cœur d' Alene R. & Nav. Co. 160 U. S. 77, 93, 40 L. ed. 346, 352, 16 Sup. Ct. Rep. 231; Supreme Lodge, K. P. v. Kalinski, 163 U. S. 289, 290, 41 L. ed. 163, 16 Sup. Ct. Rep. 1047; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 53, 49 L. ed. 382, 384, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Re Dunn, 212 U. S. 374, 383, 384, 53 L. ed. 558, 562, 29 Sup. Ct. Rep. 299), save where the particular suit was withdrawn or excluded from that jurisdiction by some specific enactment, [307] like that of July 12, 1882, chap. 290, § 4, 22 Stat. at L. 162, Comp. Stat. 1913, § 9665, placing most of the suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States. Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 781, 30 L. ed. 816, 818, 7 Sup. Ct. Rep. 777; Continental Nat. Bank v. Buford, 191 U. S. 119, 122, 48 L. ed. 119, 120, 24 Sup. Ct. Rep. 54.

It results that if the general jurisdictional provision, now embodied in § 24 of the Judicial Code, respecting suits arising under the laws of the United States, were alone to be considered, it would have to be held that the district court had jurisdiction of the present suit as one falling within that class by reason of the incorporation of the Texas & Pacific Railway Company under a law of the United States. But § 5 of the act of January 28, 1915, must also be considered. It is a later enactment, is shown by the title to be amendatory of the Judicial Code, and, as has been seen, declares that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress." These are direct and comprehensive words, and, when read in the light of the settled course of decision just mentioned, must be taken as requiring that a suit by or against a railroad company incorporated under an act of Congress be not regarded, for jurisdictional purposes, as arising under the laws of the United States, unless there be some adequate ground for so regarding it other than that the company was thus incorporated. Plainly, there was a purpose to effect a real change in the jurisdiction of such suits. Counsel for plaintiff concede that this is so. But they urge that all that is intended is to eliminate the mere creation of a railroad corporation under an act of Congress as a ground for regarding the suit as arising under the laws of the United States. In this there is an evident misapprehension of what constitutes incorporation, as [308] also of the real basis of the jurisdiction affected. A corporation is never merely created. Being artificial, possessing no faculties or powers save such as are conferred by law, and having in legal contemplation no existence apart from them, its incorporation consists in giving it individuality and endowing it with the faculties and powers which it is to possess. It is upon this theory that the decisions have proceeded. The ruling has been that a suit by or against a Federal corporation arises under the laws of the United States, not merely because the corporation owes its creation to an act of Congress, but because it derives all of its capacities, faculties, and powers from the same source. This is shown in the quotation before made from Osborn v. Bank of United States, supra, and also in the following excerpt from Shoshone Min. Co. v. Rutter, 177 U. S. 505, 509, 510, 44 L. ed. 864, 866, 867, 20 Sup. Ct. Rep. 726: "A corporation has no powers and can incur no obligations except as authorized or provided for in its charter. Its power to do any act which it asumes to do, and its liability to any obligation which is sought to be cast upon it, depend upon its charter, and when such charter is given by one of the laws of the United States there is the primary question of the extent and meaning of that law. In other words, as to every act or obligation the first question is whether that act or obligation is within the scope of the law of Congress; and that being the matter which must be first determined, a suit by or against the corporation is one which involves a construction of the terms of its charter; in other words, a question arising under the law of Congress." And so, when due regard is had for the terms of the amendatory section of 1915 and for the real basis of the jurisdiction affected, the conclusion is unavoidable that what is intended is to make the fact that a railroad company is incorporated under an act of Congress,—that is to say, derives its existence, faculties, and powers from such an act,—an entirely negligible factor in deter-

mining whether a suit by or [309] against the company is one arising under the laws of the United States.

Upon examining the bill in the present suit, it is certain that it does not arise under those laws apart from the incorporation of the Texas & Pacific Company under acts of Congress. We say "acts" of Congress, because the original act was amended and supplemented by three others, and the four constitute the company's charter. Portions thereof are copied into the bill as showing that the mortgage sought to be enforced was given under a power conferred by Congress, but this does not help the jurisdiction. As, under the amendatory section, the fact that the company derives its existence and all of its faculties and powers from a Federal charter cannot avail to give jurisdiction, it is obvious that to dwell upon the fact that any particular power comes from the common source must be equally unavailing.

The case of Male v. Atchison, T. & S. F. R. Co. 240 U. S. 97, ante, 544, 36 Sup. Ct. Rep. 351, does not make for a different conclusion, because it was not a suit by or against a railroad company incorporated under an act of Congress, and because it arose and was pending in this court prior to the amendatory act of 1915, and by § 6 of that act was excepted from its provisions.

3. Whether this is a suit between citizens of different states turns upon whether the Texas & Pacific company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of opinion that the company is not a citizen of any state. It was incorporated under acts of Congress, not under state laws; and its activities and operations were not to be confined to a single state, but to be carried on, as in fact they are, in different states. Of course it is a citizen of the United States in the sense that a corporation organized under the laws of one of the states is a citizen of that state, but it is not within the [310] clause of the 14th Amendment which declares that native born and naturalized citizens of the United States shall be citizens of the state wherein they reside. Nor has Congress said that it shall be regarded as possessing state citizenship for jurisdictional purposes, as is done in respect of national banks by § 24, ¶ 16, of the Judicial Code. In short, there is no ground upon which the company can be deemed a citizen of Texas, and this being so, the suit is not one between citizens of different states.

Decree affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
JOHN J. DE ATLEY.

(See S. C. Reporter's ed. 310-318.)

Master and servant — assumption of risk — extraordinary hazard.

1. The head brakeman of a freight train, though assuming the risks normally incident to the boarding of a moving train in the discharge of his duties, does not assume the risk of injury involved in an attempt to board a train operated at an unusually high and dangerous rate of speed until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other.

[For other cases, see Master and Servant, II b, in Digest Sup. Ct. 1908.]

Trial — question for jury — assumption of risk — extraordinary hazard.

2. It is for the jury to say whether the head brakeman on a freight train assumed the risk of injury in an attempt, in the discharge of his duties, to board the engine of his train, which was moving directly toward him at a speed of 12 miles per hour.

[For other cases, see Trial, VI. c, in Digest Sup. Ct. 1908.]

Trial — requested instructions — assumption of risk.

3. There is no error in refusing to give a requested instruction upon the question of the assumption of risk which deals solely with the ordinary risks and hazards, and embodies no definition of such risks and hazards, nor any qualification appropriate to the particular facts of the case, which involves a question of extraordinary hazard.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

[No. 274.]

Argued and submitted March 10 and 13, 1916. Decided May 22, 1916.

IN ERROR to the Court of Appeals of the state of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Mason County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 159 Ky. 687, 167 S. W. 933.

The facts are stated in the opinion.

NOTE.—On *volenti non fit injuria* as defense to actions by injured servants—see notes to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 162.

As to whether a servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

As to servant's assumption of risk, generally—see note to Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

Messrs. E. L. Worthington, W. D. Cochran, and Le Wright Browning submitted the cause for plaintiff in error:

Plaintiff cannot recover unless defendant's negligence was the proximate cause of the accident and injury to him.

St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; 4 Labatt, Mast. & S. § 1604.

Plaintiff, as a matter of law, assumed the risk of injury from his attempt to board defendant's train.

3 Labatt, Mast. & S. §§ 1168, 1168a; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229; 4 Labatt, Mast. & S. §§ 1310, 1313, 1315, 1325; St. Louis Cordage Co. v. Miller, 61 C. C. A. 506, 126 Fed. 511, 15 Am. Neg. Rep. 476; Creola Lumber Co. v. Mills, 149 Ala. 474, 42 So. 1019; Green v. Cross, 79 Tex. 130, 15 S. W. 220; Derr v. Lehigh Valley R. Co. 158 Pa. 365, 38 Am. St. Rep. 848, 27 Atl. 1002; O'Neil v. Keyes, 168 Mass. 517, 47 N. E. 416, 3 Am Neg. Rep. 178; Missouri, K. & T. R. Co. v. Thompson, 11 Tex. Civ. App. 658, 33 S. W. 718.

A brakeman will be presumed to know of, and to appreciate, the danger of coupling, from the inside of a curve, of cars having double deadwoods of unusual length (Kohn v. McNulta, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; Michigan C. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791; Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 66 Am. St. Rep. 456, 71 N. W. 42, 2 Am. Neg. Rep. 743); to the same effect is the holding as to danger of injury from unblocked frogs (Southern P. Co. v. Seley, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530); also, as to knowledge of the risk that the drawbars of two cars may slip and pass each other, and thus render dangerous an attempt to couple them on the inside of a sharp curve (Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166); so an experienced brakeman cannot recover for an injury caused by his miscalculating the actual difference between the heights of two drawheads, he being aware that there was some difference (Hulett v. St. Louis, K. C. & N. R. Co. 67 Mo. 239); so as to the danger of going onto the running board of a "hard-running" engine, liable to rock and sway (Southern P. Co. v. Johnson, 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 559).

Under the Kentucky practice it was the duty of the trial court to have prepared and given a corrected instruction embodying the defense under consideration, *i. e.*, an instruction setting out the circumstances under which an "extraordinary," as distinguished from an "ordinary," risk is assumed by the servant.

Louisville & N. R. Co. v. Harrod, 115 Ky. 877, 75 S. W. 233; Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 820, 139 S. W. 1073.

The rules of the state practice govern in cases brought in the state courts under the Federal employers' liability act.

Chesapeake & O. R. Co. v. Kelly, 161 Ky. 655, 171 S. W. 185; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

So far as the defense of assumed risks is concerned, there is no difference between the negligence of the master and the negligence of a coemployee.

Chicago & G. W. R. Co. v. Crotty, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; St. Louis, I. M. & S. R. Co. v. Ledford, 90 Ark. 543, 119 S. W. 1123; Murphy v. New York, N. H. & H. R. Co. 187 Mass. 18, 72 N. E. 330; Meagher v. Crawford Laundry Mach. Co. 187 Mass. 586, 73 N. E. 853.

If, as is practically assumed by the court of appeals, the engineer was negligent in operating the train at said rate of speed, then, by parity of reasoning, the plaintiff was negligent in attempting to board the same.

Hurst v. Kansas City, P. & G. R. Co. 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 965; Dowell v. Vicksburg & M. R. Co. 61 Miss. 519; Louisville & N. R. Co. v. Wallace, 90 Tenn. 53, 15 S. W. 921; Whitfield v. Atlantic Coast Line R. Co. 147 N. C. 236, 60 S. E. 1126; Southern R. Co. v. Williams, 143 Ala. 212, 38 So. 1013.

Although the servant's contributory neglect is not a bar to the recovery of damages, yet it is still the duty of the court to instruct the jury that the servant's conduct amounted to negligence *per se* where the facts, and the inferences to be drawn from them, are not conflicting as to the fact that contributory negligence existed.

Thornton, Federal Employers' Liability Act, § 115.

Mr. Allan D. Cole argued the cause, and, with Mr. H. W. Cole, filed a brief for defendant in error:

The failure to exercise ordinary care when

the engineer not only knew that defendant in error went to the tower, but also knew that he would have to board the train again, and saw him on the platform before the injury, was certainly negligence. If he had stopped the train and then allowed defendant in error to get aboard, would it then have been possible for him to lose his leg? If, instead of 12 or 15 miles an hour, the engineer had driven the train at the rate of 4 miles an hour, would defendant in error than have lost his leg? If he, an inexperienced boy, thought the train was going at a slow rate of speed, when in fact it was not, this did not relieve plaintiff in error of the consequence of its carelessness and negligence in pulling him loose by the train's momentum from the grab iron on the engine, and throwing him upon the ground underneath the car wheels. Moreover, there was an utter failure to warn and instruct him of the danger.

De Atley v. Chesapeake & O. R. Co. 147 Ky. 315, 144 S. W. 95, 201 Fed. 592; Galveston, H. & S. A. R. Co. v. Sullivan, 53 Tex. Civ. App. 394, 115 S. W. 615; Cincinnati, N. O. & T. P. R. Co. v. Swann, 160 Ky. 462, L.R.A.1915C, 27, 169 S. W. 886.

If the plaintiff in error was guilty of any causative negligence, no matter how slight, in comparison with that of defendant in error, no matter how gross, there was a question for the jury.

New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 955; Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493.

Where it was part of the switchman's duty to jump on a moving train, and the evidence whether he should have attempted to jump on at the place where he did was conflicting, and the plaintiff testified that he did not know the place was dangerous, the question of his contributory negligence is for the jury.

8 Thomp. Neg. § 5602.

The general rule that persons injured while attempting to get on or off moving cars are guilty of contributory negligence does not apply with absolute strictness to train hands accustomed to get on and off moving cars in the performance of their duties.

8 Thomp. Neg. § 5602; Charlton v. St. Louis & S. F. R. Co. 200 Mo. 413, 98 S. W. 529; Heilig v. Southern R. Co. 152 N. C. 469, 67 S. E. 1009; Whitfield v. Atlantic Coast Line R. Co. 147 N. C. 236, 60 S. E. 1126.

Proximate cause is a question for the jury.

7 Thomp. Neg. § 161; San Francisco & P. S. S. Co. v. Carlson, 89 C. C. A. 45, 161 Fed. 854; Hales v. Michigan C. R. Co. 118 C. C. A. 627, 200 Fed. 537; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; 4 Labatt, Mast. & S. § 157; Myers v. Pittsburgh Coal Co. 233 U. S. 192, 58 L. ed. 910, 34 Sup. Ct. Rep. 559.

There is no room in this case for the assumption of ordinary risks, and no instruction was asked in the trial court by the plaintiff in error on the assumption of extraordinary risks. Hence, it was not error to refuse the instruction offered on ordinary risks, nor was the trial court bound to modify such instruction so as to make it apply to extraordinary risks.

Catts v. Phalen, 2 How. 382, 11 L. ed. 308; Buck v. Chesapeake Ins. Co. 1 Pet. 159, 7 L. ed. 94; Haffin v. Mason, 15 Wall. 671, 21 L. ed. 196.

Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the line of these and other decisions of the Federal courts.

Seaboard Air Line R. Co. v. Moore, 228 U. S. 434, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Moreover, the court will not inquire into questions relating to pleading and practice in state courts. Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 9, 45 L. ed. 402, 21 Sup. Ct. Rep. 240. For the appellate state court may, as it did in the case at bar, rest its affirmance of the judgment below on some question of practice or pleading, and such a decision is not adverse to the Federal right or claim.

Matheson v. Bank of Alabama, 7 How. 261, 12 L. ed. 693; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 473, 43 L. ed. 520, 19 Sup. Ct. Rep. 268; Semple v. Hagar, 4 Wall. 434, 18 L. ed. 402; Smith v. Adsit, 16 Wall. 188, 21 L. ed. 310; Commercial Bank v. Rochester, 15 Wall. 642, 21 L. ed. 117; Chouteau v. Gibson, 111 U. S. 201, 28 L. ed. 401, 4 Sup. Ct. Rep. 340.

No Federal question is presented for the further reason that assumption of risk is a question of common law, and it is well settled that, if a state decision is made upon rules of general jurisprudence, or upon other grounds broad enough to sustain the judgment without considering the Federal question, jurisdiction of this court will not attach.

New Orleans v. New Orleans Waterworks Co. 142 U. S. 84, 35 L. ed. 944, 12 Sup. Ct. Rep. 142; Bank of West Tennessee v. Citizens' Bank, 13 Wall. 433, 20 L. ed. 515.

Under the facts there was, therefore, no

error in failing to charge the jury on the subject of assumption of risks.

Central Vermont R. Co. v. White, supra; Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 102, 58 L. ed. 525, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Illinois C. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 315.

The master will not be excused for his failure to warn and instruct an inexperienced servant, unless it appears that the servant not only understood, but appreciated the danger. There is quite a difference between knowing that you will get hurt if you do a certain thing, and such appreciation of the danger as will cause you to stop and think before you do it.

Southern R. Co. v. Mauck, 152 Ky. 500, 153 S. W. 729.

Even if defendant in error had discovered the danger when he was injured, but had no time deliberately to choose to take his chances, he did not assume the risk.

Illinois C. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 34; Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130; 26 Cyc. 1177; Cincinnati, N. O. & T. P. R. Co. v. Goldston, 156 Ky. 410, 161 S. W. 246.

The facts and inferences therefrom are conflicting as to the existence of contributory negligence, and the question of contributory negligence in such instances is for the jury.

Scheben v. George Wiedeman Brewing Co. 161 Ky. 417, 170 S. W. 948.

Mr. Justice Pitney delivered the opinion of the court:

In this action, which was brought in a state court under the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), the following facts appeared or might reasonably be inferred from the evidence most favorable to defendant in error (plaintiff below), in the light of which the initial question touching the validity of the judgment in his favor must be determined:

On January 22, 1911, plaintiff was in the employ of defendant and acting as head brakeman on train No. 95—a fast west-bound interstate freight train. When the [312] train reached a station called Springdale, about 6 miles east of Maysville, in Kentucky, the train engineer directed plaintiff to go to a nearby railway telephone, call up the operator, and ascertain the whereabouts of train No. 1, which was a fast west-bound passenger train; the object being to determine whether it was safe for No. 95 to proceed to Maysville ahead of it. Plaintiff was unable to understand the operator and so reported to the engineer. He then got into the cab of the locomotive and the train proceeded to the coal docks, about 1 mile east of Maysville and about 460 yards east of a telegraph station in a signal tower known as the F. G. cabin, where it stopped for coal and water. Plaintiff was directed by the engineer to go forward to F. G. cabin and ascertain from the operator the whereabouts of train No. 1. Plaintiff went to the tower, and was there advised that his train had time to reach Maysville. He immediately descended to the platform in front of the tower and beside the track, and saw that his train was approaching. He waited for it, and when it reached the platform he attempted to board the engine. He could not accurately judge the speed of the train, but it appeared to him to be going slowly enough for him to get aboard it. He caught hold of the grab iron and put one foot on the step, and then the speed of the train, combined with his weight, caused his foot to slip and loosened his hold, so that he fell beneath the wheels of the tender and his arm was cut off. He had been employed as brakeman for about six weeks, and before that had made two round trips over the road for the purpose of becoming acquainted with his duties. During the time of his employment he had frequently been called upon, under orders of the train engineer, to leave the train and go forward to signal towers for orders or information, and then mount the train as it came moving by. On the occasion of the accident the train was running about 12 miles per hour.

[313] The case went to the jury under instructions making defendant's liability dependent upon whether the engineer, with knowledge of plaintiff's presence at the telegraph tower upon business connected with the operation of the train, and with knowledge of his purpose to board the train, negligently operated the train at such a rate of speed as to make plaintiff's attempt to board it unusually hazardous. There was a verdict for plaintiff and the resulting judgment was affirmed by the court of appeals of Kentucky. 159 Ky. 687, 167 S. W. 933.

Upon the present writ of error, it is not disputed that there was sufficient evidence of the negligence of the engineer to require the submission of the case to the jury. It is argued that there was no substantial evidence to support the conclusion that such negligence was the proximate cause of the injury; but this is so clearly untenable as to require no discussion. The remaining

questions turn upon the application of the law respecting assumption of risk.

It is insisted that, even conceding the train was operated at a negligent rate of speed in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The act of Congress, by making the carrier liable for an employee's injury "resulting in whole or in part from the negligence of any of the officers, agents, or employees" of the carrier, abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee (Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 502, 58 L. ed. 1062, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834), the act placed a coemployee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand [314] to the question whether a plaintiff is to be deemed to have assumed the risk.

On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 101, 58 L. ed. 521, 534, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

It is argued that, so far as the question of assumed risks is concerned, it makes no difference, in the case of a brakeman about to board a moving train, whether it is operated at a low or at a high rate of speed; that if the train is moving slowly the risk is an ordinary one, incident to the business of railroading; while if it is moving rapidly, the risk is open, obvious, and apparent. Were we to consider only extreme cases, such as were instanced in argument, the point might be conceded; that is, that mounting a train operated at 1 mile per hour is an ordinary risk, while mounting a train operated at 50 miles per hour presents a risk which, although extraordinary, is open, obvious, and apparent. But these extremes do not present an apt illustration. A speed very much below 50 miles would endanger the brakeman's safety, at the same time being much less apparent. If those operating the train [315] in question knew that plaintiff intended to board it at that point,—and the verdict is to that effect,—the jury was warranted in finding that plaintiff had a right to expect that the train would be moving at a moderate rate of speed such as would enable an ordinarily careful brakeman to get on with reasonable safety; and this upon the ground that, as head brakeman, plaintiff had the right—indeed, that it was his duty—to get upon the engine, since otherwise the train would be left without a head brakeman and the engineer without the information required for the safe operation of the train; and that plaintiff had no notice nor any opportunity to determine with reasonable certainty what the speed of the train was, or that it was too great for his safety, until the engine had practically reached him. It cannot be said, as matter of law, that a speed of 12 miles per hour would necessarily be obvious to him as a dangerous speed, before he made the attempt to board the train.

It is insisted that the true test is not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. Ibid.

[316] We conclude that there was no error in refusing to peremptorily instruct

the jury to return a verdict in favor of defendant.

Error is assigned to the refusal of the trial court to instruct the jury as follows: That when plaintiff entered defendant's service as brakeman he assumed all the ordinary risks and hazards of that employment, and if the jury should believe from the evidence that his injuries were the natural and direct result of any of such risks or hazards, they must find for the defendant. The instruction thus requested was defective, and there was no error in refusing to give it in this form, since it embodied no definition of "ordinary risks and hazards," nor any qualification appropriate to the particular facts of the case. The *gravamen* of plaintiff's complaint, as developed at the trial, and the sole theory upon which the case was submitted to the jury, was that the negligence of the engineer in operating the train at an unduly high rate of speed created an unusual and extraordinary hazard. An instruction upon the question of assumption of risk, dealing solely with the ordinary hazards of the employment, and not pointing out that a different rule must be applied with respect to an extraordinary risk attributable to the engineer's negligence, would probably have confused and misled the jury.

But it appears that in Kentucky there is an established rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed, but they are incorrect in form or substance, it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in the place of the defective ones. Louisville & N. R. Co. v. Harrod, 115 Ky. 877, 882, 75 S. W. 233; West Kentucky Coal Co. v. Davis, 138 Ky. 667, 674, 128 S. W. 1074; Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 820, 824, 139 S. W. 1073.

Although the present action was based upon a Federal [317] statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Minneapolis & St. L. R. Co. v. Bombolis, No. 478, this day decided [241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595]. The Kentucky court of appeals assumed for the purposes of the decision that the case was one where the trial court ought to have followed the local practice and prepared or directed the preparation of a proper instruction covering the question of assumption of risk; and it sustained the judgment only upon the ground that there was no question for the jury respecting it. Whether there was is a question of law, and of course, in this case, a Federal question; and since the court of appeals assumed to decide it, it is incumbent upon us to review the decision. North Carolina R. Co. v. Zachary, 233 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. 305, Ann. Cas. 1914C, 159.

We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. The court of appeals reasoned that plaintiff's duties required him to be upon the passing train; that if he failed to board it he would be left behind; that he had a right to assume the engineer would run the train at a speed that would enable him to get on in safety; [318] that he was facing the train, which was going directly toward him; that, as a matter of common knowledge, one standing in that position cannot form an accurate judgment of its speed until it comes quite near to him; and that his opportunity to observe the speed was limited to the brief space of time that elapsed between the passing of the front end of the engine and the cab, where it was his purpose to get on; and the court determined that, under such circumstances, "it is well-nigh impossible to tell the difference between a rate of from 4 to 6 miles an hour, when an ordinarily prudent brakeman might get on with reasonable safety, and a rate of from 10 to 12 miles an hour, when it would be dangerous for him to do so;" and that "all the circumstances tend to show that knowledge of the speed of the train came to him so suddenly and unexpectedly that he did not have an opportunity to realize and appreciate the danger of getting on." Conceding the force of the reasoning, we are bound to say that, in our opinion, it cannot be said, as matter of law, to be so incontrovertible that reasonable minds might not differ about the conclusion that should be reached. We therefore hold that the question of assumption of risk was one proper for submission to the jury, and assuming, as the court assumed, that the local

practice required the preparation of a proper instruction covering the topic, in the place of the defective instruction that was offered, there was error in affirming the judgment of the trial court.

Judgment reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice McKenna and Mr. Justice Holmes dissent.

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[319] CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
D. F. AND T. C. RANKIN.

(See S. C. Reporter's ed. 319-328.)

Carriers — liability as insurers — effect of Carmack amendment.

1. The common-law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591), to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, Comp. Stat. 1913, § 8563), § 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury "caused by it" or by any other carrier to which the shipment may be delivered.

[For other cases, see Carriers, II. b, 8, in Digest Sup. Ct. 1908.]

Carriers — measure of rights and liability — interstate shipment.

2. The rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the bill of lading, and common-law rules as accepted and applied in Federal tribunals.

[For other cases, see Carriers, II. b. 1, in Digest Sup. Ct. 1908.]

Evidence — presumption — carrier's compliance with law.

3. It cannot be assumed merely because the contrary has not been established by proof that an interstate railway carrier is conducting its affairs in violation of controlling Federal legislation.

[For other cases, see Evidence, II. f, 1, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — limitation of carrier's liability — choice of rates.

4. Recitals in a bill of lading for an interstate shipment, signed by both parties, that alternate rates, based upon specified values, are offered by the carrier's published freight rates, constitute admissions by the shipper and sufficient prima facie evidence of a choice of rates, and cast upon him the burden of proving, in case he wishes to contradict his admissions, that the carrier had not complied with the requirements of controlling Federal legislation respecting the filing and publishing of its rate schedules.

[For other cases, see Evidence, II. f, in Digest Sup. Ct. 1908.]

[No. 59.]

Argued November 5, 1915. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals of that state, affirming a judgment of the Circuit Court of Hamilton County, in favor of a shipper in an action against a carrier to recover for damages to an interstate shipment. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. James J. Lynch argued the cause, and, with Messrs. Michael M. Allison, Edward Colston, and Isaac G. Phillips, filed a brief for plaintiff in error:

If liable at all, the amount of the judgment complained of is erroneous. Defendants in error are only entitled to recover $75 for each of the animals lost, as provided for in the contract of shipment.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 668, 57 L. ed. 690, 696, 33 Sup. Ct. Rep. 397; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

If plaintiff in error had filed the schedule of rates containing the limited valuation set out in the bill of lading, with the Interstate Commerce Commission, their reasonableness could not be considered by the courts in this suit.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

The positive mandate of the law required the railway company to charge, and the shipper to pay, the rate which had been filed with the Interstate Commerce Commission, and the giving or acceptance of any other rate would have been a violation of the law, and would have subjected both the railway company and the shipper to a heavy penalty.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 445, 51 L. ed. 561, 27 Sup.

Ct. Rep. 350, 9 Ann. Cas. 1075; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1012, 26 Sup. Ct. Rep. 628.

The court should presume that the schedule of rates providing for this limited valuation was properly filed with the Interstate Commerce Commission, as required by law.

Clement v. Louisville & N. R. Co. 153 Fed. 979; Meeker v. Lehigh Valley R. Co. 162 Fed. 359; Knox County v. Ninth Nat. Bank, 147 U. S. 94, 37 L. ed. 95, 13 Sup. Ct. Rep. 267; 1 Beach, Contr. § 717; Greenhood, Pub. Pol. Rule 130, p. 118; 2 Elliott, Contr. § 1061; 2 Chamberlayne, Ev. § 1056; Bradner, Ev. p. 362, § 25; Geraty v. Atlantic Coast Line R. Co. 211 Fed. 227.

Where the common-law liability of the carrier was waived by contract, such carrier was liable only for a breach of its duty to exercise ordinary care to protect freight from loss in transportation.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390; 1 Hutchinson, Carr. § 292; 2 Hutchinson, Carr. § 667.

Messrs. W. B. Miller and Charles C. Fox argued the cause and filed a brief for defendants in error:

A special plea, or one setting up an affirmative defense, imposes the burden of evidence on the party introducing such plea.

Gaugh v. Henderson, 2 Head, 629; Brown v. Phelon, 2 Swan, 629; Carter v. Turner, 5 Sneed, 179; Douglass v. Brandon, 6 Baxt. 58.

A plea bringing forward a substantive fact is not supported by one presumption based on another or other presumptions.

16 Cyc. 1050, 1051; United States v. Ross, 92 U. S. 218, 23 L. ed. 707; First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845; Manning v. John Hancock Mut. L. Ins. Co. 100 U. S. 693, 25 L. ed. 761; East Tennessee & W. N. C. R. Co. v. Lindamood, 111 Tenn. 458, 78 S. E. 99; De Glopper v. Nashville R. & Light Co. 123 Tenn. 633, 33 L.R.A.(N.S.)913, 134 S. W. 609.

The dangerous condition made and maintained by the carrier, coupled with the reckless conduct of the engineer, assuredly made a clear case of loss caused by the carrier. There was no other cause. The cow crossing the tracks was only a remote cause. Hence, liability is clearly fixed regardless of what construction may be given the words "caused by it." As respects the carrier, this loss was "caused by it."

Louisville & N. R. Co. v. Warfield, 6 Ga. App. 553, 65 S. E. 308.

If for no other reason, the limitation of value should fail because utterly lacking in mutuality.

9 Cyc. 244, 245; 39 Cyc. 686; Clark v. Small, 6 Yerg. 423.

The carrier had better facilities and greater means of knowledge for proving the affirmative defense contained in its pleas than had the shipper to prove a negative. And the failure to prove its pleas or offer any evidence of the fact that the published freight rates and the tariff regulations referred to were legally authorized reacts with special force against it.

Brown v. Raisin Fertilizer Co. 124 Ala. 221, 26 So. 891; Cook v. Guirkin, 119 N. C. 13, 25 S. E. 715; see also N. H. Blitch Co. v. Atlantic Coast Line R. Co. 87 S. C. 115, 69 S. E. 16.

Mr. Justice **McReynolds** delivered the opinion of the court:

Defendants in error, experienced shippers, on November 6, 1911, delivered to plaintiff railway at Danville, Kentucky, a car of mules, nineteen of which they owned, for transportation to Atlanta, Georgia. They signed and accepted a through bill of lading, the pertinent portions of which follow:

Contract for limited liability in the transportation of live stock at reduced rates.

3. Limit of value.—That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, *viz.*:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

. . .

Horses or mules, not exceeding $75 each

. . .

That the tariff regulations of said carrier provide that for every increase of 100 per cent, or fraction thereof, in the above valuations, there shall be an increase of 50 per cent in the freight rate; and that the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss [321] or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true

values of the animals, unless an additional amount is herein stated and paid for.

4. Guaranteed freight rate.—That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations is $—— per —— from —— —— to —— —— and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc.

A wreck occurred at Dayton, Tennessee; some of the animals were killed; others were injured and afterwards sold by plaintiff in error; and shippers brought this suit in the circuit court, Hamilton county, Tennessee, to recover $4,750,—$250 per head.

The declaration contains two counts. The first—a common-law count on a general contract of affreightment—alleges delivery with agreement to pay full freight charges and that the carrier accepted and agreed to transport safely, but failed so to do. The second sets up execution and delivery of the bill of lading annexed as an exhibit, but declares shippers knew nothing of the limited-liability provision therein; and further "that the whole of said paper, and especially the $75 limitation, is void and of no effect and is not operative or binding on them or either of them," because (1) executed in Kentucky, under whose laws it is void; (2) unreasonable and unjust; (3) no other contract of transportation was offered, and shippers were not aware that the transportation was to take place at reduced rates and under stipulations for limited liability; (4) there was no consideration; (5) the [322] parties were not on equal terms. It also denounces as untrue statements in clause 3 of the bill concerning published freight rates and tariff regulations.

The railway filed nine pleas; two general —"not guilty" and "that it did not breach the contract of carriage" as alleged—and seven special ones. Among other things, the company avers in the latter: That it had duly filed with the Interstate Commerce Commission and had published and kept open for inspection schedules of joint rates between Danville, Kentucky, and Atlanta; they contained classifications of freight in force, and stated separately all terminal and other charges, and provided that carload rates upon horses and mules, where valued not above $75 each, should be $95 per car, and for every increase of 100 per cent or fraction thereof there should be an increase of 50 per cent in rate; plaintiffs knew the company's freight rate was based upon specified values and that it stood ready to transport at increased valuation and rate, and, knowing these facts, they declared the value specified, and thereby obtained the cheaper rate of $95 per car. That the receipt or bill of lading duly signed by shippers fixes a maximum value; contains definite recitals (set out above) in respect of rates, etc., and "with all the provisions thereof, is valid and binding upon the plaintiffs and the defendant when applied to interstate shipments which are governed by the acts of Congress of February 4, 1887 (24 Stat. at L. 379, chap. 104), and June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), and defendant pleads and relies upon the same as a complete bar to any recovery (in excess of $75) for such mules as were actually killed and such ones as were actually damaged to the amount of $75."

Issue being joined, the cause was tried to a jury. D. F. Rankin, testifying for himself, declared the mules were worth from $230 to $240 each; described the circumstances surrounding shipment, identified exhibited bill of lading as signed and accepted by him, but stated he did not read [323] it, and nothing was said about rates, and that he was not aware of the $75 limitation; admitted he had shipped stock over same route before, paying $95 per car; and asserted he had seen no printed tariff rates from Danville to Atlanta. The bill so identified was treated throughout the trial as properly in evidence; but no duly filed and applicable rate schedules were presented, nor did the railway introduce any evidence to support its special pleas.

The trial judge held:

"The one controlling point in this case is as to whether or not there is a presumption in favor of the defendant's compliance with the law whereby it seeks by its action to escape from liability."

"There is no doubt in the mind of the court but that if the railroad were charged with a violation of the provisions of the interstate commerce act, a presumption in favor of its compliance would arise; but where the railroad, as in this case, sets up, as a matter of defense, its compliance with the provisions of that act, the court is of the opinion that there is no presumption in its favor, and that the burden of proof is on the defendant to show a substantial compliance with the provisions of the act."

"It therefore follows that under the facts in this case, the undisputed facts and the decisions of our courts on this subject, that the court is of the opinion that the contract in this case is invalid, and the question goes to the jury as to the negligence

of the defendant on this shipment of stock." And he charged the jury:

"If you find from the proof in this case that the plaintiff did deliver in good condition nineteen mules to the defendant to be transported to Atlanta, Georgia, and that there was an accident, a collision on the railroad, then the burden is upon the railway company to show that it has not been guilty of any negligence.

[324] "If the defendant company shows you by the greater weight or the preponderance of the evidence its freedom from negligence, then the plaintiff is not entitled to recover.

"If you reach the conclusion that the plaintiff has made out his case and is entitled to recover for the value of the nineteen mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value at the time they would have been delivered but for the negligence of the carrier, less whatever transportation charges there would have been on this car of stock.

"It is also in the discretion of the jury to award interest on any recovery from the time of the loss up to the present time."

. . . "Negligence is the want or lack of exercise of that degree of care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

Judgment upon a verdict for $4,180—$220 per head—and $328.82 interest was affirmed by the court of civil appeals, and the supreme court approved this action without opinion.

The court of civil appeals *inter alia* declared:

"It hardly appears debatable to us, that it was incumbent upon the railroad company, in this case, in the present state of the pleadings, to show by proof that it had met the requirements of the interstate commerce act, and this burden it failed to carry, and having failed to do so, it cannot rely upon presumption.

"Having reached this conclusion, it remains to be determined what are the rights and liabilities of these parties, under the contract of carriage in this case. There being nothing in the record to show that the rate of freight charged by the company was approved and authorized by the Interstate Commerce Commission, we must determine the rights of these parties upon the theory that no [325] such rate was ever filed with the Commission, or approved or authorized by it, and that the rate and contract made in this case was without the authority and outside of the act of Congress, invoked by this defendant; or, in other words, so far as the interstate commerce act is concerned, this railroad company has made the contract in violation of its provisions. . . .

"There is no proof that the railroad company had any other rate than the one charged plaintiffs for this shipment between Danville, Kentucky, and Atlanta, Georgia. There is no proof that it offered to plaintiffs, at the time it issued to them its bill of lading, a contract with unlimited liability, or, in other words, a common-law liability. . . .

". . . If the company had any other rate than the one it agreed for the transportation of this freight, it did not disclose that fact to the shipper, nor did it have any rate whatever posted in or about its office. If it had a shipping contract with unlimited liability it did not choose between the two, and, from the undisputed facts developed in this record, it is clear to our minds this contract is void and the limited-liability clause therein cannot be relied upon by the company as a bar to the recovery of full value of each animal shipped. If, however, the defendant had shown, by proof, that the rate charged by it for this freight had been filed with and approved by the Interstate Commerce Commission, and that it had posted the rate, as required by the act of Congress, then a rate of freight based upon the valuation fixed in the bill of lading would have limited plaintiffs' right to recover to the value fixed in the contract."

Plaintiff in error maintains, first, that, not having been negligent, it is not liable for any sum; and, second, that in any event it is protected by a valid limitation in the bill of lading.

Counsel concede liability of a common carrier under the long-recognized common-law rule not only for negligence, [326] but also as an insurer, and that unless the Carmack amendment (copied in margin [1]) has changed this rule, the railway is responsible for damages not exceeding specified value. But they insist that in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148, we held this amendment restricts a carrier's liability to loss "caused by it." And, consequently, they say, the trial court erred when it charged: "In this case the carrier

[1] "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such pr

is held to the highest degree of care for the safe transportation of the animals."

Construing the Carmack amendment, we said through Mr. Justice Lurton in the case cited (pp. 506, 507): "The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier." Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line.

The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill [327] of lading, and common-law rules as accepted and applied in Federal tribunals. Cleveland, C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177; Southern Exp. Co. v. Byers, 240 U. S. 612, ante, 825, 36 Sup. Ct. Rep. 410, and cases cited; Southern R. Co. v. Prescott, 240 U. S. 632, ante, 836, 36 Sup. Ct. Rep. 469.

We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the interstate commerce act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law "presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.*" Bank of United States v. Dandridge, 12 Wheat. 64, 69, 70, 6 L. ed. 552, 554, 555; Knox County v. Ninth Nat. Bank, 147 U. S. 91, 97, 37 L. ed. 93, 95, 13 Sup. Ct. Rep. 267; Maricopa & P. R. Co. v. Arizona, 156 U. S. 347, 351, 39 L. ed. 447, 449, 15 Sup. Ct. Rep. 391; Sun Printing & Pub. Asso. v. Moore, 183 U. S. 642, 649, 46 L. ed. 366, 372, 22 Sup. Ct. Rep. 240.

Under our former opinions the settled doctrine is that where alternate rates, fairly based upon valuation, are offered, a railroad may limit its liability by special contract. George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 283, 59 L. ed. 576, 581, 35 Sup. Ct. Rep. 351.

The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its [328] schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on specified values were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice. If, in such a case, the shipper wishes to contradict his own admissions, the burden of proof is upon him. York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 113, 18 L. ed. 170, 172; The Delaware, 14 Wall. 579, 601, 20 L. ed. 779, 783; Hart v. Pennsylvania R. Co. 112 U. S. 331, 337, 28 L. ed. 717, 719, 5 Sup. Ct. Rep. 151; Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; Squire v. New York C. R. Co. 98 Mass. 239, 248, 93 Am. Dec. 162; Wabash R. Co. v. Curtis, 134 Ill. App. 409, 412; Hutchinson, Carr. 3d ed. § 475.

The bill of lading in question is plainly entitled, "Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates," and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper, and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as prima facie valid, and, consequently, the trial court erred in holding it void as a matter of law, and permitting a recovery for full value of the animals.

The judgment below is reversed and the cause remanded to the Supreme Court of

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erty caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. . . ." (Chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592.

Tennessee for further proceedings not inconsistent with this opinion.

Reversed.

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[329] JOHN S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Appts.,

v.

PHILADELPHIA & READING COAL & IRON COMPANY. (No. 253.)

JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Appt.,

v.

WESTERN UNION TELEGRAPH COMPANY. (No. 254.)

(See S. C. Reporter's ed. 329-333.)

Removal of causes — restriction of right by state — foreign corporation.

An unconstitutional attempt to prevent foreign corporations doing both interstate and intrastate business from removing to a Federal court suits brought against them in a Wisconsin court by citizens of that state is made by the provisions of Wis. Stat. § 1770f, for the revocation by the secretary of state of the license of any foreign corporation to do business within the state whenever it shall remove or make application to remove to a Federal court any suit brought against it by any citizen of the state upon a claim or cause of action arising within the state.

[For other cases, see Removal of Causes, II. a; Corporations, XII. b, 2, in Digest Sup. Ct. 1908.]

[Nos. 253 and 254.]

Argued April 13, 1916. Decided May 22, 1916.

TWO APPEALS from the District Court of the United States for the Western District of Wisconsin to review decrees enjoining the revocation of the licenses of foreign corporations to do business within the state because of the removal to a Federal court of suits brought against them by citizens of the state. Affirmed.

See same case below, 216 Fed. 199.

The facts are stated in the opinion.

Mr. J. E. Messerschmidt argued the cause, and, with Mr. Walter C. Owen, Attorney General of Wisconsin, filed a brief for appellants:

The provision of the Wisconsin statutes, that, if a foreign corporation shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state, the license issued to such corporation shall be void, and the secretary of state shall enter such forfeit in the records in his department, has not for its object to oust the Federal court of jurisdiction, but the primary purpose is the putting of foreign corporations on substantially the same footing as domestic corporations, and such is the result.

State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692; Independent Tug Line v. Lake Superior Lumber & Box Co. 146 Wis. 121, 131 N. W. 408; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148.

The mandate of the 14th Amendment to the Constitution of the United States, that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, is applicable to remedial rights.

Ex parte Stricker, 109 Fed. 150; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 338, 78 Am. St. Rep. 17, 59 Pac. 304; 8 Cyc. 1076; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 501, 17 So. 721; Brannon, 14th Amend. 343; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; State ex rel. Kellogg v. Currens, 111 Wis. 431, 56 L.R.A. 252, 87 N. W. 561; Southern R. Co. v. Green, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

The rule of comity goes only so far as to place foreign corporations on an equal basis with domestic corporations, but never beyond.

5 Thomp. Corp. 2d ed. § 6628; Clarke v. Central R. & Bkg. Co. 15 L.R.A. 683, 50 Fed. 338; Van Steuben v. Central R. Co. 178 Pa. 367, 34 L.R.A. 577, 35 Atl. 992; Presbyterian Ministers Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801; 6 Thomp. Corp. § 7885; 2 Morawetz, Priv. Corp. 2d ed. § 965; Empire Mills v. Alston Grocery Co. — Tex. App. —, 15 S. W. 200; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Hiskey v. Pacific States Sav. L. & Bldg. Co.

NOTE.—On revocation of license of foreign corporation on account of removal of action to Federal court—see note to Harrison v. St. Louis & S. F. R. Co. L.R.A.1915F, 1187.

27 Utah, 409, 76 Pac. 20; Fowler v. Bell, 90 Tex. 150, 39 L.R.A. 254, 59 Am. St. Rep. 788, 37 S. W. 1058; Coler v. Tacoma R. & Power Co. 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413; White v. Howard, 46 N. Y. 144; Falls v. United States Sav. L. & Bldg. Co. 97 Ala. 417, 24 L.R.A. 174, 38 Am. St. Rep. 194, 13 So. 25; Walter v. Whitlock, 9 Fla. 86, 76 Am. Dec. 607; Harding v. American Glucose Co. 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; United States Mortg. Co. v. Gross, 93 Ill. 483; Faulkner v. Hyman, 142 Mass. 53, 6 N. E. 846; People v. Howard, 50 Mich. 239, 15 N. W. 101; State ex rel. St. Louis, K. C. & C. R. Co. v. Cook, 171 Mo. 348, 71 S. W. 829; Toomey v. Supreme Lodge, K. P. 74 Mo. App. 507; Fisher v. Lord, 63 N. H. 514, 3 Atl. 927.

The rule of the Doyle and Prewitt Cases, properly qualified and limited in its scope, is applicable to this statute, and is sufficient to sustain its constitutionality.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; State ex rel. Drake v. Doyle, 40 Wis. 175, 22 Am. Rep. 692; Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; National Council v. State Council, 203 U. S. 163, 51 L. ed. 137, 27 Sup. Ct. Rep. 46; Swing v. Weston Lumber Co. 205 U. S. 278, 51 L. ed. 800, 27 Sup. Ct. Rep. 497; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. 280; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Western U. Teleg. Co. v. Julian, 169 Fed. 166; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333.

It is a cardinal rule of construction that when a statute is susceptible of two constructions, one of which supports the act and gives it effect, and the other renders it unconstitutional and void, the former will be adopted even though the latter would be the more natural interpretation of the language used.

United States v. Coombs, 12 Pet. 75, 9 L. ed. 1005; United States v. Central P. R. Co. 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038; Missouri ex rel. Barton County v. Kansas City, Ft. S. & G. R. Co. 32 Fed. 722; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; Singer Mfg. Co. v. McCollock, 24 Fed. 667; Bigelow v. West Wisconsin R. Co. 27 Wis. 478; Palms v. Shawano County, 61 Wis. 211, 21 N. W. 77; Johnson v. Milwaukee, 88 Wis. 389, 60 N. W. 270.

The complainant in this case has no right to contend that the statute in question is unconstitutional, while at the same time retaining the benefits that it received by reason of a license having been issued it by virtue of such law.

Ferguson v. Landram, 5 Bush, 230, 196 Am. Dec. 350; Daniels v. Tearney, 102 U. S. 421, 26 L. ed. 189.

The scope and meaning of a state statute, as determined by the highest court of the state, concludes this court in determining whether or not such statute violates the Federal Constitution.

Smiley v. Kansas, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Horn Silver Min. Co. v. New York, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403; Ducat v. Chicago, 10 Wall. 410, 19 L. ed. 972; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

The Wisconsin statutes relating to foreign companies do not in any way interfere with or affect interstate commerce.

Ashland Lumber Co. v. Detroit Salt Co. 114 Wis. 66, 89 N. W. 904; Beaser v. Barber Asphalt Paving Co. 120 Wis. 599, 98 N. W. 525; Chicago Title & T. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888; Presbyterian Ministers Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801; Allen v. Milwaukee, 128 Wis. 678, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 Ann. Cas. 392; Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797; Catlin & P. Co. v. Schuppert, 130 Wis. 642, 110 N. W. 818; Elwell v. Adder Mach. Co. 136 Wis. 82, 116 N. W. 882.

The revocation of the license of the respondent does not deprive it of any constitutional rights.

Pratt v. Brown, 3 Wis. 603; Madison, W. & M. Pl.-road Co. v. Reynolds, 3 Wis. 287; Blair v. Milwaukee & P. du C. R. Co. 20 Wis. 254, 10 Am. Neg. Cas. 518; State v. Milwaukee Gaslight Co. 29 Wis. 454, 9 Am. Rep. 598; Chicago Title & T. Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Coe v. Rockman, 126 Wis. 515, 106 N. W. 290; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95;

Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 24 L. ed. 94; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Newport & C. Bridge Co. v. United States, 105 U. S. 470, 26 L. ed. 1143; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437.

Mr. **M. H. Boutelle** argued the cause and filed a brief for the Philadelphia & Reading Coal & Iron Company:

In the light of the later decisions of this court, it would seem that nothing more than the statement of facts was required to demonstrate the unconstitutionality of the legislation in question.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. Rep. 232; Ludwig v. Western U. Teleg. Co. 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333; New York L. Ins. Co. v. Head, 234 U. S. 149, 164, 58 L. ed. 1259, 1265, 34 Sup. Ct. Rep. 879; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 472, 473, 58 L. ed. 1398, 1407, 34 Sup. Ct. Rep. 979; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63–72, 59 L. ed. 839–843, 35 Sup. Ct. Rep. 504.

Mr. **Rush Taggart** argued the cause, and, with Mr. Francis Raymond Stark, filed a brief for the Western Union Telegraph Company:

The statute is unconstitutional generally:

(1) Because it is a direct attempt to limit and restrict the judicial power of the United States.

(2) Because it requires a stipulation in advance not to exercise a Federal right.

Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333; South Carolina ex rel. Phœnix Mut. L. Ins. Co. v. McMaster, 237 U. S. 63, 71, 59 L. ed. 839, 843, 35 Sup. Ct. Rep. 504; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; Barron v. Burnside, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

(3) Because it discriminates between foreign corporations on the one hand and domestic corporations and individuals (resident or nonresident) on the other.

Southern R. Co. v. Greene, 216 U. S. 400, 413, 54 L. ed. 536, 540, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. Rep. 633.

The statute is unconstitutional at all events as to this appellee, because appellee is not within the class of foreign corporations which the state may arbitrarily exclude from the privileges of domestic business:

(1) Because it is an interstate telegraph company.

Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 33, 37, 54 L. ed. 355, 368, 370, 30 Sup. Ct. Rep. 190; Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 332, 58 L. ed. 621, 626, 34 Sup. Ct. Rep. 333.

(2) Because it is a Federal postal agent.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 554, 31 L. ed. 790, 795, 8 Sup. Ct. Rep. 961; Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116; Kansas City Southern R. Co. v. Kaw Valley Drainage Dist. 233 U. S. 75, 78, 58 L. ed. 857, 858, 34 Sup. Ct. Rep. 564; Mercantile Trust Co. v. Texas & P. R. Co. 216 Fed. 225, affirmed in 223 U. S. 710, 56 L. ed. 624, 32 Sup. Ct. Rep. 519.

Mr. Justice **McReynolds** delivered the opinion of the court:

These appeals bring up for consideration the validity of a Wisconsin statute providing for revocation of licenses granted to corporations not organized under the laws of that state. They were heard together, and to dispose of them by one opinion will be convenient.

Terms and conditions upon which foreign corporations might do local business, and penalties for failure to comply therewith, were first prescribed by the legislature of Wisconsin in 1898. Amendatory and supplemental statutes were enacted, and finally the act of June 20, 1905, added four new sections to the statutes of 1898, one of which follows:

Sec. 1770f. "Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such

corporation to do business within this state."

Since 1860 the Western Union Telegraph Company, a [332] New York corporation, has been continuously carrying on within Wisconsin both intra and interstate commerce, and for use therein has acquired and owns a large amount of property. In 1907 it filed with the secretary of state a copy of its charter, paid the prescribed fee, and took out a license to do intrastate business.

The Philadelphia & Reading Coal & Iron Company, a Pennsylvania corporation, since prior to 1898, within Wisconsin has been continuously shipping and selling coal both in intrastate and interstate commerce, and for use therein has purchased at great expense docks and other properties. Having paid required fees and filed its charter with the secretary of state, it received a license, November 10, 1898.

The Western Union Telegraph Company removed to the United States district court a civil suit begun against it in the circuit court, Dane county, Wisconsin, during 1911; and in 1912 an action against the Philadelphia & Reading Coal & Iron Company was likewise removed. Averring that so far as the same directs or attempts to direct annulment of its right to do business, § 1770f, above quoted, is in conflict with the Federal Constitution, each of the appellees filed an original bill praying an injunction restraining the secretary of state from revoking its license because of such removal. The lower court sustained the claim of unconstitutionality (216 Fed. 199), granted preliminary injunctions, and these direct appeals were taken.

Consideration of the Wisconsin statutes convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts. To accomplish this is beyond the state's power. The action of the court below in holding § 1770f inoperative, and enjoining its enforcement as to appellees, was correct and its decree must be affirmed.

[333] We are asked in effect to reconsider the question discussed and definitely determined in Harrison v. St. Louis & S. F. R. Co. 232 U. S. 318, 58 L. ed. 621, L.R.A.1915F, 1187, 34 Sup. Ct. Rep. 333. We there said (p. 328): "The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious."

Affirmed.

SOUTHERN RAILWAY COMPANY, Plff. in Err.,
v.
MAGGIE GRAY, Administratrix of Kenneth L. Gray, Deceased.

(See S. C. Reporter's ed. 333-339.)

Master and servant — employers' liability — Federal common law controls.

1. Rights and obligations under the Federal employers' liability acts of April 22, 1908 (35 Stat. at L. 65, chap. 149), and April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8657), depend upon those statutes and applicable principles of the common law as interpreted and applied in the Federal courts.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

Trial — taking case from jury — employers' liability — last clear chance.

2. The trial court should have granted a motion to dismiss as of nonsuit an action brought under the Federal employers' liability acts of April 22, 1908 (35 Stat. at L. 65, chap. 149), and April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8657), for the death of a railway brakeman who, having gone to sleep on the track some ¾ of a mile from his train after setting his signal lights on the track to warn an expected passenger train, was struck and killed by the passenger engine, where the evidence shows that the engineer sounded the customary flagman's signal when it first became possible to see the signal lights, then about 1,250 feet distant, and almost immediately thereafter, seeing the body, did everything possible to check the train, there being uncontradicted testimony that the train could not have been stopped in less than 1,900 feet, and nothing to indicate that after the engineer saw or could have seen the brakeman's body, the train could have been stopped in time to prevent the accident.

[For other cases, see Trial, VI. d, 2, in Digest Sup. Ct. 1908.]

[No. 355.]

Argued May 5, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of North Carolina to review a

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38; and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

On the doctrine of last clear chance—see note to Bogan v. Carolina C. R. Co. 55 L.R.A. 418.

On the applicability of the doctrine of last clear chance where the danger is not actually discovered—see note to Bourrett v. Chicago & N. W. R. Co. 36 L.R.A.(N.S.) 957.

judgment which affirmed a judgment of the Superior Court of Randolph County, in that state, in favor of plaintiff in an action of death brought under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 167 N. C. 433, 83 S. E. 849.

The facts are stated in the opinion.

Mr. L. E. Jeffries argued the cause, and, with Messrs. H. O'B. Cooper and L. L. Oliver, filed a brief for plaintiff in error:

In determining what constitutes negligence under the Federal employers' liability act, recourse must be had to the common law as interpreted by the Federal courts.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 3 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; Western U. Teleg. Co. v. Commercial Mill. Co. 218 U. S. 416, 54 L. ed. 1091, 36 L.R.A.(N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; Rice v. Minnesota & N. W. R. Co. 1 Black, 374, 17 L. ed. 151; United States v. Sanges, 144 U. S. 311, 36 L. ed. 446, 12 Sup. Ct. Rep. 609; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773; Standard Oil Co. v. United States, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A. (N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States v. American Tobacco Co. 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

Under the law as applied by the Federal courts, the defendant is liable if it could have avoided the injury by the exercise of ordinary care, only after discovering the perilous situation.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Baltimore & O. R. Co. v. Hellenthal, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; Iowa C. R. Co. v. Walker, 121 C. C. A. 579, 203 Fed. 685; Hart v. Northern P. R. Co. 116 C. C. A. 12, 196 Fed. 180; Atchison, T. & S. F. R. Co. v. Taylor, 116 C. C. A. 440, 196 Fed. 878; Newport News & M. Valley Co. v. Howe, 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; Bogan v. Carolina C. R. Co. 55 L.R.A. 424, note; New York, N. H. & H. R. Co. v. Kelly, 35 C. C. A. 571, 93 Fed. 745; Little Rock R. & Electric Co. v. Billings, 31 L.R.A. (N.S.) 1031, 98 C. C. A. 467, 173 Fed. 903, 19 Ann. Cas. 1173.

Where, in an action under the Federal act, the claim is made and denied that there was no evidence tending to show liability, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

The doctrine of comparative negligence is inapplicable.

Southern R. Co. v. Johnson, 111 Va. 499, 69 S. E. 323, Ann. Cas. 1912A, 81; Great Northern R. Co. v. Wiles, 240 U. S. 444, ante, 732, 36 Sup. Ct. Rep. 406.

Mr. Thomas H. Calvert argued the cause, and, with Mr. John A. Barringer, filed a brief for defendant in error:

Upon a motion to nonsuit, the court could not consider any of the defendant's testimony in its favor, but only that of the plaintiff and such parts of the defendant's as tended to establish plaintiff's right to recover.

Winborne Guano Co. v. Plymouth Mercantile Co. 168 N. C. 223, 84 S. E. 272.

When there is sufficient evidence, viewed in the light most favorable to the plaintiff, to sustain a verdict in his favor, a motion of nonsuit will not be granted.

Hodges v. Wilson, 165 N. C. 323, 81 S. E. 340; Walters v. Durham Lumber Co. 165 N. C. 388, 81 S. E. 453.

Contributory negligence will not defeat recovery if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed. 270, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives,

144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Sullivan v. New York, N. H. & H. R. Co. 154 Mass. 524, 28 N. E. 911, 12 Am. Neg. Cas. 70.

It is the duty of the engineer and fireman to keep a proper lookout on the track.

Arrowood v. Southern Carolina & G. Extension R. Co. 126 N. C. 629, 36 S. E. 151; Smith v. Norfolk & S. R. Co. 114 N. C. 729, 25 L.R.A. 287, 19 S. E. 863, 923.

And it is for the jury to say whether, under all the circumstances, the defendant's employees were negligent in failing to keep a proper lookout for the warning lights on the track, which would have put them on notice of some danger, with respect to which, whatever it might be, they must bring the train under immediate control.

Dallago v. Atlantic Coast Line R. Co. 165 N. C. 269, 81 S. E. 318.

It was for the jury to determine, under the circumstances, the distance in which the warning lights or body of the deceased could have been seen, as well as the distance within which the train could have been stopped.

Draper v. Atlantic Coast Line R. Co. 161 N. C. 307, 77 S. E. 231; Davis v. Seaboard Air Line R. Co. 136 N. C. 117, 48 S. E. 591, 1 Ann. Cas. 214; Wright v. Southern R. Co. 127 N. C. 225, 37 S. E. 221; Henderson v. Atlantic Coast Line R. Co. 159 N. C. 581, 75 S. E. 1092; Holman v. Norfolk & W. R. Co. 159 N. C. 44, 74 S. E. 577; Edge v. Atlantic Coast Line R. Co. 153 N. C. 212, 69 S. E. 74; Powell v. Southern R. Co. 125 N. C. 374, 34 S. E. 530; Pickett v. Wilmington & W. R. Co. 117 N. C. 628, 30 L.R.A. 257, 53 Am. St. Rep. 611, 23 S. E. 264.

In those jurisdictions in which the doctrine of discovered peril is applied, a qualification is recognized, as where the defendant, by the exercise of reasonable care, might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. To render the defendant liable it is not necessary that he could have contemplated, or even been able to anticipate, the particular consequences which ensued.

Title, Negligence, 29 Cyc. 495; Title, Negligence, 21 Am. & Eng. Enc. Law, 2d ed. 487; Robinson v. Melville Mfg. Co. 165 N. C. 495, 52 L.R.A.(N.S.) 385, 81 S. E. 681; Ward v. North Carolina R. Co. 161 N. C. 179, 76 S. E. 717; Hudson v. Atlantic Coast Line R. Co. 142 N. C. 198, 55 S. E. 103; Drum v. Miller, 135 N. C. 204, 65 L.R.A. 899, 102 Am. St. Rep. 528, 47 S. E. 421, 16 Am. Neg. Rep. 215; Shearm. & Redf. Neg. 5th ed. § 99; 1 Thomp. Neg. §§ 219 et seq.; 29 Cyc. 531; Klockenbrink v. St. Louis & M. River R. Co. 81 Mo. App. 356.

Mr. Justice McReynolds delivered the opinion of the court:

Kenneth L. Gray, an experienced brakeman, was of the crew in charge of plaintiff in error's north-bound interstate freight train which started from Spencer at 9:45 P. M. August 29, 1912. Seeking damages for his death, the administratrix brought this suit under the Federal employers' liability act (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657, chap. 143, 36 Stat. at L. 291) in the superior court, Randolph County, North Carolina. Among other things here amended complaint alleges:

"5. That on the 30th day of August, 1912, the intestate of the plaintiff was on a freight train running from Spencer in the state of North Carolina to Washington, District of Columbia, through the state of Virginia, and when the freight train upon which the intestate of the plaintiff was operating in going north arrived at Dry Fork, in the state of Virginia, the intestate of the plaintiff was sent forward about three quarters of a mile to signal a passenger train of defendant coming south; that the intestate of the plaintiff, when he had gotten about three quarters of a mile from Dry Fork, for some reason—loss of sleep or for some other [335] cause unknown to the plaintiff—laid down by the side of the track of the defendant with his head on the end of the cross-ties and went to sleep; that shortly thereafter passenger train No. 37, coming south as aforesaid, carelessly and negligently ran over the intestate. . . .

. . . . . .

"7. That the death of the intestate of the plaintiff was caused without fault on his part and by the wrongful and negligent act of the defendant, in that both the engineer and the fireman upon the passenger train which killed the intestate of the plaintiff could have easily seen the intestate of the plaintiff lying in a helpless condition as aforesaid upon the track of the defendant, the track of the defendant being straight a sufficient distance upon which the said passenger train was running toward the intestate of the plaintiff to have stopped the train or slackened its speed sufficiently to have prevented the killing of the intestate of the plaintiff, ran their train onto the intestate of the plaintiff without ringing the bell, without blowing its whistle, without slackening its speed, or without stopping the said train; in that the servants of the defendant did not keep proper lookout on the track in front of the engine, and have the engine and train of the defendant in proper control so that they could stop the engine of the defendant in

time to have prevented the wrongful killing of the intestate of the plaintiff; in that the servants of the defendant did not see the intestate of the plaintiff, which it was their duty to do and which they could have done by ordinary care, until the train was so near the prostrate form of the intestate of the plaintiff that the servants of the defendant could not stop the train in time to save the life of the intestate of the plaintiff; in that the servants of the defendant wrongfully killed the intestate of the plaintiff upon the said occasion when they had the last clear chance to save his life, which they failed to do by the exercise of ordinary care."

[336] The accident occurred at 5:14 A. M.,—twenty minutes before sunrise,—when it was somewhat foggy and ordinary objects on the ground could not readily be seen without artificial light. Approaching Dry Fork station the freight train stalled, and having been divided into two sections, these were hauled onto sidings there. After placing section 1, and as returned by the main track to bring up section 2, the freight engineer directed Gray to flag south-bound passenger train No. 37. It was the latter's duty, with a red and white lantern in hand, to go forward eighteen telegraph poles (half a mile) and lay a torpedo on the track; then to go nine poles further and place two torpedoes; then to return, stand near pole eighteen and await the expected train. No torpedo was put in place; but having advanced some three quarters of a mile he set the lanterns on the track, lay down with his head on a cross-tie, and went to sleep. There is nothing to explain this action.

From Banister Hill, 2¼ miles southward, and almost to Dry Fork, the track, following several curves, descends on a heavy grade. Commencing say ¼ of a mile down this grade it runs in a straight line ½ mile; then around a sharp curve to the right, passing through a deep cut, to a point some 600 feet from where the brakeman lay; then again in a straight line some 400 feet; and thence around a moderate curve to the left perhaps a half mile.

On the west side of this last curve, approximately 217 feet from its north end, is the spot where Gray slept. Coming south along the track in broad daylight one can first see it when he reaches a point on the right-hand curve in the deep cut 1,254 feet away.

Passenger train No. 37, properly equipped, 790 feet long, composed of ten cars,—six steel sleepers and four other cars,—a tender and engine, came down the long grade running 55 miles an hour. The engineer says [337] that, approaching the right-hand curve, he blew a station signal; when he reached point in the cut where it first became possible to see the lights, he blew a flagman's signal; almost immediately thereafter, seeing the body, he put on brakes, turned off steam, and did everything possible to check the train; before this could be done, a low step struck the brakeman's head. Just before No. 37 blew for that station (it was not scheduled to stop there) the freight engine, standing at Dry Fork, signaled for Gray's return.

Three engineers testified that, in the circumstances, the pasenger train could not have been stopped in less than 1,900 feet, and no other evidence was offered on this point. There is nothing indicating that after the engineer saw or could have seen the brakeman's body the train could have been stopped before reaching it.

In an effort to discredit the passenger engineer, only witness to some circumstances, he was asked on cross-examination concerning prior contradictory statements; but the exclusion of all or any part of his evidence would not change the result. Of course, the contradictory statements can have no legal tendency to establish the truth of their subject-matter. Donaldson v. New York, N. H. & H. R. Co. 188 Mass. 484, 486, 74 N. E. 915; McDonald v. New York C. & H. R. R. Co. 186 Mass. 474, 72 N. E. 55; Com. v. Starkweather, 10 Cush. 59; Sloan v. New York C. R. Co. 45 N. Y. 125; Purdy v. People, 140 Ill. 46, 29 N. E. 700.

Following local practice, at close of all the evidence a motion was made to dismiss as of nonsuit, because negligence by the railroad had not been shown. The court denied this and submitted two issues to the jury,—"whether the intestate of the plaintiff was killed by the negligence of the defendant, as alleged in the complaint," and "what damage, if any, is the plaintiff entitled to recover." In connection with these a lengthy and rather involved charge was given, the objections to which it is not now necessary for us to consider. Judgment upon a [338] verdict for the administratrix was affirmed by the supreme court. 167 N. C. 433, 83 S. E. 849.

Plaintiff in error maintains that the trial court erred in overruling its motion to dismiss, and also relies upon objections to the charge. Counsel for defendant in error claim all instructions were correct, and insist that the verdict is adequately supported by evidence. Concerning the latter they say:

"On the testimony and the law applicable to the case the jury could have arrived at the following conclusions:

"1. That there was an unobstructed view of more than 1,200 feet from the danger

signals and the place the intestate was struck.

"2. That the red and white lights were on the track. This was undisputed.

"3. That it was the duty of the engineer to keep a lookout for danger signals. . . .

"4. That the fact the train approached about 1,300 feet distant around a curve did not excuse the engineer from keeping a lookout down the track.

"5. That the lights on the track could in fact be more easily seen when they were in the darkness and out of the direct rays of the headlight as the train was entering the straight track from the curve.

"6. That in the exercise of ordinary care the engineer could have seen the lights at a point more than 1,200 feet distant.

"7. That the engineer should have blown his signal as soon as he saw the danger signals, or by the exercise of ordinary care could have seen them, which was when he was more than 1,200 feet distant.

"8. That instead of bringing his train under control and trying to stop it as soon as he saw, or, by the exercise of ordinary care, could have seen, the lights, the engineer waited until he saw the intestate lying beside the track."

As the action is under the Federal employers' liability [339] act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal courts. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Great Northern R. Co. v. Wiles, 240 U. S. 444, ante, 732, 36 Sup. Ct. Rep. 406.

Negligence by the railway company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error. When it first became possible for the engineer to see signal lights 1,254 feet away he had a right to suppose the brakeman was standing there on guard. Immediately, he says, the customary signal was sounded. No duty to the brakeman demanded an instant effort to stop the train,—the indicated danger was more than half a mile away. Moreover, application of emergency apparatus on that moment, it appears, would not have caused a stop in time to prevent the accident. There is no evidence that the engineer could have seen the brakeman a single moment before he did, or omitted thereafter to do all within his power.

We think the motion to dismiss should have been granted. The judgment below is accordingly reversed and the cause remanded to the Supreme Court of North Carolina for further proceedings not inconsistent with this opinion.

Reversed.

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[340] LE ROY BRAZEE, Plff. in Err.,
v.
PEOPLE OF THE STATE OF MICHIGAN

(See S. C. Reporter's ed. 340-344.)

Constitutional law — police power — regulating employment agency.

1. The state, in the exercise of its police power, could, consistently with the Federal Constitution, enact so much of Mich. Pub. Acts 1913, act No. 301, as provides for the licensing of private employment agencies, and prescribes reasonable regulations in respect to them, to be enforced according to the legal discretion of a commissioner, including a provision making it a misdemeanor to send one seeking employment to an employer who has not applied for help.

[For other cases, see Constitutional Law, IV. c; IV. a, 5; IV. b, 7, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

2. The possible invalidity of so much of Mich. Pub. Acts 1913, act No. 301, licensing and regulating private employment agencies, as prescribes the fees which may be demanded or retained, does not affect the validity of other provisions of the act from which the provision in respect to fees is separable.

[For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

[No. 402.]

Argued April 6, 1916. Decided May 22, 1916.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a conviction, in the Recorder's Court of the City of Detroit, in that state, upon a charge of violating a state statute regulating employment agencies by sending one seeking employment to an em-

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NOTE.—On police power to license employment agencies—see notes to People ex rel. Armstrong v. Warden, 2 L.R.A.(N.S.) 859; and Spokane v. Macho, 21 L.R.A. (N.S.) 263.

On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363; and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

ployer who had not applied for help. Affirmed.

See same case below, 183 Mich. 259, L.R.A.—, —, 149 N. W. 1053.

The facts are stated in the opinion.

Mr. Proctor Knott Owens argued the cause and filed a brief for plaintiff in error:

The statute in question is contrary to the 14th Amendment of the Constitution of the United States, as being a denial of due process of law and the equal protection of the laws.

Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Re Grice, 79 Fed. 627; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; People ex rel. Valentine v. Berrien Circuit Judge (People ex rel. Valentine v. Coolidge) 124 Mich. 664, 50 L.R.A. 493, 83 Am. St. Rep. 352, 83 N. W. 594; State v. Moore, 113 N. C. 697, 22 L.R.A. 472, 18 S. E. 342; Moore v. St. Paul, 48 Minn. 332, 51 N. W. 219; Chaddock v. Day, 75 Mich. 527, 4 L.R.A. 809, 13 Am St. Rep. 468, 42 N. W. 977; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; Atty. Gen. ex rel. Dingeman v. Lacy, 180 Mich. 329, 146 N. W. 871; Spokane v. Macho, 51 Wash. 322, 21 L.R.A.(N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755; Robison v. Miner, 68 Mich. 566, 37 N. W. 21; State ex rel. Luria v. Wagener, 69 Minn. 206, 38 L.R.A. 677, 65 Am. St. Rep. 565, 72 N. W. 67; State v. Mitchell, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; Williams v. Detroit, 2 Mich. 568; Devine v. Cook County, 84 Ill. 590; Scowden's Appeal, 96 Pa. 422; Spring Valley Water Co. v. San Francisco, 165 Fed. 667; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A.(N.S.) 1074, 94 N. E. 141; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764.

Mr. Grant Fellows, Attorney General of Michigan, argued the cause, and, with Mr. David H. Crowley, filed a brief for defendant in error:

This law is a proper exercise of the police power of the state.

Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; Bacon v. Walker, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Gundling v. Chicago, 177 U. S. 188, 44 L. ed. 728, 20 Sup. Ct. Rep. 633; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; People v. Wagner, 86 Mich. 594, 13 L.R.A. 286, 24 Am. St. Rep. 141, 49 N. W. 609; Grand Rapids v. Braudy, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, 64 N. W. 29; Rast v. Van Deman & L. Co. 240 U. S. 342, ante, 679, 36 Sup. Ct. Rep. 370; Tanner v. Little, 240 U. S. 369, ante, 691, 36 Sup. Ct. Rep. 379; Pitney v. Washington, 240 U. S. 387, ante, 703, 36 Sup. Ct. Rep. 385; Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719; Moore v. St. Paul, 48 Minn. 331, 51 N. W. 219; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; Ex parte Dickey, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428, 77 Pac. 924; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A. (N.S.) 859, 76 N. E. 11, 5 Ann. Cas. [illegible]; Spokane v. Macho, 51 Wash. 322, 21 L.R.A. (N.S.) 263, 130 Am. St. Rep. 1100, 98 Pac. 755.

It is for the state, and the state alone, to determine what special legislation may be required to fit the locality, so long as that legislation is not arbitrary and without any reasonable basis.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144; Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; 25 Cyc. 608; State v. O'Hara, 36 La. Ann. 93; Texas Bkg. & Ins. Co. v. State, 42 Tex. 636; State v. Schlier, 3 Heisk, 281; State, Paul, Prosecutor, v. Circuit Judge, 50 N. J. L. 585, 1 L.R.A. 86, 15 Atl. 272.

Mr. Justice McReynolds delivered the opinion of the court:

Brazee, having taken out a license to conduct an employment agency in Detroit under act 301, Public Acts of Michigan, 1913, was thereafter convicted upon a charge of violating its provisions by sending one seeking employment to an employer who had not applied for help. He claimed the statute was invalid upon its face because in [342] conflict with both state and Federal

Constitutions, and lost in both trial and supreme courts. 183 Mich. 259, L.R.A.—, —, 149 N. W. 1053. Now he insists it offends that portion of the 14th Amendment which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The general purpose of the act is well expressed in its title—"An Act to Provide for the Licensing, Bonding, and Regulation of Private Employment Agencies, the Limiting of the Amount of the Fee Charged by Such Agencies, the Refunding of Such Fees in Certain Cases, the Imposing of Obligations on Persons, Firms, or Corporations Which Have Induced Workmen to Travel in the Hope of Securing Employment, Charging the Commissioner of Labor with the Enforcement of This Act, and Empowering Him to Make Rules and Regulations, and Fixing Penalties for the Violation Hereof." It provides: Sec. 1. No private employment agency shall operate without a license from the commissioner of labor, the fee for which is fixed at $25 per annum except in cities over two hundred thousand population, where it is $100; this license may be revoked for cause; the commissioner is charged with enforcement of the act, and given power to make necessary rules and regulations. Sec. 2. A surety bond in the penal sum of $1,000 shall be furnished by each applicant. Sec. 3. Every agency shall keep a register of its patrons and transactions. Sec. 4. Receipts containing full information regarding the transactions shall be issued to all persons seeking employment who have paid fees. Sec. 5. "The entire fee or fees for the procuring of one situation or job and for all expenses, incidental thereto, to be received by any employment agency, from any applicant for employment at any time, whether for registration or other [343] purposes, shall not exceed 10 per cent of the first month's wages;" no registration fee shall exceed $1 and in certain contingencies one half of this must be returned. Sec. 6. "No employment agent or agency shall send an applicant for employment to an employer who has not applied to such agent or agency for help or labor;" nor fraudulently deceive any applicant for help, etc. Sec. 7. No agency shall direct any applicant to an immoral resort, or be conducted where intoxicating liquors are sold. Sec. 8. Violations of the act are declared to be misdemeanors and punishment is prescribed.

The supreme court of Michigan held "the business is one properly subject to police regulation and control;" the prescribed license fee is not excessive; provisions of the state Constitution in respect of local legislation are not infringed; and no arbitrary powers judicial in character are conferred on the commissioner of labor. But it did not specifically rule concerning the validity of limitations upon charges for services specified by § 5.

Considering our former opinions it seems clear that without violating the Federal Constitution a state, exercising its police power, may require licenses for employment agencies, and prescribe reasonable regulations in respect of them, to be enforced according to the legal discretion of a commissioner. The general nature of the business is such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them. Williams v. Fears, 179 U. S. 270, 275, 45 L. ed. 186, 189, 21 Sup. Ct. Rep. 128; Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 562, 563, 50 L. ed. 305, 310, 311, 26 Sup. Ct. Rep. 144; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 472, 54 L. ed. 839, 845, 30 Sup. Ct. Rep. 606; Engel v. O'Malley, 219 U. S. 128, 136, 55 L. ed. 128, 136, 31 Sup. Ct. Rep. 190; Rast v. Van Deman & L. Co. 240 U. S. 342, 365, ante, 679, 690, 36 Sup. Ct. Rep. 370; Armour & Co. v. North Dakota, 240 U. S. 510, 513, ante, 771, 774, 36 Sup. Ct. Rep. 440; See Moore v. Minneapolis, 43 Minn. 418, 45 N. W. 719; Price v. People, 193 Ill. 114, 55 L.R.A. 588, 86 Am. St. Rep. 306, 61 N. E. 844; People ex rel. Armstrong v. Warden, 183 N. Y. 223, 2 L.R.A.(N.S.) 859, 76 N. E. 11, 5 Ann. Cas. 325. In its general scope, and so far as now [344] sought to be enforced against plaintiff in error, the act in question infringes no provision of the Federal Constitution. The charge relates only to the plainly mischievous action denounced by § 6. Provisions of § 5 in respect of fees to be demanded or retained are severable from other portions of the act, and, we think, might be eliminated without destroying it. Their validity was not passed upon by the supreme court of the state, and has not been considered by us.

The judgment of the court below is affirmed.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 344-351.)

Master and servant — safety appliances — interstate electric railways.

1. Passenger cars operated in trains on a standard gauge interurban interstate electric railway are not within the exception in favor of cars "used upon street railways," which is made by the amendment of March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), to the Federal safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), although they run over the local street railway tracks for the mile and a quarter lying between the company's yards, near the city limits, and the terminal station.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — penalties — difficulty or impossibility of compliance with statute.

2. The difficulty or impossibility of equipping passenger cars used on an interurban interstate electric railway with the grab irons and automatic couplers required by the Federal safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and its amendments, does not relieve the railway company from liability to the prescribed penalties for violations of those acts.

[For other cases, see Master and Servant, II. a, 2, in Digest Sup. Ct. 1908.]

Evidence — expert testimony — sufficiency of safety appliances.

3. Whether or not openings in the sills or buffers of passenger cars operated on an interstate interurban electric railway were a sufficient protection to employees, and were sufficient to accomplish the purposes intended to be accomplished by the provisions of the Federal safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and its amendments, requiring secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars, and were better than those commonly used upon cars engaged in interstate commerce, is not a subject for expert testimony, but is a question for the jury to determine from the evidence, under proper instructions.

[For other cases, see Evidence, VII. i, in Digest Sup. Ct. 1908.]

[No. 136.]

Submitted December 15, 1915. Decided June 5, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Washington, enforcing penalties for violations of the Federal safety appliance acts. Affirmed.

See same case below, L.R.A.—, —, 127 C. C. A. 61, 210 Fed. 243.

The facts are stated in the opinion.

Mr. Will G. Graves submitted the cause for plaintiff in error. Messrs. F. H. Graves and B. H. Kizer were on the brief:

The language of the exception relied upon is simple, and under accepted rules it does not seem permissible to limit its operation by reading into it the word "exclusively."

United States v. Temple, 105 U. S. 97, 26 L. ed. 967; Cherokee Tobacco (Boudinot v. United States) 11 Wall. 616, 20 L. ed. 227.

Moreover, to limit the exception to cars exclusively used upon street railways, or while in use upon street railways, is contrary to the meaning given the term "used," as it appears in other parts of the act.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Wabash R. Co. v. United States, 93 C. C. C. 393, 168 Fed. 1; Southern R. Co. v. Snyder, 109 C. C. A. 344, 187 Fed. 492; Erie R. Co. v. Russell, 106 C. C. A. 160, 183 Fed. 722; Davis v. Cleveland, C. C. & St. L. R. Co. 146 Fed. 403.

But if it is said that the language is so general as to be ambiguous, then the congressional intent is to be sought,—sought not only in the entire context of the section,—statutes or series of statutes *in pari materia* (Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841),—but also in the light of contemporaneous events and the general knowledge of mankind concerning the causes for the exception and what was designed to be achieved.

Preston v. Browder, 1 Wheat, 115, 4 L. ed. 50; United States v. Union P. R. Co. 91 U. S. 72, 23 L. ed. 224; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; United States v. Whitridge, 197 U. S. 135, 143, 49 L. ed. 696, 698, 25 Sup. Ct. Rep. 406.

What was said by the court in the Omaha Street R. Case seems thoroughly applicable—controlling, indeed—in the case at bar.

NOTE.—On the applicability of the commerce clause or statutes thereunder to street railways or to interurban roads—see note to Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 46 L.R.A. (N.S.) 385.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890.

Error was committed in excluding expert testimony relative to the sufficiency of the hand holds on the cars.

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 560, 35 L. ed. 270, 273, 11 Sup. Ct. Rep. 653; Eastern Transp. Line v. Hope, 95 U. S. 297, 298, 24 L. ed. 477, 478; United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 415; Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St. 335; Ogden v. Parsons, 23 How. 167, 16 L. ed. 410; Union Ins. Co. v. Smith, 124 U. S. 405, 31 L. ed. 497, 8 Sup. Ct. Rep. 534; Texas & P. R. Co. v. Watson, 190 U. S. 287, 47 L. ed. 1057, 23 Sup. Ct. Rep. 681; Union P. R. Co. v. Clopper, 131 U. S. cxcii, Appx. and 26 L. ed. 243; Union P. R. Co. v. Novak, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573; Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; Pittsburgh, S. & N. R. Co. v. Lamphere, 69 C. C. A. 542, 137 Fed. 20; Chicago, R. I. & P. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 71; Troxell v. Delaware, L. & W. R. Co. 180 Fed. 871; Mahoning Ore & Steel Co. v. Blomfelt, 91 C. C. A. 390, 163 Fed. 827; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; Louisville & N. R. Co. v. Hall, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277; Louisville & N. R. Co. v. Davis, 99 Ala. 593, 12 So. 786; Louisville & N. R. Co. v. Binion, 107 Ala. 645, 18 So. 75; Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. 573; Boan v. W. T. Smith Lumber Co. 184 Ala. 535, 63 So. 564; Kansas City Southern R. Co. v. Henrie, 87 Ark. 443, 112 S. W. 967; Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983; Peters v. Southern P. R. Co. 160 Cal. 48, 116 Pac. 400; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701, 13 Am. Neg. Cas. 537; Baltimore & P. R. Co. v. Elliott, 9 App. D. C. 341; Goodwyn v. Central R. Co. 2 Ga. App. 470, 58 S. E. 688; Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Louisville & S. I. Traction Co. v. Snead, 49 Ind. App. 16, 93 N. E. 177; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Reifsnyder v. Chicago, M. & St. P. R. Co. 90 Iowa, 76, 57 N. W. 692; Brownfield v. Chicago, R. I. & P. R. Co. 107 Iowa, 254, 77 N. W. 1038, 5 Am. Neg. Rep. 331; Schroeder v. Chicago & N. W. R. Co. 128 Iowa, 365, 103 N. W. 985; Kansas City, Ft. S. & M. R. Co. v. Blaker, 68 Kan. 244, 64 L.R.A. 81, 75 Pac. 71, 1 Ann. Cas. 883; Stewart v. Louisville & N. R. Co. 136 Ky. 717, 125 S. W. 154; Baltimore Belt R. Co. v. Sattler, 100 Md. 306, 59 Atl. 654, 3 Ann. Cas. 660; Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 Atl. 510; Baltimore & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060; Johnson v. Detroit & M. R. Co. 135 Mich. 353, 97 N. W. 760; Goins v. Chicago, R. I. & P. R. Co. 47 Mo. App. 173; Copenhaver v. Northern P. R. Co. 42 Mont. 453, 113 Pac. 467; Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463; Jamieson v. New York & R. Beach R. Co. 162 N. Y. 630, 57 N. E. 1113; Freemont v. Boston & M. R. Co. 187 N. Y. 571, 80 N. E. 1109; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227, 10 Am. Rep. 729; Missouri, O. & G. R. Co. v. Miller, — Okla. —, 145 Pac. 367; Jones v. Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Galveston, H. & S. A. R. Co. v. Pitts, — Tex. Civ. App. —, 42 S. W. 255; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11; San Antonio & A. Pass. R. Co. v. Beauchamp, 54 Tex. Civ. App. 123, 116 S. W. 1163; St. Louis Southwestern R. Co. v. Neef, — Tex. Civ. App. —, 138 S. W. 1168; Atchison, T. & S. F. R. Co. v. Bryant, — Tex. Civ. App. —, 162 S. W. 400; Fisher v. Waupaca Electric Light & R. Co. 141 Wis. 515, 124 N. W. 1005.

Assistant Attorney General **Underwood** and Mr. **John C. Brooke** submitted the cause for defendant in error:

The act is remedial and should be liberally construed. Its primary object is to promote the public welfare by securing the safety of employees and travelers.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Central of Georgia R. Co. 157 Fed. 894; United States v. Chicago, B. & Q. R. Co. 237 U. S. 410, 413, 59 L. ed. 1023, 1027, 35 Sup. Ct. Rep. 634; United States v. Erie R. Co. 237 U. S. 402, 59 L. ed. 1019, 35 Sup. Ct. Rep. 621.

The facts of this case bring it within both the letter of the statute and the scope of its purpose.

Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518; United States v. Atchison, T. & S. F. R. Co. 220 U. S. 37, 44, 55 L. ed. 361, 363, 31 Sup. Ct. Rep. 362.

The exception relied upon is in the nature of a proviso, and should be construed strictly, and not extended to cover exceptions not clearly within its terms.

United States v. Dickson, 15 Pet. 141, 165, 10 L. ed. 689, 698; Arnold v. United States, 147 U. S. 494, 499, 37 L. ed. 253, 255, 13 Sup. Ct. Rep. 406; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678.

Testimony of expert witnesses to the effect that openings in the buffer of a car

were better than the ordinary grab iron was properly excluded.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. ed. 487; Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520, 32 L. ed. 1035, 9 Sup. Ct. Rep. 601; Montana R. Co. v. Warren, 137 U. S. 348, 34 L. ed. 681, 11 Sup. Ct. Rep. 96; White v. Ballou, 8 Allen, 408; Simmons v. New Bedford, V. & N. S. B. Co. 97 Mass. 361, 93 Am. Dec. 99; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 559, 35 L. ed. 270, 273, 11 Sup. Ct. Rep. 653.

Technical words or phrases in a statute will be understood in a technical sense when the act treats of the subject in relation to which such words are technically employed.

Sutherland, Stat. Constr. 2d ed. § 395.

The precautions taken by a carrier might afford as complete, or indeed fuller, protection to its employees than the means demanded by the law. It none the less follows that imposition of the penalty must be visited upon the carrier guilty of a noncompliance with the act of Congress.

United States v. Philadelphia & R. R. Co. 223 Fed. 217; Virginian R. Co. v. United States, 139 C. C. A. 278, 223 Fed. 748.

Mr. Chief Justice White delivered the opinion of the court:

The United States brought this suit against the railroad company to recover penalties for fifteen alleged violations of the safety appliance act. The violations consisted in hauling in interstate commerce on October 23, 1911, twelve cars which were not provided with hand holds or grab irons at the ends, as required by the act, and three cars which were not equipped with automatic couplers. The answer admitted that at the time named all fifteen cars had been used in interstate commerce, and that three of them were not equipped with automatic couplers, but denied that the other twelve were not provided with hand holds or grab irons, as required by the act, and denied that it had in any respect violated the act, because all fifteen cars were used by the company upon its line of street railway, and were therefore expressly excepted from the operation of the act. A verdict and judgment against [346] the company on all fifteen charges was affirmed by the court below.

We briefly state the material facts. The railroad company operated a street railway system in Spokane, Washington, and several interurban electric lines, one of which extended from Spokane to Cœur d'Alene, Idaho, a distance of about 40 miles. Over this line passenger trains composed of two or more cars were operated, starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits, and thence over its private right of way to Cœur d'Alene. The road was standard gauge, with rails of standard weight, and the passenger trains were made up according to standard railroad rules, with markers to designate the trains, and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations, at which regular stops were made, and express matter and baggage were carried on the passenger trains. The street-car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits, and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. In addition to its passenger trains, the interurban line also operated freight trains, which, however, started from the company's yards and ran directly to Cœur d'Alene, and did not, therefore, enter upon the street railway tracks.

The fifteen cars here in question were passenger cars, and on the day named were used in passenger trains which were run from the station in Spokane to the city limits, and thence over the company's right of way to Cœur d'Alene. Twelve of them (those which it was charged were not equipped at the ends with grab irons or hand holds) [347] were cars regularly used on the interurban lines, and were rounded at the ends and equipped with radial couplers to enable the trains to make sharp turns. As the swinging of these couplers from one side to the other across the ends of the cars would break off grab irons of the type ordinarily used on the ends of cars, they were not used. It was claimed, however, that the requirements of the safety appliance act with respect to hand holds or grab irons were in substance complied with by a different, and what was asserted to be an equivalent, appliance; that is, openings in the top of the buffer or sill extending across the ends of the cars, just above the couplers. To support this claim the company offered testimony of experienced railroad men to the effect "that the hand holds or grab irons in the buffers or sills of such cars were sufficient to protect men who might be required to go between the cars in coupling or otherwise handling them, that they were sufficient to accomplish purposes intended to be accomplished by the provisions of the safety appliance act requiring hand holds

or grab irons to be placed upon the ends of cars used in interstate commerce, and that they were better than those commonly used upon cars engaged in interstate commerce." The United States objected to the introduction of the testimony, and it was excluded on the ground "that it was not a question for expert testimony, but was a matter of common knowledge." During the trial (at whose request it does not appear) the jury were taken to inspect the openings in some of the cars.

The other three cars were large street cars which were regularly used only on the street railway tracks, but which, because of unusually heavy traffic on the day named, were coupled together with link and pin couplers and operated as a train to Cœur d'Alene.

The assignments of error present two questions which we consider separately.

[348] 1. It is urged that error was committed in construing the safety appliance act, since, when correctly interpreted, the fifteen cars in question were expressly excepted from its requirements. To appreciate the contentions based upon this proposition it is necessary to recur to the text of the original act and the amendments thereto. By the act of March 2, 1893 (chap. 196, 27 Stat. at L. 531, Comp Stat. 1913, § 8605), it was made unlawful for any common carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact" (§ 2), or "to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars" (§ 4), with the proviso that the prohibitions of the act should not apply to "trains composed of four-wheel cars or to locomotives used in hauling such trains" (§ 6). By the act of April 1, 1896 (chap. 87, 29 Stat. at L. 85, Comp. Stat. 1913, § 8610) the proviso of § 6 was amended as follows: "That nothing in this act contained shall apply to trains of four-wheel cars or to trains composed of eight-wheel standard logging cars . . . or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs." By the amendment of March 2, 1903 (chap. 976, 32 Stat. at L. 943, Comp. Stat. 1913, § 8613), the provisions of the act relating to automatic couplers, grab irons, etc., were extended and made applicable to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," and to the exceptions from the requirements of the original act and the amendment of 1896 were added "trains, cars, and locomotives . . . which are used upon street railways."

The contention is that as the trains in which the fifteen cars were hauled were operated over the street railway [349] tracks from the station in Spokane to the yards of the company, they were "used upon streets railways," and were hence expressly exempted from the requirements of the act by the amendment of 1903. This, it is said, results from the unambiguous text of the exception contained in that amendment, and is from a twofold point of view made additionally certain by the context of the act which we have quoted. The argument is that the word "used" in the amendment of 1903, excepting cars, etc., "used upon street railways," must be construed as having the same significance as the same word in the amendment making the act applicable to all cars, etc., "used on any railroad engaged in interstate commerce." From this premise it is insisted that as the latter provision has been construed as enlarging the scope of the act by causing it to embrace all cars used on interstate commerce railroads, although at the particular time the cars are employed in intrastate commerce (Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822), it must follow that the word "used" in the street railway excepting clause under consideration must have the same construction, and therefore exclude from the operation of the act all cars used upon street railways, however temporary such use, and however frequent or material may be their use in interstate commerce on other than street railways. Again, it is urged that the judgment of the court below can be affirmed only by construing the word "used" in the exception as meaning exclusively used,—a construction which, it is said, would be wholly unwarranted in view of the amendment of 1896, excepting from the act certain cars, etc., "exclusively used for the transportation of logs," and the demonstration thereby afforded that if such a meaning had been contemplated by Congress in the amendment of 1903, the word "exclusively" would have been employed. But we think the want of merit in the contentions is clear, and the unsoundness of the argument advanced [350] to sustain them apparent. We say this because, while it is conceded that the obvious purpose of Congress in enacting the law and its amendments was to secure

the safety of railroad employees, and that the amendment of 1903 sought to enlarge and make that purpose more complete, yet it is insisted that the exception in the act should receive such a broad construction as would destroy the plain purpose which caused the act to be adopted. But to so treat the act would be in plain disregard of the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment. That the meaning contended for would be in direct conflict with this rule would seem free from doubt, since the inevitable result of sustaining the contention would be to put it in the power of a railroad, by operating a train for a trifling distance over tracks within the exception, to thereby secure the right thereafter to operate such train over long distances without regard to compliance with the safeguards of the statute which otherwise would be controlling. And this reasoning disposes of the contention deduced from the use of the word "exclusively" in the provision excepting cars used on logging railroads, and its absence in the street railway clause, since, on the face of the statute, the object of both provisions was to exempt both the logging and street railway cars from the operation of the act only when used for logging, on the one hand, and on street railways, on the other, and not to exempt them when not so used.

The suggestion is made in argument that in any event the railroad company was not liable for the penalties because of the difficulty of equipping the twelve cars with grab irons which would not interfere with the lateral movement of the radial couplers, and because the other three cars were so constructed that they could not be [351] provided with automatic couplers, and were used only on the one day because of unusually heavy traffic. But this merely asserts that the statute may be violated with impunity if only the railroad finds its provisions onerous, or deems it expedient to do so.

2. It is contended that error was committed in rejecting the testimony of experts offered by the railroad company as to the protection afforded to employees by the openings in the buffers at the ends of the twelve cars. Without stopping to point out the inappositeness of the many authorities cited in support of the contention, we think the court was clearly right in holding that the question was not one for experts, and that the jury, after hearing the testimony and inspecting the openings, were competent to determine the issue, particularly in view of the full and clear instruction given on the subject, concerning which no complaint is made.

Affirmed.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

JOHN F. CUBBINS, Appt.,
v.
MISSISSIPPI RIVER COMMISSION and the Yazoo-Mississippi Delta Levee Board.

(See S. C. Reporter's ed. 351–370.)

Waters — riparian rights — obstructing flow — protection against accidental or extraordinary floods.

1. Riparian owners may, without liability to other riparian owners, protect themselves from the consequences of accidental and extraordinary floods by erecting defensive works along the front of their lands.

[For other cases, see Waters, II. b, in Digest Sup. Ct. 1908.]

Waters — riparian rights — obstructing flow — protection against accidental or extraordinary floods.

2. The entire valley which the Mississippi river traverses may not be regarded as the high-water bed of the river, so that levees may not be erected on its natural banks as a protection against accidental and extraordinary floods without liability to riparian owners whose lands may be damaged by the consequent raising of the flood level.

[For other cases, see Waters, II. b, in Digest Sup. Ct. 1908.]

Waters — riparian rights — obstructing flow — protection against accidental or extraordinary floods.

3. A riparian owner may not complain of the building of levees along the natural banks of the Mississippi river for the purpose of containing the water in times of flood within the river, and preventing it from spreading over the alluvial valley through which the river flows, even though the resulting increase in the volume of the

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NOTE.—On the right of riparian owner as against other riparian owners to confine flood waters within banks of stream—see note to Jefferson v. Hicks, 24 L.R.A.(N.S.) 214.

On liability of municipality for confining flood water within banks of stream to injury of riparian owner—see note to Walters v. Marshalltown, 26 L.R.A.(N.S.) 199.

As to whether casting water upon opposite bank by raising bank of a stream is a taking or damaging of property within constitutional provision—see note to Ft. Worth Improv. Dist. v. Ft. Worth, 48 L.R.A.(N.S.) 994.

waters within the river raises its flood level so as to overflow his land.
[For other cases, see Waters, II. b, in Digest Sup. Ct. 1908.]

Waters — power of Congress — improving navigation — Mississippi levees.

4. The building of levees along the natural banks of the Mississippi river under the authority vested in Congress to improve navigation gives rise to no valid cause for complaint to riparian owners whose lands are overflowed as a consequence of the resulting increase in the volume of the river and the raising of the flood level.
[For other cases, see Waters, I. d, 3, in Digest Sup. Ct. 1908.]

[No. 299.]

Argued April 24, 1916. Decided June 5, 1916.

APPEAL from the District Court of the United States for the Northern District of Mississippi to review a decree dismissing the bill in a suit to enjoin the enlarging, strengthening, repairing, or maintaining of levees along the Mississippi river. Affirmed.

The facts are stated in the opinion.

Mr. Barnette E. Moses argued the cause and filed a brief for appellant:

The right of the appellee levee district for the reclamation of lands, to construct levees along the Mississippi river, a navigable fresh-water stream, which have the effect of obstructing the natural flow, and turning the water upon the lands of an owner on the opposite side of the river, is not a local question, but is one of general law, on which decisions of the state courts are not binding on the Federal courts.

Cario, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129; Hollingsworth v. Tensas Parish, 4 Woods, 280, 17 Fed. 115.

The term "property," in its legal signification, means only the right of the owner to possess, use, enjoy, and dispose of a thing.

Eaton v. Boston, C. & M. R. Co. 51 N. H. 511, 12 Am. Rep. 147.

The land of appellant, in its natural condition, was from 3 to 10 feet above the highest natural flood heights of the Mississippi river, and the highest natural floods did not overflow it nor interfere with the use and occupancy thereof. His property in his land was full, absolute, and complete. His right to use, possess, and enjoy it was unlimited and unqualified. In its natural condition his land constituted neither a part of the bed nor a part of the bank of the river.

Paine Lumber Co. v. United States, 55 Fed. 866; Carpenter v. Hennepin County, 56 Minn. 513, 58 N. W. 295.

Appellant had an entire, absolute, and unqualified property in his land on the eastern side of the Mississippi river, situated above the highest natural flood waters. His land was subject to no easement or servitude in favor of appellees or any other person. It was upland.

Chandler Dunbar Water Power Co. v. United States, 229 U. S. 70, 57 L. ed. 1078, 33 Sup. Ct. Rep. 667.

The distinction between the police power and the right of eminent domain is a question of general jurisdiction, and not one of local law.

Hollingsworth v. Tensas Parish, supra.

The construction of works for the improvement of navigation is an exercise of the power of eminent domain, and the owner of private property taken for that purpose must be compensated.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Arimond v. Green Bay & M. Canal Co. 31 Wis. 316; King v. United States, 59 Fed. 9; Williams v. United States, 104 Fed. 50; Carlson v. St. Louis River Dam & Improv. Co. 73 Minn. 128, 41 L.R.A. 371, 72 Am. St. Rep. 610, 75 N. W. 1044; Velte v. United States, 76 Wis. 278, 45 N. W. 119; Desty, Fed. Const. 322.

The construction of levees for the reclamation of lands from overflow, although referable in a certain sense to the police power, is likewise an exercise of the power of eminent domain, and the owner of property "taken" for such purpose must be compensated therefor.

Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 172, 34 L.R.A. 725, 36 S. W. 1041; Levee Inspectors v. Crittenden, 36 C. C. A. 418, 94 Fed. 613; Hollingsworth v. Tensas Parish, supra; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Hughes v. Mississippi Levee Comrs. — Miss. —, 27 So. 744; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Carson v. St. Francis Levee Dist. 59 Ark. 513, 27 S. W. 590.

The police power, under which, as in the case of Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 172, 34 L.R.A. 725, 36 S. W. 1041, it has several times been attempted, in vain, to justify the taking of private property for levee purposes, without compensation, is founded upon the maxim *Sic utere tuo ut alienum non lædas*, which is very different from the power of eminent domain. The police power extends only to the regulation of the private injurious use of property; and to hold that, by reference to it, the right exists to take the property of another for the purpose of enhancing the value of one's own, would be a subversion of the very maxim upon which the alleged right is admitted to be founded.

Dill. Mun. Corp. ¶ 93; Cooley, Const. Lim. p. 594; Penrice v. Wallis, 37 Miss. 172; Sweet v. Rechel, 159 U. S. 309, 40 L. ed. 196, 16 Sup. Ct. Rep. 43.

The primary purpose for which levees are constructed by the appellee levee districts, along the Mississippi river, is the reclamation of land.

Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Leovy v. United States, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797; Manigault v. Springs, 199 U. S. 473, 50 L. ed. 274, 26 Sup. Ct. Rep. 127; Carson v. St. Francis Levee Dist. 59 Ark. 532, 27 S. W. 590.

An owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood water, in times of ordinary flood, over his side, and cast them upon land on the opposite side.

Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129; Rex v. Trafford, 1 Barn. & Ad. 874, 1 Moore & S. 401, 2 Cromp. & J. 265, 9 L. J. Mag. Cas. 66, 8 Bing. 204; Paine Lumber Co. v. United States, 55 Fed. 854; Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 782; Jones v. United States, 48 Wis. 385, 4 N. W. 519; Velte v. United States, 76 Wis. 278, 45 N. W. 119; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; Gerrish v. Clough, 48 N. H. 9, 2 Am. Rep. 165, 97 Am. Dec. 561; Parker v. Atchison, 58 Kan. 29, 48 Pac. 631; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 238, 36 Am. Rep. 480; Gulf, C. & S. F. R. Co. v. Clark, 2 Ind. Terr. 319, 51 S. W. 962; Barden v. Portage, 79 Wis. 126, 48 N. W. 210; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Sullivan v. Dooley, 31 Tex. Civ. App. 589, 73 S. W. 82; Byrd v. Blessing, 11 Ohio St. 362; Meyers v. St. Louis, 8 Mo. App. 266; Menzies v. Breadalbane, 3 Bligh, N. R. 414; Rix v. Johnson, 5 N. H. 520, 22 Am. Dec. 472; Jones v. Soulard, 24 How. 41, 16 L. ed. 604; Adams v. Frothingham, 3 Mass. 352, 3 Am. Dec. 151; Rex v. Yarborough, 3 Barn. & C. 91, 2 Bligh. N. R. 147, 1 Dow. & C. 178, 5 Bing. 163, 4 Dowl. & R. 91, 27 Revised Rep. 292, 1 Eng. Rul. Cas. 458; Scratton v. Brown, 4 Barn. & C. 485, 6 Dowl. & R. 536, 28 Revised Rep. 344; Gould, Waters, § 209, and notes.

The allegations of appellant's bill show a taking of his property within the constitutional provisions requiring compensation.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Boston & R. Mill Corp. v. Newman, 12 Pick. 467, 23 Am. Dec. 622; Hooker v. New Haven & N. Co. 14 Conn. 146, 36 Am. Dec. 477; King v. United States, 59 Fed. 9; Lowndes v. United States, 105 Fed. 838; United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; High Bridge Lumber Co. v. United States, 16 C. C. A. 460, 37 U. S. App. 234, 69 Fed. 326; Paine Lumber Co. v. United States, 55 Fed. 854; Jones v. United States, 48 Wis. 385, 4 N. W. 519; Velte v. United States, 76 Wis. 278, 45 N. W. 119; United States v. Welch, 217 U. S. 333, 54 L. ed. 787, 28 L.R.A.(N.S.) 385, 30 Sup. Ct. Rep. 527, 19 Ann. Cas. 680; United States v. Grizzard, 219 U. S. 180, 55 L. ed. 165, 31 L.R.A.(N.S.) 1135, 31 Sup. Ct. Rep. 162; United States v. Sewell, 217 U. S. 601, 54 L. ed. 897, 30 Sup. Ct. Rep. 691; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Scranton v. Wheeler, 179 U. S. 141, 153, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48; United States v. Chandler-Dunbar Water Power Co. 229 U. S. 70, 57 L. ed. 1078, 33 Sup. Ct. Rep. 667; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 593, 50 L. ed. 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; McKenzie v. Mississippi & R. River Boom Co. 29 Minn. 288, 13 N. W. 123; Manigault v. Springs, 199 U. S. 485, 50 L. ed. 280, 26 Sup. Ct. Rep. 127; Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742.

The term "natural conditions" is applicable to and should be considered in connection with the ordinary high-water stage of the river, as well as the low-water stage thereof, in determining the questions in the cases at bar.

Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Angell, Watercourses, § 333; Rex v. Trafford, 1 Barn. & Ad. 874, 1 Moore & S. 401, 2 Cromp. & J. 265, 9 L. J. Mag. Cas. 66, 8 Bing. 204; Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129.

The facts in Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, warrant the belief that the injuries might have been held to be remote or consequential because the work of the government, upon which the third ground of complaint was based, operated only to restore natural conditions at the Bougere crevasse, and the injuries to the Jackson land, in so far as this work was concerned, were not the direct and proximate result of the work, but were the direct and proximate result of the operation of natural forces, after the restoration of natural conditions. This intervention of natural forces, as the direct cause of the injuries, made those injuries remote and consequential, in so far as the work of the government was concerned, and there was, therefore, no liability on its part.

Barnes v. Marshall, 68 Cal. 569, 10 Pac. 115; Bedford v. United States, 192 U. S. 225, 48 L. ed. 417, 24 Sup. Ct. Rep. 238; Gulf, C. & S. F. R. Co. v. Clark, 41 C. C. A. 597, 101 Fed. 678.

The facts in the Jackson Case warrant the belief that the injuries might have been held to be remote or consequential because the injury alleged in the third ground of complaint amounted to a mere increase in pressure on the Jackson levee, and the destruction could have been prevented by building the Jackson levee higher. The government was not liable, upon this theory, because the failure of the Jacksons to build their levee higher and thus prevent the injury was the direct and proximate intervening cause of the injury, and the work of the government was only a remote or consequential cause, in fact.

Manigault v. Springs, 199 U. S. 485, 50 L. ed. 280, 26 Sup. Ct. Rep. 127.

The Jacksons were the first to disturb natural conditions by building a levee, and they could not recover when a levee was built by others on the opposite bank, even though the Jackson levee and land were thereby destroyed.

Avery v. Empire Woolen Co. 82 N. Y. 582; Menzies v. Breadalbane, 3 Bligh, N. R. 421; Wilhelm v. Burleyson, 106 N. C. 381, 11 S. E. 590; Davis v. Munro, 66 Mich. 485, 33 N. W. 408; Harding v. Whitney, 40 Ind. 379; 30 Am. & Eng. Enc. Law, 2d ed. p. 387.

The term "consequential damages" has been used in applying the comprehensive rule stated by counsel, to designate injuries which, in fact, did not amount to a material impairment of the value of land.

Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

The permanency of the injury has been expressly treated as one of the determining factors in considering this question.

Hollingsworth v. Tensas Parish, 4 Woods, 280, 17 Fed. 115; Cumberland & O. Canal Corp. v. Hitchings, 57 Me. 146.

The term "consequential damages" has also been used to designate those injuries which, in fact, did not result, directly and proximately, from the work of the defendants.

Bedford v. United States, 192 U. S. 225, 48 L. ed. 417, 24 Sup. Ct. Rep. 238.

Its application, in any particular case, however, has always been determined by the facts in that case; and the phrase has been used broadly to designate all those injuries which, in fact, were not such as to amount to a "taking" within the rule before stated. The use of this term to designate, as a matter of law, injuries resulting from work done by the government, for which immunity from liability was claimed, regardless of the facts as to proximate cause, or the nature of the injury, has been expressly repudiated by this court.

United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; Scratton v. Brown, 4 Barn. & C. 485, 6 Dowl. & R. 536, 28 Revised Rep. 344.

No provision for compensation is made by the state acts for the land of appellant; and such provision is an indispensable requisite to their constitutionality.

Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; Head v. Amoskeag Mfg. Co. 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460; Cherokee Nation v. Southern Kansas R. Co. 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; Benedict v. New York, 39 C. C. A. 290, 98 Fed. 789; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Ex parte Martin, 13 Ark. 198; Bloodgood v. Mohawk & H. River R. Co. 18 Wend. 9, 31 Am. Dec. 313; Meriwether v. St. Francis Levee Dist. 91 C. C. A. 285, 165 Fed. 317.

The constitutional provision requiring compensation is merely declaratory of the common law, and the right to compensation was recognized before the Constitution.

Staton v. Norfolk & C. R. Co. 111 N. C. 278, 17 L.R.A. 839, 16 S. E. 181; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Withers v. Buckley, 20 How. 84, 15 L. ed. 816; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184.

Taking private property without compensation is a deprivation thereof without due process of law.

Cooley, Const. Lim. p. 357; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557; Scott v. Toledo, 1 L.R.A. 688, 36 Fed. 385.

Solicitor General Davis argued the cause, and, with Mr. Robert Szold, filed a brief for the Mississippi River Commission:

Complainant is entitled to no recovery at law, because his damages are remote and consequential. The authorities are conclusive.

Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363,

33 Sup. Ct. Rep. 1011; Hughes v. United States, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019.

Mr. Gerald FitzGerald argued the cause and filed a brief for the Yazoo-Mississippi Delta Levee Board:

The principle of self-defense applies to persons, commonwealths, and nations.

Rex v. Sussex County, 8 Barn. & C. 355; Bowditch v. Boston, 101 U. S. 16, 25 L. ed. 980; Hoard v. Des Moines, 62 Iowa, 326, 17 N. W. 527; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Cairo & V. R. Co. v. Stevens, 73 Ind. 283, 38 Am. Rep. 139; Dubose v. Levee Comrs. 11 La. Ann. 165; Bass v. State, 34 La. Ann. 494; Farnham, Waters, § 357, p. 1340; Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; Lamb v. Reclamation Dist. 73 Cal. 135, 2 Am. St. Rep. 775, 14 Pac. 625; McCoy v. Plumb Bayou Levee Dist. 95 Ark. 345, 29 L.R.A.(N.S.) 396, 129 S. W. 1097.

When progress and development, not in the exercise of eminent domain, but in an effort to combat the dangerous and troublesome "Father of Waters" from destroying life and property, causes consequential injuries to one's property, he can claim no compensation therefor.

Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Hughes v. United States, 230 U. S. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019; Gibson v. United States, 166 U. S. 272, 41 L. ed. 1000, 17 Sup. Ct. Rep. 578; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

Mr. Chief Justice White delivered the opinion of the court:

The conditions out of which this controversy arises are substantially the same as those which were relied upon in Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011. We therefore here make a briefer statement of the topography of the country with which the case is concerned, and of the other general conditions involved, than we would do if such were not the case, since, if a fuller statement as to any particular aspect is desired, it can be readily found by a reference to the report of that case.

The complainant, as the owner of a piece of land on the east bank of the Mississippi river, adjacent to Memphis,[359] Tennessee, on his own behalf, and on behalf of others owning similar land in the same locality, commenced this suit against the Mississippi River Commission and fifteen local state levee boards operating on the river between Cape Girardeau, Missouri, and the mouth of the river at the Gulf of Mexico, three of these boards being organized under the laws of Missouri, four under the law of Arkansas, one under that of Tennessee, one under the law of Mississippi, and six under the law of Louisiana.

It was alleged that in flood seasons, when the water in the Mississippi river rose above its natural low-water banks, such water would flow out and over the vast basins in which the alluvial valley between Cape Girardeau and the Gulf formed itself, and would then, either by percolation gradually flow back into the river, or be carried over and through the basins by the streams flowing through them into the Gulf of Mexico, where such streams emptied. It was further alleged that the land of the complainant, when the river in the flood periods was thus permitted to discharge its waters, was so situated that it was beyond the reach of overflow from the river. It was then alleged that in 1883 the Mississippi River Commission, acting under the authority of Congress, had devised a plan known as the Eads Plan, by which it was contemplated that on both banks of the river, except at certain places, which were stated, a line of embankment or levees would be built which, in times of high water or flood, would hold the water relatively within the lines of the low-water banks, thus improving navigation by causing the water to deepen the bed, and saving the country behind the levees from inundation. It was averred that, to further this plan, the various state levee boards, which were made defendants, were organized, and that all of them, within the scope of their power and the limits of their financial ability, had aided in carrying on this work, and that, as the result of their work and of the levees built by the Mississippi [360] River Commission, it had come to pass that from Cairo to the Gulf, a distance of about 1,050 miles, on both sides of the river, except at points which were stated, there was a continuous line of levee restraining the water from flowing out into the basins, as above stated, and which, in many instances, cut off the outlets connecting the streams which drained the basins and ultimately carried off the water to the Gulf. It was charged that this line of levees as a whole had been virtually adopted by the Mississippi River Commission, which body had assumed control of the whole subject, and that such body and all the state agencies co-operating were engaged in strengthening, elevating, reviewing, repairing, and increasing

the lines of levee so as to more effectually accomplish the purpose in view.

It was charged "that the effect of the closing by the defendants of the natural outlets along the said river, and the confining of the flood waters between the levee system as a whole, is to obstruct the natural high-water flow of the water of said river in and along its natural bed for its entire length, thereby raising the level of the water to such an extent that said flood waters, within the last five years, have attained a sufficient height to flow over complainant's land, and when there is now a high-water stage in said river, the waters of said river accumulate, flow over, and remain standing upon and over said lands of complainant to a depth of from 4 to 8 feet, so that complainant is now being interrupted in the profitable use, occupation, and enjoyment of his said land." And it was further alleged that "said land is being covered with superinduced additions of said, silt, and gravel, now from 6 inches to 3 feet in depth; the houses and fences thereon are being washed away, rendering the said land and the houses thereon unfit for occupancy, driving away the tenants, doing irreparable harm and injury to said land, impairing its usefulness, [361] causing the practical destruction thereof, and destroying its market value."

It was averred that to obstruct the river as alleged was a violation of the legal rights of the complainant, since he was entitled to the natural flow of the river within its natural high or low-water bed, free from interference by the acts of the defendants. Averring that no proceedings had been taken to expropriate the land, and that no offer to pay for the same had been made, and that the acts complained of constituted a taking without compensation, in violation of due process of law under the Constitution of the United States, and that there was no adequate remedy at law, the prayer was for an injunction against the Mississippi River Commission and all its officers, employees, agents, and contractors, wherever found, and against all the local levee boards and their officers, employees, agents, and contractors, perpetually prohibiting them from further building any levees, from enlarging, strengthening, repairing, or doing any act to maintain the levees already built, and for general relief.

The bill was amended by alleging that the overflow of complainant's land, as averred, instead of having happened within five years, had occurred within one year, and the original prayer was added to by asking that if it was found that the injunction prayed could not be granted, the case be transferred from the equity to the law side, and be converted into a law action to recover from the Yazoo-Mississippi Delta Levee Board, the local Mississippi board which alone of the defendants had been served, the sum of $500,000 as the value of the plantation alleged to have been wrongfully taken.

A motion by that corporation was made to dismiss the bill on the ground that it stated no basis for relief, and in any event it alleged no ground for equitable jurisdiction, since at best, upon the theory that a cause of action was [362]stated, there was plainly an adequate remedy at law. On the hearing the motion to dismiss was joined in by the Mississippi River Commission, and the case is here as the result of the action of the court below in dismissing the bill for want of equity.

At the threshold we put out of view as primarily negligible contentions as to whether, in any event, in view of the vast public interests which would have been detrimentally affected, the injunction prayed could have been granted, and whether the suit should not have been dismissed so far as the Mississippi River Commission was concerned, on the ground that it was really a suit against the United States without its consent, and not a mere action against individuals acting as officers, to prevent them from violating the rights of the complainant by taking his property without compensation. We say these contentions are negligible because underlying them all is the fundamental issue whether, under the averments of the bill, there was any right to relief whatever, and to that decisive question we come. Its solution involves deciding whether the complainant, as an owner of land fronting on the river, had a right to complain of the building of levees along the banks of the river for the purpose of containing the water in times of flood within the river, and preventing it from spreading out from the river into and over the alluvial valley through which the river flows to its destination in the Gulf, even although it resulted that the effect of thus keeping the water within the river was, by increasing its volume, to so raise its level as to cause it to overflow the complainant's land.

While we are of the opinion that in substance a negative answer to the proposition must follow from applying to this case the doctrines which were upheld in Jackson v. United States, 230 U. S. 1, 57 L. ed. 1363, 33 Sup. Ct. Rep. 1011, and Hughes v. United States, 230 U. S. p. 24, 57 L. ed. 1374, 46 L.R.A.(N.S.) 624, 33 Sup. Ct. Rep. 1019, as the unsoundness of the distinctions attempted in the argument to be drawn between those cases and this, [363] and the decisive application of those cases to this, will be more readily appreciated by a recurrence to the legal

principles by which the controversy is to be governed, we address ourselves to that subject, looking at it in a twofold aspect: First, with reference to the rights and obligations of the landowners and the power of the state to deal with the subject; and second, with reference to the power of United States to erect levees to confine the water for the purpose of improving navigation, as superimposed on the right of the landowners or that of the state authorities to construct such levees, if such right obtains, and if not, as independently existing in virtue of the dominant power to improve navigation vested in Congress under the Constitution.

1. Without seeking to state or embrace the whole field of the Roman law concerning the flow of water, whether surface or subterranean, or to trace the general differences between that law, if any, as it existed in the ancient law of the continent of Europe, whether customary or written, or as it prevailed in France prior to, and now exists in, the Code Napoleon, one thing may be taken as beyond dispute, that not only under the Roman law, but under all the others, the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors, in consequence of their right to enjoy the same, were protected from undue interference or burden created by obstructions to the flow, by deflections in its course, or any other act limiting the right to enjoy the flow, or causing additional burdens by changing it. But while this was universally true, a limitation to the rule was also universally recognized by which individuals, in case of accidental or extraordinary floods, were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the [364] accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection.

Demolombe after commenting upon article 640 of the Code Napoleon generally dealing with the servitudes arising from the flow of water, and pointing out that, under the Roman law as well as under the ancient French law and the Code Napoleon, it was the duty of proprietors whose lands bordered upon or were traversed by rivers to permit the water of such rivers to flow their natural course unimpeded, and quoting the Roman law, *fluminis naturalem cursum non avertere* (L. 1, Cod. de Alluvionibus), additionally states that under both the Roman and ancient law and under the Code Napoleon such proprietors were bound "to undertake to do no work the result of which would be to change the direction of the stream or enlarge its bed, or to injure in any manner other proprietors whose lands border upon or are traversed by the stream" (Demolombe, vol. 11, No. 30, p. 36). But the author at once proceeds to add that the principles thus stated in no way serve to prevent or to limit the right of proprietors whose lands border on or are traversed by rivers "from guarantying themselves against damage by defensive works, constructed either upon the border of the rivers or in the interior of their property, against either the permanent and insensible action of the rivers or streams, or particularly against the damage caused by the accidental or extraordinary overflow of their banks; *Ripam suam adversus rapidi amnis impetum munire prohibitum non est* (L. 1, Cod. de Alluv.)." And proceeding, the author states that this right of the proprietors undoubtedly exists "even when the effect of the dikes or other works done will be, as is nearly always the case, to render the waters of the river more hostile and damaging to other properties, the owners of which would have no cause of complaint because each one is entitled to do the same in his own behalf, [365] as the right of preservation and of legitimate defense is reciprocal, since it is impossible to conceive that the law would impose upon the proprietors bordering upon streams an obligation to suffer their property to be devoured [by accidental or extraordinary overflows] without the power on their part to do anything to protect themselves against the disaster." Proceeding to elucidate and state the limitations by which the right thus universally recognized is safeguarded, the author says: "It is necessary, however, that the works constructed [for the purposes stated] do not encroach upon the natural bed of the water courses, that they should be of course constructed in conformity to the police regulations, if any exist, and finally, that they are in fact constructed by those who build them for the defense of their own property, because constructions would not be tolerated which had been erected by a proprietor upon his own land without any necessity whatever for his own protection, but with the only and disloyal purpose of injuring the property of others." Demolombe further states: "What I have just said of streams and rivers is equally applicable to accidental torrents of water, which, like avalanches, may sometimes precipitate themselves upon certain properties. Such a case is likewise one of *vis major*, against which each one has a right, by the natural law, on his own behalf to seek to protect himself as best he may,—a right which, as well said by the court of Aix, is like that

which obtains to resist the incursion of an enemy, without being preoccupied as to what may be the result or the wrong suffered by a neighbor who may not have had the foresight to successfully avoid the disaster." The author then proceeds: "These principles, which are sustained both by reason and by conceptions of equity, have been for all time recognized both in the Roman law and in our ancient French jurisprudence. They are to-day supported by the unanimous accord of the decided cases and of the opinions of authors. (Comp. L. 2, [366] § 9, ff. *de aqua et aquæ;* L. unic., ff. *de ripa munienda;* L. 1, ff. *ne quid in flum. publ.;* Coepolla, tract. 2, cap. XXXVIII. n° 2; Troncon, sur l'art. 225 de la cout. de Paris; Henrys, liv. IV., title II., quaest. 75 Domat, Lois civiles, liv. II., title VIII., sec. III., n° 9; Aix, 19 Mai, 1813, Raousset, Sirey, 1814, II., 9; Duranton, t. V., n° 162: Pardessus, t. I, n° 92; Garnier, t. III., n° 677; Daviel, t. I., nos 384-386, et t. II., nos 697, 698; Taulier, t. II., p. 361.)

See Mailhot v. Pugh, 30 La. Ann. 1359, where some of the authors referred to by Demolombe and others are quoted, and one or more of the adjudged French cases enforcing the limitation are stated and commented upon.

That the general right to an unrestrained flow of rivers and streams, and the duty not to unduly deflect or change the same by works constructed for individual benefit, as qualified by the limitation as to accidental and extraordinary floods which prevailed in Rome and on the Continent, and which to-day govern in France, as stated by Demolombe, also obtained in Scotland, was recognized in 1741, in the case of Farquharson v. Farquharson, Morison's Dict. 12,779. And the character of the limitation of the rule is well illustrated by Menzies v. Breadalbane, 3 Bligh, N. R. 414 (H. L.), where it was held that it did not apply to a case where a structure was erected in the established high-water channel of a stream. It is apparent also from the opinions in Nield v. London & N. W. R. Co. L. R. 10 Exch. 4, 44 L. J. Exch. N. S. 15, 23 Week. Rep. 60, 23 Eng. Rul. Cas. 756, and the statement found in Coulson on the Law of Waters, 3d. ed. pages 177 et seq., that the limitation as to accidental and extraordinary overflows likewise exists in England.

In this country it is also certain, without going into a review of decided cases, that the limitation is recognized, although it is true to say that much contrariety and confusion exist in the adjudged cases as to when it is applicable, some cases extending the rule so far as to virtually render the limitation inoperative, others extending the [367] limitation to such a degree as really to cause it to abrogate the rule itself. But into these differences and contrarieties it is not at all necessary to enter, since there is no decided case, whatever may be the difference as to the application of the limitation, holding that it does not exist, and when in fact the very statement of the general rule requires it to be determined whether that rule as correctly stated would include situations which the limitation, if recognized, would exclude. We place in the margin a few of the many adjudged cases from which the situation just stated will be made manifest.[1]

Were the overflows in this case accidental and extraordinary? is, then, the proposition to which the case reduces itself. That the volume of water from the vast watershed which the Mississippi river drains, and which, by means of percolation and tributaries, reaches that river, is susceptible now and again of being so simultaneously drained off from the watershed into the river, and thus so vastly increasing the amount of water to be carried off in a given time as to cause the overflow of the valley which the river traverses, and to thereby endanger the enormous interests concerned, is too well known to require anything but statement. But that the possibilities of such a result do not, when such overflows occur, cause them to be not accidental, is, to say the least, persuasively established by the ruling in Viterbo v. Friedlander, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962. And leaving aside this view, it is obvious from the situation and the causes which, in the nature of things, may accidentally bring about the emptying into the river at one and the same time of the volumes of water from all the vast sources of supply which drain the expansive watershed [368] into the river, in the absence of which accidental unison there could be no flood, that the accidental character of the unity of the conditions upon which the flood depends serves to affix that character to the result,—the flood itself. But assuming, as we think it must be assumed, that the words "accidental" and "extraordinary" are to be taken as relating to the river,—that is, as alone embracing conditions not usually there occurring, and not ordinary to the stream in its usual condition, having regard to the

[1] Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Cairo, V. & G. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 394, 27 Am. St. Rep. 246, 13 S. E. 489; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Mailhot v. Pugh, 30 La. Ann. 1359.

flow through its natural bed, whether in high or low water,—that view would be here irrelevant, since there is no suggestion of any bed of the river in high or low water except the space between the natural banks along which the levees were built, unless the whole valley be considered as such bed. Indeed, from the face of the bill it is apparent that the rights relied upon were assumed to exist upon the theory that the valley through which the river travels, in all its length and vast expanse, with its great population, its farms, its villages, its towns, its cities, its schools, its colleges, its universities, its manufactories, its network of railroads,—some of them transcontinental,—are virtually to be considered from a legal point of view as constituting merely the high-water bed of the river, and therefore subject, without any power to protect, to be submitted to the destruction resulting from the overflow by the river of its natural banks. In fact, the nature of the assumption upon which the argument rests, is shown by the contention that the building of the levees under the circumstances disclosed was a work, not of preservation, but of reclamation; that is, a work not to keep the water within the bed of the river, for the purpose of preventing destruction to the valley lying beyond its bed and banks, but to reclaim all the vast area of the valley from the peril to which it was subjected by being situated in the high-water bed of the river. If it were necessary to say anything more to demonstrate the unsoundness of this view, [369] it would suffice to point out that the assumption is wholly irreconcilable with the settlement and development of the valley of the river, that it is at war with the action of all the state governments having authority over the territory, and is a complete denial of the legislative reasons which necessarily were involved in the action of Congress creating the Mississippi River Commission, and appropriating millions of dollars to improve the river by building levees along the banks in order to confine the waters of the river within its natural banks, and, by increasing the volume of water, to improve the navigable capacity of the river.

2. Although, in view of the conclusion just stated, it is unnecessary to refer to the power of Congress to build the levees under the paramount authority vested in it to improve the navigation of the river, we cannot fail to point out the complete demonstration which that power affords of all want of legal responsibility to the complainant for the building of the levees complained of. In this connection it is to be observed that the complete application of this power is, in the reason of things, admitted by the erroneous assumption upon which alone the arguments proceed in seeking to avoid the effect of the well-defined limitation as to accidental and extraordinary floods; that is, the erroneous contention as to the high-water bed of the river, which we have disposed of. We say this, since it is apparent that if the property in the valley were to be treated as in the bed of the river, that would be true also of the property of the complainant, hence, causing it to come to pass that, as to such property, so situated, there would be no possible lawful ground of complaint to arise from the action of Congress in exerting its lawful power over the bed of the river for the improvement of navigation.

These conclusions dispose of the case without the necessity of recurring, as we proposed at the outset to do, [370] to the rulings in the Jackson and Hughes Case, but, in the light of the principles we have stated, we direct attention to the fact that the attempt to distinguish the Jackson Case upon the ground that relief was there denied because the proprietor on one side of the river, who complained of the increase of the flood level and injury to his land from the levees erected on the other side, or from the levee system as a whole, had himself erected a levee to protect his property, and therefore was estopped, is without foundation. It is plain when the context of the opinion in the Jackson Case is considered, that the denial of the right to relief in that case was rested not upon the conception that a right existing on one side of the river was destroyed by estoppel, and a right not existing on the other was conferred by the same principle, but upon the broad ground that the rights of both owners on either side embraced the authority, without giving rise to legal injury to the other, to protect themselves from the harm to result from the accidental and extraordinary floods occurring in the river, by building levees, if they so desired. Additionally, when the principle laid down in the Jackson Case is illustrated by the ruling which was made in the Hughes Case, it becomes apparent that the contention here urged as to the identity between the great valley and the flood bed of the river was adversely disposed of, since under no view could the ruling in the Hughes Case have been made except upon the theory that the bank of the river was where it was found, and did not extend over a vast and imaginary area.

Affirmed.

Mr. Justice Pitney concurs in the result.

[371] ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Plff. in Err.,
v.
J. R. HAROLD.

(See S. C. Reporter's ed. 371-379.)

Commerce — local transportation as part of interstate shipment — continuous movement.

1. A carload of grain originally shipped from Yanka, Nebraska, consigned to Topeka, Kansas, to the order of the consignors, with a direction to notify, "care of Santa Fe for shipment," a grain company residing and doing business at Kansas City, Missouri, to which the bill of lading was indorsed with draft for the purchase price attached, must be deemed to have moved in a continuous interstate commerce shipment from the date of its departure from Yanka to the termination of the transit over the Santa Fe Railroad from Topeka, Kansas, to Elk Falls, Kansas, under an exchange bill of lading which the grain company had obtained from the agent of the Santa Fe at Kansas City, consigning the identical car then still in transit to their own order at Elk Falls, and, therefore, the delivery of the car to the Santa Fe at Topeka for further movement was not a new and distinct shipment in intrastate commerce.

[For other cases, see Commerce, I. b, in Digest Sup. Ct. 1908.]

Error to state court — decision of Federal question.

2. A holding that facts which were otherwise pertinent and controlling in a suit against a carrier for delay in the delivery of an interstate shipment, in which the carrier relied upon certain conditions in the interstate bill of lading as a defense, must be put out of view because a bill of lading in the hands of an innocent purchaser is in fact negotiable paper, giving greater rights to him than could be enjoyed by the shipper or by the one from whom he had acquired the bill, amounts to a decision of a Federal question which will sustain a writ of error from the Federal Supreme Court to a state court.

[For other cases, see Appeal and Error, 1393-1430, in Digest Sup. Ct. 1908.]

Commerce — exclusiveness of Federal regulation — carrier's liability to innocent holder of interstate bill of lading.

3. Congress has so asserted, by the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592), § 7, to the act of February 4, 1887 (24 Stat. at L. 379, chap. 104), § 20, its power over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder, as to preclude the application to an interstate commerce shipment of a local and exceptional rule of law which invests the innocent holder of a bill of lading with rights not available to the shipper, such as the right to rely on erroneous recitals in the bill of lading as to the date of the carrier's receipt of the goods.

[For other cases, see Carriers, II. b, in Digest Sup. Ct. 1908.]

[No. 347.]

Argued May 2, 1916. Decided June 5, 1916.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Sedgwick County, in that state, in favor of the owner of a bill of lading in an action to recover from a carrier for delay in delivery. Reversed and remanded for further proceedings.

See same case below, 93 Kan. 456, 144 Pac. 823.

The facts are stated in the opinion.

Mr. Alfred A. Scott argued the cause, and, with Messrs. Robert Dunlap, William R. Smith, and Gardiner Lathrop, filed a brief for plaintiff in error:

The case at bar is analogous to an action for personal injuries brought by an employee of a railway company, where it is held that if the evidence shows that the employee was engaged in interstate commerce at the time of his injury, the Federal law controls, to the exclusion of all state laws, notwithstanding no reference be made to the Federal law in the pleadings; that the state court is bound to take the same notice of a Federal law as of a state law, and be governed accordingly.

Toledo, St. L. & W. R. Co. v. Slavin, 236

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to local transportation of goods as part of interstate or foreign shipment—see notes to Missouri P. R. Co. v. Sherwood T. & Co. 17 L.R.A. 643, and Gulf, C. & S. F. R. Co. v. Texas, 51 L. ed. U. S. 540.

As to when the transit of goods commenced in another state may be deemed to have been terminated so as to subject the goods to local taxation. General Oil Co. v. Crain, 52 L. ed. U. S. 755.

U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306.

This action is in its essence a Federal case, and not simply a case involving a Federal question,—an important distinction which has been recognized by this court.

Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62.

The shipment in question was interstate.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 527, 55 L. ed. 310, 320, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 109, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 128, 129, 57 L. ed. 442, 449, 450, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Baer Bros. Mercantile Co. v. Denver & R. G. R. Co. 233 U. S. 479, 58 L. ed. 1055, 34 Sup. Ct. Rep. 641; Kirby v. Union P. R. Co. 94 Kan. 485, L.R.A.—, —, 146 Pac. 1183.

The shipment being interstate, the meaning and effect of the bill of lading and the rights of an assignee thereunder must be interpreted and determined by Federal law, rules, and decisions, and not by the laws, rules, decisions, or policies of the state of Kansas.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; St. Louis & S. F. R. Co. v. Woodruff Mills, 105 Miss. 214, 62 So. 171; Southern R. Co. v. North State Cotton Co. 107 Miss. 71, 64 So. 965.

Under the Federal rule the plaintiff in error was not bound by the recitals in the bill of lading, but could show the actual facts as to the receipt of the goods.

Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 113; Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990.

Mr. Ray Campbell argued the cause, and, with Messrs. W. A. Ayers and J. Graham Campbell, filed a brief for defendant in error:

That a judgment of the state supreme court may be reviewed by this court, it must affirmatively appear from the record that a Federal right, privilege, or immunity was specially set up and claimed in the trial court.

Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739; El Paso & S. W. R. Co. v. Eichel, 226 U. S. 590, 57 L. ed. 369, 33 Sup. Ct. Rep. 179; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, 32 Sup. Ct. Rep. 790; Cincinnati, N. O. & T. P. R. Co. v. Slade, 216 U. S. 78, 54 L. ed. 390, 30 Sup. Ct. Rep. 230; Waters Pierce-Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Louisville & N. R. Co. v. Smith, H. & Co. 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

Even though a Federal question had been presented to the state supreme court in the briefs of the railway company, which does not show from the record, the question was not specially set up or claimed.

Zadig v. Baldwin, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639.

The Kansas supreme court held that by the laws and decisions of Kansas, Harold was entitled to certain relief from the railway company. Before such decision of the state court is reviewable here, it must affirmatively appear that, in according such relief to defendant in error, a Federal right was not only claimed by plaintiff in error, but that it was necessarily denied it by the decision complained of. It must be manifest, from the decision of the state court, that its judgment could not have been rendered without denying a claimed Federal right.

Atlantic Coast Line R. Co. v. Glenn, 239 U. S. 388, ante, 344, 36 Sup. Ct. Rep. 154; Mellon Co. v. McCafferty, 239 U. S. 134, ante, 181, 36 Sup. Ct. Rep. 94; Chicago, B. & Q. R. Co. v. Railroad Commission, 237 U. S. 220, 59 L. ed. 926, P.U.R.1915C, 309, 35 Sup. Ct. Rep. 560; Western U. Teleg. Co. v. Wilson, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; Vandalia R. Co. v. Indiana, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30.

A Federal question must be set up and decided by the state court of last resort, prior to the filing of a petition for rehearing, in order that such decision may be reviewable by this court.

St. Louis & S. F. R Co. v. Shepherd, 240 U. S. 240, ante, 622, 36 Sup. Ct. Rep. 274; Louisville & N. R. Co. v. Woodford, 234 U. S. 46, 58 L. ed. 1202, 34 Sup. Ct. Rep. 739; Consolidated Turnp. Co. v. Norfolk & O. P.

R. Co. 228 U. S. 326, 57 L. ed. 857, 33 Sup. Ct. Rep. 510; Forbes v. State Council, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 53 L. ed. 431, 29 Sup. Ct. Rep. 227; McCorquodale v. Texas, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146.

Not only does the record fail to show that the shipment was interstate, but it shows conclusively that it was intrastate.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360; Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co. 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co. 229 U. S. 336, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 59 L. ed. 350, L.R.A. 1915F, 792, P.U.R.1915C, 231, 35 Sup. Ct. Rep. 158; Pennsylvania R. Co. v. Mitchell Coal & Coke Co. 238 U. S. 251, 59 L. ed. 1293, 35 Sup. Ct. Rep. 787.

It was the common-law duty of the railway company to issue a correct bill of lading, and concerning such common-law liability Congress has not legislated.

Eastern R. Co. v. Littlefield, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489.

Mr. Chief Justice White delivered the opinion of the court:

We are of the opinion that a motion to dismiss is without merit, but the reasons which lead us to that conclusion will be more clearly appreciated after we have made a statement of the case. Until that is done we hence postpone the subject.

J. Bell & Son, having sold a carload of bulk corn to the C. V. Fisher Grain Company, residing and doing business at Kansas City, Missouri, on September 21, 1910, shipped the same from Yanka, Nebraska, over the Union Pacific Railroad. The bill of lading identified the car as L. W. No. 33,791, containing 100,420 pounds of corn, and the same was consigned to Topeka, Kansas, to the order of the consignors (Bell & Son), with a direction, however, in the bill of lading, to "notify C. V. Fisher Grain Company, care of Santa Fe, for shipment." A draft for the purchase price of the corn was mailed to Kansas City, Missouri, accompanied with the bill of lading, indorsed over to the order of the Fisher Grain Company, and on the presentation of this draft to the Grain Company at Kansas City, Missouri, while the car was yet in transit, it [373] paid the same and became the possessor and owner of the bill of lading. On the 24th of September the Grain Company surrendered to an agent of the Santa Fe at Kansas City, Missouri, the Yanka bill of lading which it had thus acquired, and took in exchange for it another bill, consigning the identical car to their own order at Elk Falls, Kansas, a place on the Santa Fe road, with a direction, however, to notify at Elk Falls the Nevling Elevator Company. This bill of lading was dated the same day as the original bill for which it was exchanged; that is, September 21st, although it was in fact only signed and issued on the 24th of that month; and although on its face it treated the car as being at Kansas City, in reality the car was in transit from Yanka, not having yet reached Topeka.

Harold, the defendant in error, a grain dealer at Wichita, Kansas, who had sold on September 15th a carload of corn to Shoe & Jackson at Elk Falls, to be shipped or delivered in a stated number of days, bought the carload of corn described by the bill of lading issued at Kansas City, and, paying a draft for the purchase price drawn by Fisher Grain Company, with the bill annexed, he became the owner of the bill, and directed that delivery of the corn be made to Shoe & Jackson. The car from Yanka had then not yet been delivered to the Santa Fe at Topeka, having reached that point only on the 28th of September, on which day it was offered to the Santa Fe for carriage and delivery at Elk Falls. Finding that the car was in bad order, the delivery was declined, and the car turned back to the Union Pacific. That road, discovering that the damage was such that the car could not be repaired while it was loaded, sent it to an elevator, transferred the grain to another car, S. P. No. 85,721, and turned that car over to the Santa Fe. The new car, however, did not contain the exact quantity of grain originally shipped from Yanka, as one of the defects in the old car was a leaky door, and [374] several hundred pounds of the corn had been lost in transit. The car was promptly carried by the Santa Fe to Elk Falls and offered for delivery, but as the period for the fulfilment by Harold of his contract with Shoe & Jackson had elapsed, and there had been a decline in the market price of corn, the latter refused to take the car. Thereupon this suit against the Santa Fe was com-

menced by Harold to recover the loss which he had suffered by the alleged unreasonable delay in delivery at Elk Falls, consisting of three items: first, the difference between the price at which the corn had been contracted to be sold to Shoe & Jackson and the market price at the date the car was offered for delivery; second, the amount of the freight paid on the corn which had been lost; and third, a reasonable attorney's fee which it was alleged a statute of the state of Kansas authorized to be recovered in case of delay of a carrier in the delivery of grain.

In its defense the company alleged the shipment over the Union Pacific from Yanka, averred that the corn was received by it at Topeka in order to complete the transportation to Elk Falls, and charged that, by a condition of the bill of lading issued at Kansas City, as the delay had been wholly caused by the Union Pacific, there was no liability on the part of the Santa Fe, and that, besides, that company was not liable, because of a failure to give a notice of claim in compliance with a condition which was also contained in the Kansas City bill of lading. There was judgment in the trial court for the plaintiff, and the judgment of the court below, affirming such action, is the one now under review.

The court, after referring to the bill of lading sued on (the one issued at Kansas City), and after stating that "the shipment intended to be described in the bill of lading originated at Yanka, Nebraska, on the Union Pacific Railway," proceeded to state the facts which we have recapitulated, and which had been admitted in [375] evidence without objection. In substance conceding that if the facts stated were made the test of the rights of the parties the judgment under review was wrong, because there had been, as a matter of fact, no unreasonable delay in delivering the corn by the Santa Fe, it was held that the judgment rendered was right, since the plaintiff below, as the purchaser of a bill of lading for value, had a right to rely upon the face of the bill, to treat the corn as having been received by the carrier at Kansas City on the date the bill of lading was issued, and therefore to recover for the unreasonable delay in delivery which necessarily would result from excluding from view the facts concerning the movement of the corn from Yanka, Nebraska, and the date of its delivery at Topeka to the Santa Fe. The essence of the opinion was aptly summed up in the syllabus which preceded it, drawn by the court, which is as follows:

"1. The rule which invests the innocent holder of a bill of lading with rights not available to the shipper, declared in Wichita Sav. Bank v. Atchison, T. & S. F. R. Co. 20 Kan. 519; Missouri, K. & T. R. Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; and Hutchings v. Missouri, K. & T. R. Co. (Sealy v. Missouri, K. & T. R. Co.) 84 Kan. 479, 41 L.R.A.(N.S.) 500, 114 Pac. 1079, is followed in a case where the plaintiff purchased corn described in a bill of lading, and paid the shipper's draft attached to the bill in the usual course of business." [93 Kan. 456, 144 Pac. 823.]

In addition, the allowance of the attorney's fees under the Kansas statute was upheld on the ground that the statute was within the legitimate police power of the state to enact, and not repugnant to the state or Federal Constitution.

The motion to dismiss, referred to at the outset, is based on the ground that the action of the court involved no question of interstate, but purely one of intrastate, commerce. But this disregards the fact that the bill of lading which was sued upon was an interstate commerce bill [376] covering a shipment from Kansas City, Missouri, to Elk Falls, Kansas. True, it is urged that that bill of lading is not the test of whether there is jurisdiction, because it was shown that in reality the shipment was an intrastate one from Topeka, Kansas, to Elk Falls in that state. But this assumes that although the judgment rests upon the conception that the previous movement of the corn from Yanka could not be considered as against the plaintiff because he was an innocent third holder of the bill of lading issued at Kansas City, nevertheless, for the purpose of determining whether jurisdiction exists, the facts as to the shipment from Yanka must be treated as relevant. Leaving aside, however, this contradiction, and considering the facts as to the movement of the grain from its inception, we are of opinion that, from that point of view, it was clearly established that the grain moved in a continuous interstate commerce shipment from the date of its departure from Yanka to the termination of the transit at Elk Falls, and that the delivery of the car to the Santa Fe at Topeka for further movement was therefore not a new and distinct shipment in intrastate commerce. We reach this conclusion in view of the place of business of the Fisher Grain Company (Kansas City, Missouri), of the fact that there was no person at Topeka to whom the grain was consigned, of the indorsement of the bill of lading to the Fisher Grain Company, and the annexing to it of a draft drawn on that company at Kansas City for the purchase price, and because the order on the face of the bill of lading to "notify C. V. Fisher Grain Company, care

of Santa Fe for shipment" made it apparent that it was not contemplated that the interstate shipment should terminate at Topeka, but that the car should move on as the result of such direction as might be given while it was in transit by the Fisher Grain Company at Kansas City, Missouri.

But, further, it is said that granting there was a Federal [377] question, as it was not asserted or relied upon until application for a rehearing, it is not open for consideration. The answer, however, is that the court considered and disposed of the question by holding that the facts which were otherwise pertinent and controlling must be put out of view because the interstate commerce bill of lading in the hands of Harold, the purchaser, was in fact negotiable paper, giving greater rights to such purchaser than could be enjoyed by the shipper, or by the one from whom he had acquired the bill. It is obvious, therefore, that this was a decision of a Federal question which we have power to dispose of as such, and we come to consider it.

That the local rule applied by the court below was in direct conflict with the general commercial law on the subject, as repeatedly settled by this court, is plain. Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. Rep. 1132; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990; The Carlos F. Roses, 177 U. S. 655, 665, 44 L. ed. 929, 933, 20 Sup. Ct. Rep. 803.

Nothing could better point out the irreconcilable conflict between the local doctrine applied by the court below and the general law, as illustrated in the cases cited, than does the following statement in the opinion in the Roses Case, last cited (p. 665):

"A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it."

Whether, in the absence of legislation by Congress, the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below, in [378] conflict with the general commercial rule, constituted a direct burden on interstate commerce, and was therefore void, need not now be considered. This is so because, irrespective of that question, and, indeed, without stopping to consider the general provisions of the act to regulate commerce, it is not disputable that what is known as the Carmack amendment to the act to regulate commerce (act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 593, Comp. Stat. 1913, § 8592) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading, and the responsibilities thereunder, which, in the nature of things, excluded state action. Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 506, 57 L. ed. 314, 319, 320, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 672, 57 L. ed. 690, 697, 698, 33 Sup. Ct. Rep. 397; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 110, 58 L. ed. 868, 875, L.R.A. 1915B, 450, Ann. Cas. 1915D, 593; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 180, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 556; Cleveland, & St. L. R. Co. v. Dettlebach, 239 U. S. 588, ante, 453, 36 Sup. Ct. Rep. 177; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, ante, 948, 36 Sup. Ct. Rep. 541.

Indeed, in the argument it is frankly conceded that, as the subject of a carrier's liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment, because "Congress has legislated relative to the one, but not relative to the other." But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack amendment, that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon were upheld. The principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents thereto. See the subject aptly and clearly illustrated by St. Louis & S. [379] F. R. Co. v. Woodruff Mills, 105 Miss. 214, 62 So. 171, where a statute of the state of Mississippi, accomplishing the very result applied by the court below, was decided to be no longer applicable to interstate commerce because of the taking possession by Congress of the field by virtue of the amendment referred to.

As it follows from what we have said that the court below erred in applying the local law to the interstate commerce shipment

under consideration, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

UNITED STATES
v.
LOUIS HEMMER, William W. Fletcher, J. E. Peart, et al.

(See S. C. Reporter's ed. 379–387.)

Indians — homesteads — restrictions on alienation.

An Indian who had made a homestead entry under the act of March 3, 1875 (18 Stat. at L. 420, chap. 131, Comp. Stat. 1913, § 4611),—giving Indians born in the United States, who are heads of families, or have arrived at the age of twenty-one years, and have abandoned their tribal relations, the benefit of the homestead laws, provided that titles acquired thereunder should be inalienable for five years from the date of payment,—and had substantially performed the conditions entitling him to a patent, except the making of final proof, at the date of the passage of the act of July 4, 1884 (23 Stat. at L. 96, chap. 180, Comp. Stat. 1913, § 4612), is not affected by the provisions of the latter act that such Indians as might then be located on the public lands, or should thereafter so locate, might avail themselves of the homestead laws, but that patents issued thereunder should contain a twenty-five years' limitation upon alienation.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 86.]

Submitted May 5, 1916. Decided June 5, 1916.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, reversing a decree of the District Court for the District of South Dakota, in favor of complainant in a suit to remove clouds on title and cancel certain conveyances, and to remove the lien of a judgment, remanded the cause, with directions to dismiss the bill. Affirmed.

See same case below, 123 C. C. A. 194, 204 Fed. 898.

The facts are stated in the opinion.

Assistant Attorney General Knaebel submitted the cause for the United States.

Mr. Lewis Benson submitted the cause for Louis Hemmer et al. Mr. George Rice was on the brief.

Mr. Justice McKenna delivered the opinion of the court:

This suit was brought in the circuit court of the United States, eighth judicial circuit, district of South Dakota, southern division, by the United States, to remove clouds from the title to certain described lands, and to cancel certain instruments purporting to convey the lands, and praying that a certain judgment against the lands be declared no lien thereon, the ground of suit being that the conveyances and the judgment were obtained in opposition to the restrictions upon the alienation or encumbrance of the lands imposed by Congress.

After issue joined and hearing had the district court, successor of the circuit court, entered a decree in accordance with the prayer of the bill. 195 Fed. 790. The decree was reversed by the circuit court of appeals, and the case remanded to the district court, with directions to dismiss the bill. 123 C. C. A. 194, 204 Fed. 898. This appeal was then prosecuted.

The facts are the following: One Henry H. Taylor, [381] known and designated sometimes as Henry Taylor, is and was during the times with which the suit is concerned a Sioux Indian of the full blood, belonging to and a member of the Santee Sioux Band of Indians, and is not a member of and has never had any connection with the Winnebago Band of Indians.

On October 7, 1878, Taylor entered upon the lands as a homestead, they being part of the public domain, and subject to entry under the homestead laws of the United States then in force. He established and continued his residence, and made satisfactory proof of all facts required by law.

On June 6, 1890, a patent was issued to him which recited, among other things, that it was granted upon the express condition that the title conveyed thereby should not be subject to alienation or encumbrance either by voluntary conveyance or by judgment, decree, or order of any court, or subject to taxation of any character, but should remain inalienable and not subject to taxation for the period of twenty years from the date thereof, as provided by act of Congress approved January 18, 1881, 21 Stat. at L. 315, chap. 23. This act applied only to Winnebagoes.

Taylor continued to own the land until August 8, 1908, when he and his wife made a contract with J. E. Peart, one of the appellees, by which they agreed to convey the land to Peart in fee simple by warranty deed for the sum of $2,400, certain land to be accepted in payment of $550 of such consideration. Time was made the essence of the contract, and it was made

binding upon the heirs, executors, administrators, and assigns of the parties.

September 8, 1908, Peart assigned the contract to William W. Fletcher, also one of the appellees herein. After this contract Taylor and wife took possession of the land taken in part payment of the consideration, and Peart took possession of the homestead land and paid the consideration in full.

[382] Taylor and his wife refused to convey the homestead land to either Peart or Fletcher, and the latter instituted suit against them to compel specific performance, which suit resulted in a decree compelling such performance, and a deed was executed to Fletcher by a commissioner appointed by the court.

February 5, 1909, Fletcher conveyed the land by warranty deed to Louis Hemmer, who, in April, 1909, denied possession to Taylor, who attempted to remove with his family back on the land, and has since denied possession to him.

June 10, 1909, the United States issued a patent to Taylor which recited that he had established a homestead upon the land in conformity with the act of Congress of July 4, 1884 (hereinafter set out), and that therefore the United States, in consideration of the premises and in accordance with the provisions of said act of Congress, did and would hold the land (it was described) for the period of twenty-five years in trust for the sole use and benefit of Taylor, or, in case of his decease, of his widow and heirs, according to the laws of the state where the land was located, and at the expiration of that period would convey the same by patent to Taylor, or his widow and heirs, in fee, discharged of the trust and free of all charge or encumbrances whatsoever. It was declared that the patent was issued in lieu of one containing the twenty-year trust clause dated June 6, 1890, which had been canceled.

In 1894 and in every year since, the county treasurer of Moody county (appellee Henderson), its auditor (appellee Hornby), and board of county commissioners have assessed the land for taxation and levied taxes against it, and have caused it to be sold, and are asserting the right to tax the same. The other appellees assert interest in the land under tax sales.

It will be observed that Taylor made his preliminary [383] homestead entry October 7, 1878, by virtue of the provisions of the act of March 3, 1875, 18 Stat. at L. 420[1], chap. 131, Comp. Stat. 1913, § 4611. The act gave Taylor, as an Indian having the qualifications it described (that is, who was born in the United States, was twenty-one years of age, the head of a family, and who had abandoned his tribal relations), the benefits of the homestead law, and provided that the title acquired by virtue of its provisions should not be subject to alienation or encumbrance, either voluntarily made or through proceedings in court, and should "remain inalienable for the period of five years from the date of the patent issued therefor."

Taylor, however, did not make his final proof until December 11, 1884, when he paid the final fees and received his final receipt and certificate. Prior to such final proof and compliance with the homestead laws Congress passed the act of July 4, 1884, 23 Stat. at L. 96, chap. 180, Comp. Stat. 1913, § 4612. It provided "that such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws . . . ; but no fees or commissions shall be [384] charged on account of such entries or proofs. All patents therefor shall be of the legal effect and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

Whether the patent to Taylor should have issued under that act and subject to its restriction of twenty-five years, or under the act of 1875, and with a limitation upon alienation of five years, is the controversy in the case. The government contends for the act of 1884, and the contention had the support of the district court. Appellees contend for the application of the act of 1875, and the circuit court of appeals approved the contention. We put to one side the act of 1881, which prescribes a period of nonalienation of twenty years, as it is conceded that the act applied only to Winnebagoes, and Taylor is a Sioux.

[1] "Sec. 15. That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled, 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twentieth, eighteen hundred and sixty-two, and the acts

The question in the case, then, is the simple one: Which act applied to and determined Taylor's rights? Or, to state the question differently and at the same time give the test of its solution, Was the act of 1875 repealed or superseded by the act of 1884? There are no repealing words in the latter act, and if it repealed the other act, it must have done so by implication. The implication of such an effect is not favored and the character of the act rejects it. Unquestionably the act of 1884 is the more general, and it has criteria of application different from that of the act of 1875. The acts, therefore, have different objects. Under the act of 1884 Indians located on the [385] public lands at the passage of the act, or that might, under the direction of the Secretary of the Interior, or otherwise, thereafter so locate, might avail themselves of the provisions of the act.

The act of 1875 was more circumscribed. It did not apply to Indians generally, but to those of special qualifications,—those who had separated themselves from their tribes and the influence of their tribes, who had advanced, therefore, to a higher status and were better prepared to manage their affairs than Indians in general. And it might well have been considered that a five-year restriction upon the alienation of their titles, added to their five years' residence, would give them an appreciation of values sufficient to protect them against the improvidence of their race and the imposition of others.

Therefore, the acts had no repugnancy, but had different fields of application, and this, it might be contended, even considering their future operation. Of this, however, we need not express opinion. The act of 1884 applied to Indians then located on the public lands. Regarding Taylor simply as an Indian, those words might be considered to be applicable to him; regarding the purpose of the act, which was to confer a benefit, not confirm one, they did not apply to him or to Indians in his situation, for he, and Indians such as he, were the beneficiaries of the prior act, and he and other Indians, it may be,—but certainly he,—had substantially performed its conditions. What remained to be done, and could have been done before the act of 1884 was passed, was not much more than ceremony.

Nor does the fact that the act of 1884 applied to such Indians as might then be *located upon the public lands* broaden it so as to include Indians who were proceeding under the act of 1875. The rule is established that under acts of Congress concerning the public lands those are not [386] regarded as such to which a claim has attached, though Congress may, if it be so advised, exercise control over them. Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 361, 364, 33 L. ed. 363, 365, 366, 10 Sup. Ct. Rep. 112; Hodges v. Colcord, 193 U. S. 192, 196, 48 L. ed. 677, 678, 24 Sup. Ct. Rep. 433; Bunker Hill & S. Min. & Concentrating Co. v. United States, 226 U. S. 548, 550, 57 L. ed. 345, 346, 33 Sup. Ct. Rep. 138. Homestead entries under the act of 1875 cannot, therefore, be considered as having been referred to.

Taylor and those in like situation did not need the aid of the act of 1884. Its language was not of confirmation of rights, but was permissive and prospective, and related to the initiation and acquisition of rights by a different class. And having this definite purpose, it would be difficult to suppose that, besides, rights acquired under prior laws were intended to be limited without reference to such laws. This view makes it unnecessary to inquire whether Taylor's rights had progressed beyond the point of subjection to the power of Congress, he having, as we have said, completed his residence upon the land, and nothing remaining but to make final proof and receive the assurance of his title, which, we have seen, was his situation nearly a year before the passage of the act of 1884.

Congress has undoubtedly by its legislation indicated a policy to protect Indians against a hasty and improvident alienation of their lands, and the government has cited a number of statutes. But, as we have pointed out, such policy was satisfied by the act of 1875, and we do not think there is anything in the history of the act of 1884 which sustains the contention that it was intended to be an amendment of the act of 1875, or to indicate that the latter act was not sufficiently potent for the purposes of protection. The recommendation of the Interior Department was for the remission of fees, and this was responded to, but confined as we have indicated; and the Interior Department considered it to be so confined, for fees were exacted from Taylor upon his final proof, manifesting [387] opinion.

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amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: Provided, however, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or encumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: . . ."

within a few months after the passage of the act of 1884, that it did not apply to him.

Decree affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

MERRILL-RUCKGABER COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 387-393.)

Public contracts — ambiguity — extra work — decision of supervising architect.

Any ambiguity in the specifications for the construction of the foundation for a government building arising from the use of the singular word "building" instead of the plural word "buildings" in specifying the underpinning required to protect adjoining property, in the face of the contractor's knowledge, by inspection, of the material conditions, and of the other parts of the specifications, which, *inter alia*, call for "rear walls" instead of a "rear wall," could, at the utmost, only give ground for dispute, and the extra cost of underpinning the rear walls of both buildings must be borne by the contractor, where the supervising architect decides that the contract calls for such underpinning, and the contract makes final his decision as to the proper interpretation of the drawings and specifications.

[For other cases, see United States, VI. f, in Digest Sup. Ct. 1908.]

[No. 281.]

Argued March 17, 1916. Decided June 5, 1916.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a public contractor for a recovery for extra work. Affirmed.

See same case below, 49 Ct. Cl. 553.

Statement by Mr. Justice McKenna:

Appellant is a New York corporation It filed a petition in the court of claims for the recovery from the United States of the sum of $4,475.90 for extra work performed in the construction of the foundation for the [388] extension and remodeling of the United States assay office in New York. Issue was joined on the petition and the court of claims, after hearing, dismissed it.

The facts pertinent to the questions presented, collated from the findings, are as follows:

The appellant entered into a contract with the United States through the proper officers of the latter for the construction of such foundation for the sum of $79,400, in accordance with specifications and drawings prepared in the office of the supervising architect.

The specifications required bidders to visit the site and fully inform themselves of the character of the same and the conditions under which the work would have to be performed, and failure to do so, it was provided, would not relieve the successful bidder from the necessity of furnishing material or performing any labor that might be required to complete the work in accordance with the true intent and meaning of the specifications and drawings, without additional cost to the government.

The specifications, it was provided, should supplement the drawings, and specifications and drawings were to be reciprocally explanatory, and the decision of the supervising architect as to the proper interpretation of the drawings and specifications was to be final.

Under the heading "Excavation" it was provided that "certain portions of old foundation walls, etc., have been left in place as retaining walls in connection with adjoining buildings; the removal of these walls and the north wall and so much of the present front building as may be necessary to install work under this contract and such other excavation in connection therewith as may be necessary are to be included. . . . The walls, etc., will have to be removed and the excavation made in such manner as not to endanger adjoining property nor prevent the occupancy of the present front building, and all necessary [389] shoring and underpinning, etc., in connection therewith, must be done."

Subsequently the supervising architect sent to all parties from whom proposals had been solicited the following addendum amending the foregoing paragraph of the specifications:

"Bidders are hereby informed that the specification is to be amended as follows: Page 7, fourth paragraph, under 'Excavation,' after the clause 'and all necessary shoring, underpinning, etc., in connection therewith, must be done,' add, 'In the case of the building joining the north line of the site, the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architect.'"

A detailed contract was entered into providing that the work was to be done in accordance with the specifications and the addendum thereto and the requirements of certain specified drawings and such other detail drawings and models as might be furnished to appellant by the supervising architect.

It was further provided that changes might be made in the work and materials when required by the United States, the value of such work and materials to be determined on the basis of the contract unit of value, at prevailing market rates, such rates, in case of dispute, to be determined by the architect, whose decision should be binding on both parties, and that no claim for damages on account of such changes or for anticipated profits should be made or allowed. No claim for extra materials or work was to be made or allowed unless specifically agreed upon in writing, or directed in writing by the United States.

The assay office extension was located practically in the middle of the block bounded by Wall, Nassau, Pine, and William streets, and among the buildings surrounding the site were two on Pine street, numbered 25, 27, and 29. Number 25 was ten stories and Nos. 27 and 29 (being one [390] building) was thirteen stories above the street, and each was one story higher at the line of the assay office extension.

Appellant submitted detail drawings showing its proposed method of underpinning and protecting the walls of the Pine street buildings. Referring to the drawings, the architect telegraphed the inquiry why they did "not show underpinning 25 Pine street extending to rock," to which appellant replied that, in accordance with the addendum to the specifications, it understood that the building referred to meant 27-29 Pine street, as No. 25 Pine street had no rear wall, but simply a light metallic curtain wall supported on the side walls, and that appellant did not consider there was any rear wall in the building, and therefore it (appellant) showed the side walls to be taken care of in the usual manner and believed its method so provided.

Much correspondence ensued, and finally appellant was told that it was the opinion of the architect's office that its letter of the 2d instant (October, 1909) correctly set forth the position of the office, and that it was of the opinion the work as therein set forth was required by the contract, and that appellant was not entitled to extra therefor, and appellant was directed to carry out its contract without further delay, in accordance with that letter. To which appellant replied that the cost of the underpinning to rock of the walls of No. 25 Pine street would be $4,800 in addition to the price named in the contract, and concluded as follows:

"'As the contract does not expressly or impliedly require us to underpin to rock premises 25 Pine street, we shall proceed with the work under the contract, taking necessary steps to protect said premises, but will not underpin any portion thereof to rock except upon the understanding that we are to be paid the reasonable cost thereof, as indicated above.'

[391] "To which the supervising architect replied, on October 30, 1909: 'Your statements are noted and you are now directed to proceed without further delay to complete the work in line with office letters of the 2d, 20th, and 26th instance, and without expense to the government. And you are advised that unless you take action along this line within a reasonable time consideration will be given to serving the eight days' notice preparatory to the government assuming charge of the work and completing it at your expense.'

"Upon appeal to the Secretary of the Treasury the action of the supervising architect was ratified, and the claimant was directed in writing by the Secretary to proceed with said underpinning in accordance with the requirements of the supervising architect, otherwise the contract would be completed at claimant's expense. The claimant did the work under protest, and completed it and all of the work under said contract within the time stipulated in the contract. The actual cost of underpinning to rock said building No. 25 Pine street was $4,450. The contractor was paid the full amount of the contract price, $79,400."

The use of the word "building" in the addendum to the specifications was the result of a clerical error in the office of the supervising architect. But before submitting a proposal for the work, appellant, through its president and agent, made an investigation of the site of the work and the buildings surrounding the site, and ascertained that the rear of both the buildings on Pine street adjoined the site on the north.

Mr. John S. Flannery argued the cause, and, with Mr. Frederic D. McKenney, filed a brief for appellant:

A contractor cannot be required, without compensation, to double the quantities of work actually specified in an advertisement for proposals prepared by the government, by recourse to general requirements, calling upon the contractor to visit the site and inform himself of what was needed.

United States v. Utah, N. & C. Stage Co. 199 U. S. 414, 50 L. ed. 251, 26 Sup. Ct. Rep. 69; Beach, Contr. § 716.

As this contract, and the specifications and addendum forming a part thereof, were not drafted by the claimant, but by the representatives of the United States,—the officials of the supervising architect's office,—and the error in substituting the word "building" for "buildings" was made in that

office, the ambiguity, if there is any in the language of the contract, taking it as a whole, must be resolved against the United States.

Beach, Contr. § 726; Chambers v. United States, 24 Ct. Cl. 387; Otis v. United States, 20 Ct. Cl. 315, 120 U. S. 115, 30 L. ed. 609, 7 Sup. Ct. Rep. 449; Edgar & T. Foundry & Mach. Works v. United States, 34 Ct. Cl. 205; United States v. Gibbons, 109 U. S. 200, 27 L. ed. 906, 3 Sup. Ct. Rep. 117; Garrison v. United States, 7 Wall. 688, 19 L. ed. 277; Anson, Contr. p. 328.

In Collins v. United States, 34 Ct. Cl. 294, it was held that a contractor who excavates the number of cubic yards required by his contract is entitled to compensation for extra excavation below grade, called for by the engineer in charge, notwithstanding a provision in the contract providing: "The lock pit must be excavated to the width and length and depth which the engineer in charge shall deem necessary."

A specific provision in a contract calling for one injector and one pump controls general provisions of a contract that everything needed for a lighthouse shall be supplied to make it ready for use.

Erickson v. United States, 107 Fed. 204; Salt Lake City v. Smith, 43 C. C. A. 637, 104 Fed. 466.

Nor should the United States be permitted to escape the consequences of the erroneous omission of its own representatives by shielding itself behind the special provision of the contract, making the decision of the supervising architect as to the quality and quantity of materials furnished under the contract final, or the general provision that the decision of the supervising architect as to the proper interpretation of the drawings and specifications shall be final. These clauses do not and cannot relate to extra labor and material which the specifications failed to embrace and the contract did not cover, and for which the claimant seeks compensation upon a *quantum meruit* (Salt Lake City v. Smith, supra). But if they did, and the supervising architect is to be regarded as the sole arbiter, the claimant would not be bound by his manifest mistake of law.

United States v. Farragut, 22 Wall. 406, 420, 22 L. ed. 879, 883.

The appellant should not be compelled to suffer loss by reason of errors in the specification admittedly made by the supervising architect.

Moore v. United States, 46 Ct. Cl. 172; O'Hare v. District of Columbia, 18 Ct. Cl. 646, 122 U. S. 640, 30 L. ed. 1243; Roettinger v. United States, 26 Ct. Cl. 391; Axman v. United States, 47 Ct. Cl. 537; Ripley v. United States, 223 U. S. 695, 701, 702, 56 L. ed. 614, 617, 618, 32 Sup. Ct. Rep. 352.

Courts strictly construe agreements for compulsory arbitrations (Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 255, 34 L. ed. 423, 10 Sup. Ct. Rep. 945), because they deprive the judicial tribunals of their proper jurisdiction.

An equity court may reform a contract for a mutual mistake, and place the parties thereto in the position they would have occupied had the mistake not been made, but we know of no authority for the position that a court of chancery may remold a contract to accord with the intentions and understandings of one of the parties, at the sole cost of the other party thereto.

Hearne v. New England Mut. M. Ins. Co. 20 Wall. 488, 490, 22 L. ed. 395, 396; Moffett, H. & C. Co. v. Rochester, 178 U. S. 384, 44 L. ed. 1112, 20 Sup. Ct. Rep. 957.

Assistant Attorney General Thompson argued the cause and filed a brief for appellee:

The supervising architect being authorized to require underpinning where necessary, his judgment cannot be questioned in the absence of bad faith on his part.

Martinsburg & P. R. Co. v. March, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035; Chicago, S. F. & C. R. Co. v. Price, 138 U. S. 185, 34 L. ed. 917, 11 Sup. Ct. Rep. 290; Kihlberg v. United States, 97 U. S. 398, 24 L. ed. 1106; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Fruin-Bambrick Constr. Co. v. Ft. Smith & W. R. Co. 140 Fed. 465.

Though a word in a contract, when standing alone, may denote the singular, but, when read with the rest of the contract, the plural is indicated, it shall be so construed.

O'Brien v. Miller, 168 U. S. 287, 42 L. ed. 469, 18 Sup. Ct. Rep. 140.

Where the complaining party does not rely upon the representations made by the other party, but seeks from other quarters means of verification of the statements made, and acts upon information thus obtained, he cannot be heard to say that he was misled by the representations of the other party.

Farnsworth v. Duffner, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164.

[392] Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them, but to all of them as asso-

ciated, and as well to the conditions to which they were addressed and intended to provide for. The argument of appellant ignores this rule. As we shall see, it makes one word dominant, controls all others by it, and puts out of view the demands of the physical conditions.

The contract provided that whatever walls would have to be removed and excavations made would have to be done in such manner as not to endanger adjoining property, and that all necessary shoring and underpinning, etc., in connection therewith, had to be done. To this provision there was subsequently added that "in the case of the *building* [italics ours] joining the north line of the site the underpinning of the main rear walls must be carried to rock by a method satisfactory to the supervising architect."

But there were two buildings "joining the north line of the site," and appellant selected one as the full measure of its obligation to carry the underpinning to rock, as required by the specifications, giving as a reason, in a communication to the architect's office, that it did not consider that there was any rear wall in No. 25 Pine street, but only a metallic curtain wall.

The architect's office was not impressed with the distinction between walls, and the selection of one building joining the north line of the site, but insisted that the underpinning of the main rear walls of both of the buildings joining such line must be carried to rock by a method satisfactory to the supervising architect. Appellant [393] filed its appeal to the Secretary of the Treasury, who affirmed the action of the architect.

Counsel intimates unfairness on the part of the supervising architect, but there is no just foundation for it; and, besides, there is no attempt to impugn the good faith of the Secretary of the Treasury, who sustained the decision of the architect, and the contract explicitly provides that "the decision of the supervising architect as to the proper interpretation of the drawings and specifications shall be final." If we may concede to appellant an ambiguity in the specifications, arising from the use of the singular word "building," instead of the plural word "buildings," against the material conditions which appellant's officers had inspected and knew of, and against, as well, the other parts of the specifications, which, among other things, call for "rear walls" instead of a "rear wall," seemingly implying two buildings, and not one only, at the utmost it could only be said that there was ground for dispute, and, under the contract, the decision of the architect upon the dispute was final.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[394] UNITED STATES, Plff. in Err.,
v.
JIN FUEY MOY.

(See S. C. Reporter's ed. 394-402.)

Food and drugs — statutory restrictions on possession of narcotics — construction.

The grave doubts as to congressional power which any other construction would raise require that the provision of the act of December 17, 1914 (38 Stat. at L. 789, chap. 1), § 8, making it unlawful for "any person" who has not registered or paid the special tax imposed by that act to have in his possession or control opium or coca leaves, their salts, derivatives, or preparations, be construed as referring to those only who are required by that statute to register and pay the special tax, *viz.*, all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away, any of said drugs, notwithstanding the exception in such section in favor of the possession of drugs prescribed in good faith by a physician, since this exception stands alongside of one that saves employees of registered persons and nurses under the supervision of a physician, etc., and is so far vague that it may have been intended to mean other persons carrying out a doctor's order, rather than the patients.

[No. 525.]

Argued December 7, 1915. Decided June 5, 1916.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a judgment quashing an indictment charging a conspiracy for the possession of opium and salts thereof. Affirmed.

See same case below, 225 Fed. 1003.

The facts are stated in the opinion.

Assistant Attorney General Wallace argued the cause, and, with Mr. W. C. Herron, filed a brief for plaintiff in error:

Section 8 of the act should not be restricted to those persons who are required to register and to pay the tax.

NOTE.—As to constitutionality, construction, and effect of statute prohibiting or regulating sale of poisons—see note to Katzman v. Com. 30 L.R.A.(N.S.) 519.

United States v. Portale, 235 U. S. 27, 59 L. ed. 111, 35 Sup. Ct. Rep. 1.

The decision of the court below goes only on construction, and not the constitutionality of the act; hence, the only question open on this writ of error is that of the construction of the act.

United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 Sup. Ct. Rep. 209; United States v. Keitel, 211 U. S. 370, 53 L. ed. 230, 29 Sup. Ct. Rep. 123; United States v. Mescall, 215 U. S. 31, 54 L. ed. 79, 30 Sup. Ct. Rep. 19; United States v. Portale, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 1.

Assistant Attorney General Wallace filed a separate brief for plaintiff in error:

If the act, under recognized rules of interpretation, is subject to but one reasonable reading,—and we insist that such is the case here,—this court will not substitute a different reading of its own, tending merely to make the act constitutional.

United States v. Bennett, 232 U. S. 299, 304, 58 L. ed. 612, 615, 34 Sup. Ct. Rep. 433.

We may not read the words "required to register" into § 8 if we can otherwise give it a reasonable meaning.

United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; United States v. Portale, 232 U. S. 27, 30, 59 L. ed. 111, 112, 35 Sup. Ct. Rep. 1.

If the words be taken according to their natural signification, it cannot be reasonably read otherwise than as the government reads it. It is therefore self-interpreting.

Black, Const. Law, § 49, p. 68; Newell v. People, 7 N. Y. 97.

If by one mode of interpretation the right must become shadowy and unsubstantial and without any remedial power adequate to the end, and by another mode it will attain its just and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible that the latter ought to prevail.

Prigg v. Pennsylvania, 16 Pet. 539, 612, 10 L. ed. 1060, 1088.

A title, though in a sense part of the act, has little, if any, weight in interpretation, where, as in congressional enactments, there is no requirement that the subject of the act shall conform to the title.

Lapina v. Williams, 232 U. S. 78, 58 L. ed. 515, 34 Sup. Ct. Rep. 196.

As an exercise of the treaty-making power this act is constitutional.

Ware v. Hylton, 3 Dall. 199, 1 L. ed. 568; Clerke v. Harwoode, 3 Dall. 342, 1 L. ed. 628; Chirac v. Chirac, 2 Wheat. 259, 4 L. ed. 234; Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Carneal v. Banks, 10 Wheat. 181, 6 L. ed. 297; Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Devlin, Treaty-Making Power, §§ 239–296; Robasse's Succession, 49 La. Ann. 1405, 22 So. 767; Tellefsen v. Fee, 168 Mass. 188, 45 L.R.A. 481, 60 Am. St. Rep. 379, 46 N. E. 562; McEvoy v. Wyman, 191 Mass. 276, 114 Am. St. Rep. 601, 77 N. E. 379; Mackenzie v. Hare, 239 U. S. 299, ante, 297, 36 Sup. Ct. Rep. 106; Extent and Limitations of the Treaty-making Power, 1 Am. Journal of International Law, pt. 2, pp. 636, 665, 670.

When action is taken within the limits of a delegated power, that action is supreme over all laws of the states by the very terms of the Constitution itself.

Gibbons v. Ogden, 9 Wheat. 209, 211, 6 L. ed. 73, 74; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 81; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39.

Giving the term "police power" a more restricted meaning, the authorities seem to permit the Federal government, under the treaty-making power, to enter this even more limited field.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Compagnie Francaise De Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; Maiorano v. Baltimore & O. R. Co. 213 U. S. 268, 53 L. ed. 792, 29 Sup. Ct. Rep. 424; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Re Ross, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897; United States v. Portale, 235 U. S. 27, 59 L. ed. 111, 35 Sup. Ct. Rep. 1; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; Re Ah Chong, 6 Sawy. 451; Re Parrott, 1 Fed. 481; 22 Ops. Atty. Gen. 214.

Mr. H. Ralph Burton argued the cause, and, with Mr. George X. McLanahan, filed a brief for defendant in error:

Statutes should receive a sensible construction to avoid an absurd conclusion.

Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

The construction placed upon § 2 by the lower court in this case is the same as that given in the case of United States v. Woods, 224 Fed. 278, and United States v. Wilson, 225 Fed. 82.

If the meaning of the statute is doubtful, the title of the act, if expressive, may have the effect to resolve the doubts, and is therefore entitled to consideration.

United States v. Fisher, 2 Cranch, 358, 386, 2 L. ed. 304, 314.

The words "for other purposes" are held to express no specific purpose, and are not to be considered in construing the title.

Sutherland, Stat. Constr. 2d ed. § 122.

The act deals with the registration and payment of the special tax by those who produce, import, etc., the drugs named, and the words in § 8 are limited accordingly.

United States v. Palmer, 3 Wheat. 610, 631, 4 L. ed. 471, 477.

The taxing clause in § 1 relates entirely to persons who produce, import, etc., certain drugs, and the prohibition in § 8 cannot be more extensive than the language of § 1.

United States v. Shelley, 229 U. S. 239, 57 L. ed. 1167, 33 Sup. Ct. Rep. 635.

To construe the words "any person" in § 8 as is contended for by the United States would be to invade the private rights of citizens of the states entirely within the jurisdiction of the state, and would accordingly be unconstitutional.

United States v. Dewitt, 9 Wall. 41, 19 L. ed. 593; Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

A convention or treaty is of no superior efficacy to a law of Congress. Each is equally the supreme law of the land (Whitney v. Robertson, 124 U. S. 190–194, 31 L. ed. 386–388, 8 Sup. Ct. Rep. 456), subject, however, to all the limitations of the Constitution (Holmes v. Jennison, 14 Pet. 550–569, 10 L. ed. 584–593; Holden v. Joy, 17 Wall. 211–243, 21 L. ed. 523–534; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794).

The act of Congress of January 17, 1914 (one of the system of laws following the opium convention), forbidding the importation of opium for smoking purposes, is not material. It does not enable or authorize Congress to pursue drugs within the states to ascertain their ultimate use.

Keller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066.

Mr. Levi Cooke also argued the cause for defendant in error.

Mr. William Strite McDowell also filed a brief for defendant in error:

The Harrison drug act, like any other act of Congress, must be construed to avoid absurdities.

United States v. Kirby, 7 Wall. 482, 486, 19 L. ed. 278, 280.

The Harrison drug act does not apply to mere consumers.

United States v. Woods, 224 Fed. 280; United States v. Wilson, 225 Fed. 84.

The words "any person" in § 8 can only apply to the persons upon whom the act was intended to operate, to wit: Those mentioned in the title and previous sections.

Martin v. Ford, 5 T. R. 101.

Section 8 of the act is only intended to create a statutory rule of evidence.

United States v. Woods, supra.

Presumed crime cannot be the basis of valid legislation.

United States v. Brown, 224 Fed. 135.

The title of an act constitutes a part of it, though only a formal part.

Hadden v. The Collector (Hadden v. Barney) 5 Wall. 107, 110, 18 L. ed. 518, 519.

It will not satisfy the demands of a constitutional government to say that this or that construction is the beneficial intent or policy of the government, or the reason of its enactment.

Hadden v. The Collector, supra.

To construe such act as a police regulation to suppress the traffic in opium within the several states is to render the act unconstitutional.

United States v. Dewitt, 9 Wall. 41, 44, 19 L. ed. 593, 594.

The presumption is against the unwarranted exercise of legislative authority.

Parsons v. Bedford, 3 Pet. 433, 448, 7 L. ed. 732, 738; Grenada County v. Brogden (Grenada County v. Brown) 112 U. S. 261, 269, 28 L. ed. 704, 707, 5 Sup. Ct. Rep. 125.

Mr. Justice Holmes delivered the opinion of the court:

This is an indictment under § 8 of the act of December 17, 1914, chap. 1, 38 Stat. at L. 785, 789. It was quashed by the district court on the ground that the statute did not apply to the case. 225 Fed. 1003. The indictment charges a conspiracy with Willie Martin to have in Martin's possession opium and salts thereof, to wit, one dram of morphine sulphate. It alleges that Martin was not registered with the collector of internal revenue of the district, and had not paid the special tax required; that the defendant, for the purpose of executing the conspiracy, issued to Martin a written prescription for the morphine sulphate, and that he did not issue it in good faith, but knew that the drug was not given for medicinal purposes, but for the purpose of supplying one addicted to the use of opium. The question is whether the possession conspired for is within the prohibitions of the act.

The act is entitled, "An Act to Provide for the Registration of, with Collectors of Internal Revenue, and to Impose a Special

Tax Upon, All Persons Who Produce, Import, Manufacture, Compound, Deal in, Dispense, Sell, Distribute, or Give Away Opium or Coca Leaves, Their Salts, Derivatives, or Preparations, and for Other Purposes." By § 1 the persons mentioned in the title are required to register, and to pay [400] a special tax at the rate of $1 per annum, with certain exceptions, and it is made unlawful for the persons required to register to produce, etc., the drugs without having registered and paid the special tax. All provisions of law relating to special taxes are extended to this tax. By § 2 it is declared unlawful for any person to sell or give away the drugs mentioned without a written order, provided for, excepting deliveries by physicians, etc., or on their order, and certain other cases. Then, after provision for returns, it is made unlawful by § 4 for any person who shall not have registered and paid the special tax to send, carry, or deliver the drugs in such commerce as Congress controls, again with exceptions. By § 6 preparations containing certain small proportions of the drugs are excluded from the operation of the act, under conditions. By § 7 internal revenue tax laws are made applicable, and then comes § 8, under which the indictment is framed.

By § 8 it is declared unlawful for "any person" who is not registered and has not paid the special tax to have in his possession or control any of the said drugs, and "such possession or control" is made presumptive evidence of a violation of this section and of § 1. There is a proviso that the section shall not apply to any employee of a registered person and certain others, with qualifications, or to the possession of any of the drugs which have been prescribed in good faith by a physician registered under the act, and to the possession of some others. And finally it is provided that the exemptions need not be negatived in any indictment, etc., and that the burden of proving them shall be upon the defendant. The district judge considered that the act was a revenue act, and that the general words, "any person," must be confined to the class of persons with whom the act previously had been purporting to deal. The government, on the other hand, contends that this act was passed with two others in order [401] to carry out the international opium convention (38 Stat. at L. 1929); that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature, and that § 8 means all that it says, taking its words in their plain, literal sense.

A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527. If we could know judicially that no opium is produced in the United States, the difficulties in this case would be less; but we hardly are warranted in that assumption when the act itself purports to deal with those who produce it. § 1. Congress, at all events, contemplated production in the United States, and therefore the act must be construed on the hypothesis that it takes place. If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime. United States v. De Witt, 9 Wall. 41, 19 L. ed. 593. The government invokes article 6 of the Constitution, that treaties made under the authority of the United States shall be the supreme law of the land. But the question arises under a statute, not under a treaty. The statute does not purport to be in execution of a treaty, but calls itself a registration and taxing act. The provision before us was not required by the opium convention, and whether this section is entitled to the supremacy claimed by the government for treaties is, to say the least, another grave question; and, if it is reasonably possible, the act should be read so as to avoid both.

The foregoing consideration gains some additional force from the penalty imposed by § 9 upon any person who violates any of the requirements of the act. It is a fine of not more than $2,000, or imprisonment for not more than [402] five years, or both, in the discretion of the court. Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least prima facie criminal, and subject to the serious punishment made possible by § 9. It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the district court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right.

Approaching the issue from this point of view we conclude that "any person not registered" in § 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal,—the persons who are required to register by § 1. It is

true that the exemption of possession of drugs prescribed in good faith by a physician is a powerful argument, taken by itself, for a broader meaning. But every question of construction is unique, and an argument that would prevail in one case may be inadequate in another. This exemption stands alongside of one that saves employees of registered persons, as do §§ 1 and 4, and nurses under the supervision of a physician, etc., as does § 4, and is so far vague that it may have had in mind other persons carrying out a doctor's orders rather than the patients. The general purpose seems to be to apply to possession exemptions similar to those applied to registration. Even if for a moment the scope and intent of the act were lost sight of, the proviso is not enough to overcome the dominant considerations that prevail in our mind.

Judgment affirmed.

Mr. Justice **Hughes** and Mr. Justice **Pitney** dissent.

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[403] RUSSO-CHINESE BANK, Petitioner,
v.
NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON.

(See S. C. Reporter's ed. 403–418.)

Appeal — reversible error — instructions — liability of collecting bank.

1. Instructing the jury that a draft received by a bank for collection, with bills of lading, insurance policy, and bill of sale attached, under instructions to deliver the documents "on payment," must be regarded as paid, so as to render the collecting bank accountable therefor to the forwarding bank, if the collecting bank permitted the drawees (who were also the agents of the carrier), upon accepting the draft, to take over the shipment under a stipulation to recognize the bank as owner, and an agreement to account to it for the proceeds of sale, affords no ground for reversal, where the court immediately thereafter said that the proceeds of the sale under the agreement were to be payment only if they equaled the amount of the draft, and otherwise were to be payment *pro tanto*, and where the evidence would not have warranted a finding that the value of the shipment was less than the amount of the draft.

[For other cases, see Appeal and Error, VIII. m, 4, in Digest Sup. Ct. 1908.]

Banks — collections — liability of collecting bank.

2. A bank forwarding a draft for collection, with bills of lading, insurance policy, and bill of sale attached, is entitled to demand an accounting from its correspondent bank for the avails of the draft, and to resist an action for the recovery back of money which it had received from the correspondent bank upon the draft, although it may have had a guaranty against loss given by the drawer of the draft.

[For other cases, see Banks, I. e, 1, in Digest Sup. Ct. 1908.]

[No. 244.]

Argued April 13 and 14, 1916. Decided June 5, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which, on a second writ of error, affirmed a judgment of the District Court for the Western District of Oregon in favor of defendant in an action by a collecting bank to recover from a forwarding bank money which the former had paid to the latter on account of a draft sent for collection. Affirmed.

See same case below, 124 C. C. A. 434, 206 Fed. 646.

The facts are stated in the opinion.

Mr. **Warren Gregory** argued the cause, and, with Messrs. George H. Whipple and T. L. Stiles, filed a brief for petitioner:

The trial court proceeded upon the assumption that there was a novation, but such assumption must necessarily be premised upon the proposition that the new obligation extinguished the claim against Clarkson & Company on the accepted draft. The pleadings, the testimony, and the conduct of the parties conclusively demonstrate the contrary.

21 Am. & Eng. Enc. Law, p. 661; Wharton v. Walker, 4 Barn. & C. 164, 3 L. J. K. B. 183, 6 Dowl. & R. 288; Hyde v. Booraem, 16 Pet. 169, 10 L. ed. 925; Union Bank v. Stafford, 12 How. 327, 13 L. ed. 1008.

If we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then, to the extent of the value of the security that was thereby released, it may have been responsible. There might have been a conversion so far as the released flour was concerned, but this conversion could not extend further than the amount and value of the flour so released.

Commercial Bank v. First State Bank & T. Co. — Tex. Civ. App. —, 153 S. W. 1175.

If a pledgee converts collateral to his own use, it may operate as a payment of the claim to the extent of the value of the converted collateral, but no further.

Randolph, Com. Paper, 2d ed. § 795; Hunt v. Nevers, 15 Pick. 504, 26 Am. Dec.

NOTE.—As to liability of collecting bank for negligence—see note to Jefferson County Sav. Bank v. Hendrix, 1 L.R.A.(N.S.) 246.

616; Alden v. Camden Anchor-Rockland Mach. Co. 107 Me. 508, 78 Atl. 977.

The vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed.

Armour & Co. v. Russell, 6 L.R.A.(N.S.) 602, 75 C. C. A. 416, 144 Fed. 614.

The instruction specified as error is inseparably connected with the special verdict, and, if erroneous, the special verdict did not cure such error.

Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; Atchison, T. & S. F. R. Co. v. McClurg, 8 C. C. A. 322, 19 U. S. App. 346, 59 Fed. 860; Deery v. Cray, 5 Wall. 795, 18 L. ed. 653.

The Port Arthur branch was not the owner either of the documents or the flour, for two reasons: (a) that the relationship between these banks was that of principal and agent, and not of vendor and vendee; and (b) because the documents were accompanied by an invoice or a bill of sale from the Centennial Mill Company to Clarkson & Company, showing that the Port Arthur branch was acting as a collection agent only, and that it could not sell the flour to anyone other than Clarkson.

Grant, Banks & Bkg. 6th ed. p. 53; Morse, Banks & Bkg. 4th ed. § 217; Second Nat. Bank v. Bank of Alma, 99 Ark. 386, 138 S. W. 472, 2 N. C. C. A. 737; Nebraska Hay & Grain Co. v. First Nat. Bank, 78 Neb. 334, 9 L.R.A.(N.S.) 251, 126 Am. St. Rep. 602, 110 N. W. 1019; Hambro v. Casey, 110 U. S. 216, 28 L. ed. 125, 3 Sup. Ct. Rep. 369; Balbach v. Frelinghuysen, 15 Fed. 675; Elm City Lumber Co. v. Childerhose & Pratt, 167 N. C. 34, 83 S. E. 22; W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank, 128 Tenn. 320, 160 S. W. 848; Ladd & T. Bank v. Commercial State Bank, 64 Or. 486, 49 L.R.A.(N.S.) 657, 130 Pac. 975; Commercial Bank v. First Nat. Bank, — Tex. Civ. App. —, 153 S. W. 1175; American Thresherman v. Citizens' Bank (American Thresherman v. De Tamble Motors Co.) 154 Wis. 366, 49 L.R.A.(N.S.) 644, 141 N. W. 210; Price Brokerage Co. v. Rushfeldt, 185 Mo. App. 32, 171 S. W. 976; Wisconsin M. & F. Ins. Co. Bank v. Bank of British N. A. 21 U. C. Q. B. 284; National Bank v. Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208; Dickerson v. Wason, 47 N. Y. 439, 7 Am. Rep. 455; Tyson v. Western Nat. Bank, 77 Md. 412, 23 L.R.A. 161, 26 Atl. 520; Midland Nat. Bank v. Brightwell, 148 Mo. 358, 71 Am. St. Rep. 608, 49 S. W. 994; Commercial Nat. Bank v. Armstrong, 39 Fed. 684; Bank of Bay Biscayne v. Monongahela Nat. Bank, 126 Fed. 436; Le Caux v. Eden, 2 Dougl. K. B. 594; Bancroft v. Bancroft, 110 Cal. 374, 42 Pac. 896.

A collecting bank cannot sell the goods represented by a bill of lading to a third party without notice to the sender.

Gregg v. Bank of Columbia, 72 S. C. 458, 110 Am. St. Rep. 633, 52 S. E. 195.

Usage or custom cannot be invoked in contradiction of an express contract.

Smith v. National Bank, 191 Fed. 226; Morse, Banks & Bkg. § 223; Charles v. Carter, 96 Tenn. 607, 36 S. W. 396.

A usage or custom, to be of any effect, must be shown to have prevailed at the place to which the goods were sent, and not from which they came.

Wisconsin M. & F. Ins. Co. Bank v. Bank of British N. A. 21 U. C. Q. B. 284; Elm City Lumber Co. v. Childerhose & Pratt, 167 N. C. 34, 83 S. E. 22.

Messrs. Warren Gregory and George H. Whipple also filed a reply brief for petitioner.

Mr. E. S. McCord argued the cause, and, with Mr. J. A. Kerr, filed a brief for respondent:

Under the plea of payment, and certainly under the plea of negligence upon the part of the plaintiff, the defendant would be permitted to show that the draft had been paid in money or by check or promissory note to Clarkson & Company and would be permitted to show facts rendering the Port Arthur branch liable to it by reason of the negligent handling of the shipment by the plaintiff.

Buddicum v. Kirk, 3 Cranch, 294, 2 L. ed. 444.

Where the owner of goods shipped them upon a bill of lading whereby they were consigned to his own order, at the same time drawing in favor of a banking partnership "for collection" a draft upon the person to whom the goods were intended to be delivered upon payment of the draft, and also attaching to the draft the bill of lading, so indorsed as to give the partnership control of the possession of the goods, a delivery of them by this firm to the drawee of the draft, without requiring its payment, was, as against the owner, a conversion.

Hobbs v. Chicago Packing & Provision Co. 98 Ga. 576, 58 Am. St. Rep. 320, 25 S. E. 584.

Where a pledgee, without specific instructions, takes over the collateral, or releases the collateral from the pledge, such release operates in law as payment of the claim; at least, to the extent of the value of the collateral.

Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec.

616; 2 Randolph, Com. Paper, § 795; Cocke v. Chaney, 14 Ala. 65; Westphal v. Ludlow, 2 McCrary, 505, 6 Fed. 348.

The legal title, both under the statutes of the state of Washington and under the general rules of law, to the bills of lading as well as the flour represented by it, passed to the Russo-Chinese bank under the indorsements and deliveries of the draft and the bills of lading to it by the National Bank of Commerce.

Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 31 L. ed. 287, 8 Sup. Ct. Rep. 266; The Carlos F. Roses, 177 U. S. 655, 44 L. ed. 929, 20 Sup. Ct. Rep. 803.

The steamship company had the right to release the flour upon the production of the bills of lading. The bills of lading were held by the Port Arthur bank. If the Port Arthur bank held the legal title to and possession of the bills of lading, that bank was the only person who had the legal right to direct the steamship company to release the flour; and the evidence is uncontradicted that the Port Arthur bank directed the steamship company to deliver the flour to Clarkson & Company, merchants. No other person had the right to direct the steamship company to release the flour,—not even the consignee of the flour, the Centennial Mill Company, could have exercised such right.

First Nat. Bank v. Northern P. R. Co. 28 Wash. 439, 68 Pac. 965; Milwaukee Nat. Bank v. City Bank, 103 U. S. 668, 26 L. ed. 417.

By the actions of the plaintiff at Port Arthur the defendant was deprived of the flour and of the proceeds of the sale thereof, and the Port Arthur branch rendered itself liable to the defendant for the full value of the flour, which the jury must have found under the evidence at least equaled the amount of the draft. The defendant never received either the flour or the proceeds thereof on account of the draft of December 11th, 1903. Consequently when plaintiff paid the money for the recovery of which it is now suing, on November 9th, 1904, it had received payment of the original draft from Clarkson & Company, or at least had rendered itself liable to the defendant by reason of its negligence in the handling of the shipment securing the draft in question.

Hobbs v. Chicago Packing & Provision Co. 98 Ga. 576, 58 Am. St. Rep. 320, 25 S. E. 584; Montague v. Stelts, 37 S. C. 200, 34 Am. St. Rep. 736, 15 S. E. 968; Means v. Bank of Randall, 146 U. S. 620, 36 L. ed. 1107, 13 Sup. Ct. Rep. 186; Dows v. National Exch. Bank, 91 U. S. 618, 23 L. ed. 214; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; 1 Morse, Banks & Bkg. 3d ed. §§ 215, 219; Allen v. Suydam, 20 Wend. 321, 32 Am. Dec. 555; Donlan v. Clark, 23 Nev. 203, 45 Pac. 1; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690.

Where the negligence of the collecting agent has been established and loss has followed, the face of the draft is prima facie the measure of damages which the party interested therein has sustained, and the burden is upon the collecting bank to show what the actual damage was, or to show that no damage has been actually suffered by him, in defense of an action brought against it.

First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618; Second Nat. Bank v. Bank of Alma, 99 Ark. 386, 138 S. W. 472, 2 N. C. C. A. 737.

The presumption of solvency has been overcome.

Sahlien v. Bank of Lonoke, 90 Tenn. 221, 16 S. W. 373; 2 Benjamin, Sales, 4th Am. ed. § 1243.

The National Bank of Commerce, acting for the Centennial Mill Company, ought to be permitted to set up any defense against the Port Arthur bank which the Centennial Mill Company might have interposed.

Second Nat. Bank v. Bank of Alma, supra; Wagnon v. Pease, 104 Ga. 417, 30 S. E. 895.

The Port Arthur bank, in assuming to make the collection of the draft of December 11th, 1903, was acting for the real and beneficial owner of the draft, no matter who that owner might be.

Bank of Washington v. Triplett, 1 Pet. 25, 7 L. ed. 37; Diamond Mill Co. v. Groesbeck Nat. Bank, 9 Tex. Civ. App. 31, 29 S. W. 169; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141; 1 Morse, Banks & Bkg. 3d ed. § 251; M'Kinster v. Bank of Utica, 9 Wend. 46.

Mr. Justice **Hughes** delivered the opinion of the court:

The Russo-Chinese Bank brought this action to recover back money which it had paid to the National Bank of Commerce of Seattle. Judgment of nonsuit was entered on the first trial and was reversed by the circuit court of appeals. 109 C. C. A. 398, 187 Fed. 80. On the second trial, there was a verdict for the defendant, and the judgment entered accordingly was affirmed. 124 C. C. A. 434, 206 Fed. 646. The case comes here on certiorari.

[407] The facts are these: In December, 1903, the Centennial Mill Company, of Seattle, shipped by the steamship "Hyades" of the "Puget Sound-Oriental Line" 35,312 quarter sacks of flour to be transported to Port Arthur, or Dalny, and to be there delivered "unto shipper's order or to his or their assigns (notify Clarkson & Company)." In accordance with the usual course of business the Centennial Mill Company drew its draft, dated December 11, 1903, on Clarkson & Company, for $36,194.80, payable ninety days after sight, to the order of the National Bank of Commerce (with exchange and collection charges), and, attaching thereto the original and duplicate of the bill of lading for the shipment above described (which was indorsed in blank), the policy of insurance, and bill of sale to Clarkson & Company, delivered the draft to the National Bank of Commerce, of Seattle, which paid the amount of the draft to the Mill Company. This bank then forwarded the draft, with the documents, to the Port Arthur branch of the Russo-Chinese Bank for collection, stating in the letter of transmittal: "Documents are to be delivered on payment." The letter, with the draft and documents, was received on January 22, 1904.[1] In acknowledging receipt, the Russo-Chinese Bank used the usual form of letter, which stated that specific instructions must be given concerning disposition of bills and documents, and storage of goods, in case the draft were dishonored. No such instructions were given. The draft was presented for acceptance on January 23, 1904, and was accepted on January 30, 1904, by Clarkson & Company, and the Seattle bank was notified accordingly. The acceptance fixed April 30, 1904, as the due date, according to the tenor of the draft, and on the expiration of two days' grace allowed by the Russian law it was protested on May 3, 1904. There was evidence that the draft, with [408] deed of protest, was mailed to the Seattle bank on May 26, 1904; and there was counter testimony that it never was received.

The Russo-Japanese War was formally declared on February 10, 1904. From February 9th there was a stringent water blockade of Port Arthur, and about May 3d the investment was made complete by the Japanese land forces. Port Arthur fell on January 2, 1905, and thereupon the Japanese authorities took possession of all the books and documents of the Russo-Chinese Bank at Port Arthur; these were retained until March, 1906, when they were returned to the bank and taken to its home office at St. Petersburg.

Clarkson & Company, an importing firm having its principal place of business at Vladivostok and a branch office at Port Arthur, were also the agents at the latter place of the steamship company which carried the flour. On April 29, 1904, the Port Arthur branch of the Russo-Chinese Bank wrote to the Shanghai branch of the bank (in answer to an inquiry requested by a representative of the Centennial Mill Company) that the bank had "all shipping documents," and added: "The flour relative to the first three bills" (including the one in question) "is in the hands of Clarkson & Company and has been sold by them. They promised to take up the bills as soon as they get the money of their sale . . . Bill No. 1559/7035" (that is, the draft here involved) "is due to-morrow and shall be protested if not paid." It was further stated that the fact that Clarkson & Company had obtained possession of the goods, although the bill of lading was held by the bank, was due to their being the steamship agents, and could not be prevented. On July 7, 1904, the Seattle bank wrote to the Russo-Chinese Bank at St. Petersburg that Clarkson had advised the drawer that this draft, and others, had been paid before maturity. The Russo-Chinese Bank replied, in substance, that it was not in a [409] position to trace the matter, but would investigate it as soon as possible. There was further correspondence in which the Seattle bank set forth its information as to the payment of the draft, and the Russo-Chinese Bank reiterated its inability to ascertain the facts. Finally, in response to the demand of the Seattle bank for the return of the bill of lading attached to the draft, or a remittance of its amount, the Russo-Chinese Bank, St. Petersburg, under date of November 9, 1904, forwarded to the Seattle bank a check for $36,013.70 (being $36,194.80, the face of the draft, less commission and charges), and added: "It remains, of course, however understood that in case your above remittance proves not to have been paid for by Clarkson & Co. you are held responsible to refund the amount of our to-day's cheque." The Seattle bank (December 5) acknowledged receipt, pointing out that a balance of $2,298.49 was still needed to make payment of principal and interest in full, and stating: "We on our part agree upon return to us of both sets of bills, showing that the draft has not been paid, to reimburse you in the sum paid us, provided, that we were in no wise injured by the fact that your Port Arthur branch has indefinitely held the bills after their maturity, at which time they could have been returned

[1] For convenience, we give the dates "New Style."

tb us and we could have collected from the Steamship Company." On December 29, 1904, the Russo-Chinese Bank, St. Petersburg, enclosed check for the balance requested, and said: "It remains understood that in case your above remittance proves not to have been paid, you declare yourselves ready to refund us these $2,298.49 with the $36,013.70, sent on 27/9 November plus accrued interest." And in reply the Seattle bank agreed "that guarantee contained in our letter of December 5th shall also cover this amount."

When the Russo-Chinese Bank obtained from the Japanese authorities the books and documents, it ascertained that the draft in question had been protested for nonpayment, [410] and had been mailed to the Seattle bank. Thereupon, on June 27, 1906, the Russo-Chinese Bank demanded the refunding of the money paid to cover the draft. The demand was refused and this action was brought.

It was alleged in the complaint that the payment to the Seattle bank had been made upon condition that "if it should thereafter be ascertained that said draft had not been paid," the money should be refunded, and that there had been no payment in fact. The defendant denied that the condition was as stated, and alleged that it had agreed to reimburse the plaintiff upon the return "of both sets of bills" and a showing that the draft "had not been paid," provided the defendant was in no wise injured by the negligence of the plaintiff in the performance of its duties. It was further averred, among other things, that the draft had been paid in full by Clarkson & Company; that it was the duty of the plaintiff not to permit the flour represented by the bill of lading to be appropriated by Clarkson & Company; and that if the proceeds of the sale of the flour were not applied to the payment of the draft, the failure was due to the plaintiff's carelessness and breach of duty. The plaintiff in its reply denied these averments and alleged affirmatively that Clarkson & Company were the agents of the steamship company, and that it was well known to the defendant that, upon arrival, the flour would be delivered into their keeping as such agents, whether the draft was paid or not, and that the appropriation of the flour by them before payment was a matter not within plaintiff's control.

The judgment of nonsuit on the first trial, because of a failure to show the return of the draft and accompanying documents, and thus to prove the breach of an express promise, was reversed upon the ground that the complaint stated a cause of action upon an implied agreement to restore money paid under mistake of fact. 109 C. C. A. 398, 187 Fed. p. 86.

[411] On the second trial the jury found a general verdict in favor of the defendant, and also returned a special finding as follows:

"We . . . find that the Port Arthur branch of the Russo-Chinese Bank did receive payment for the draft dated December 11th, 1903, on account of which the plaintiff made the remittance to the defendant alleged in the complaint."

The court of appeals held that, notwithstanding the protest of the draft and the other evidence introduced by the plaintiff to show that it had not been paid, this special finding had sufficient support. In its succinct review of the evidence the court said:

"The flour in question was carried to Port Arthur by the ship Hyades, which reached there about the middle of January, 1904. The evidence also shows that Clarkson & Company were large customers of the bank. The succeeding ship of the steamship company, also carrying flour among other things, reached Port Arthur about the 7th of February, 1904. Short" (assistant manager of Clarkson & Company until, as he said, February 4, 1904) "testified, among other things, that when the Hyades arrived with the 35,312 quarter sacks of flour in question, there were but from 6,000 to 8,000 sacks in Clarkson & Company's warehouse, and that when that shipment arrived he went to the Port Arthur bank on behalf of Clarkson & Company to accept the draft drawn for the purchase price of it, and did so; that when he accepted the draft Mr. Ofsiankin" (manager of the Russo-Chinese Bank at Port Arthur), "on behalf of the bank, authorized Clarkson & Company to take immediate possession of the flour and sell it, and that he (Short), on behalf of that firm, gave the bank what he designates as a 'letter of guaranty,' and what Davidson" (then, as he testified, manager of Clarkson & Company at Port Arthur) "in his deposition designates as one of 'hypothecation,' recognizing the flour as the property of the bank until paid for, and [412] agreeing to pay over to the bank the proceeds thereof until full payment was made; that the letter was 'the regular form of bank guaranty; it was a printed form,' said the witness. And both Short and Davidson testified that what was done in the matter of the shipment here in question was in accordance with a long-established custom between the Port Arthur bank and Clarkson & Company; Short testifying that: 'From the year 1900 the same rule existed. We always gave the bank a letter of guaranty against—a letter of guaranty to take

delivery of the cargo, and the cargo belonged to them until it was paid for, and we sold it out and deposited the money in the bank from time to time as Clarkson & Company got it in.' Davidson, in his deposition, corroborates the testimony of Short in that regard. . . . Short testified that upon the acceptance by Clarkson & Company of the draft in question, and the delivery by that firm to the Port Arthur bank of the documents mentioned, Clarkson & Company took possession of the 35,312 quarter sacks of flour; and that they thereupon commenced selling it, and paying into the bank the proceeds thereof, is a fair inference from his testimony, as well as that of Davidson. It appears from the latter's testimony that, by reason of orders of the Russian military authorities, he was compelled to leave Port Arthur, and did so on the 17th of February, 1904." After referring to the fact that Davidson was evidently confident that the steamer that brought the flour was the "Pleiades" (the steamer that arrived in February, after the "Hyades"), the court continued:—"but the flour itself, the witness distinctly testified, was sold by him before leaving Port Arthur to the firm of Ginsburg & Company, which he testified was a large Russian firm doing an extensive business with the Port Arthur bank, and with its principal place of business at that place, and which sale he testified he had to make in order to protect Clarkson & Company against the war conditions then prevailing. His testimony is, in [413] part, that he arranged with Ginsburg & Company to pay a part of the money for which he sold the flour into the Port Arthur bank, and to take a draft from that company on Shanghai in his favor, which he intended to pay into Clarkson & Company's branch at that place, and that he took the head of the firm, Ginsburg, to the Port Arthur bank, and explained to the manager of that bank the terms of the sale, to which he agreed. Short testified that the Pleiades arrived at Port Arthur about the 7th of February, and that he himself left there on board of that vessel, and that not more than 1,500 or 2,000 sacks of flour were landed at Port Arthur from that ship, so that the jury might well have concluded that the 35,000 or 40,000 sacks of flour which Davidson thought were brought by the Pleiades was the consignment of flour that the Hyades carried to that port a few weeks before. As a matter of course that, and all other inconsistencies in the testimony of the various witnesses, as well as their veracity, were matters for the determination of the jury, in the light of all of the facts and circumstances of the case. Moreover, there was testimony tending to show that from the 1st of January, 1904, to November 23d of the same year, Clarkson & Company paid into the Port Arthur bank 126,928 roubles and 97 kopeks." 109 C. C. A. 439-441, 206 Fed. pp. 651-653.

We agree with the court of appeals that the special finding of the jury was adequately supported. Error is assigned with respect to the following instruction to the jury:

"If you find from the evidence in this case that plaintiff permitted Clarkson Company to take over the flour under such an arrangement as the defendant claims with the stipulation that the plaintiff was the owner of the flour and with the agreement that Clarkson & Company would account to the plaintiff for the proceeds of the sale of the flour, then I instruct you that such action on the part of the plaintiff constitutes in law a payment of the draft in question [414] and the plaintiff cannot recover and your verdict must be for the defendant."

It is said by the petitioner that "if we assume that the Port Arthur branch did, contrary to its instructions, permit Clarkson to take over the flour, then to the extent of the value of the security that was thereby released it may have been responsible." But it is argued that "although the bank did without warrant release the security," still no damage resulted to the Seattle bank if Clarkson & Company were in fact able to pay their draft, and that there was abundant evidence that Clarkson's financial standing in Port Arthur at this time was good; and that in any event the debt could not be deemed to be paid to a greater extent than the value of the property. The trial court, it is insisted, in effect directed a finding of payment, if the jury found that the agreement was made as described, regardless of this value.

This criticism of the instruction fails, we think, to take proper account of its context. Immediately following the words quoted, the court said:

"It is a general rule of law that where collateral security is received for a debt with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary and the law makes the application. If the proceeds equal or exceed the amount of the debt it is *de facto* paid; no action would lie for it, and proof of these facts would support the defense of payment. And if you find from the evidence in this case that the plaintiff did consent to Clarkson taking over the flour in question and consented to the sale of the same

by Clarkson & Company, and then Clarkson & Company sold the flour in question and paid over the proceeds thereof to the plaintiff, then such payment of the proceeds of the sale of such flour to the plaintiff operated as a payment of the draft in question,—provided the proceeds [415] of the sale of the flour equaled the amount of the draft; and if such proceeds did not equal or exceed the amount of the debt then it was a payment *pro tanto*—that is, a payment of so much of the said draft as the proceeds of the sale of the flour would pay of the same; and this is the law, notwithstanding the fact that plaintiff may have received the proceeds of the sale of said flour and placed the same to the credit of Clarkson & Company in its bank, and permitted Clarkson & Company to use said funds for other purposes."

In this, the trial judge made his meaning sufficiently clear. If the proceeds of the sale under the agreement were to be payment only if they "equaled the amount of the draft," and otherwise were to be "payment *pro tanto*," plainly the agreement itself was not to be treated as constituting payment regardless of the value of the flour. Taking the instructions on this point in their entirety we think that their fair import was that the finding of payment in consequence of the stated arrangement was to be reached only in case the value of the flour was not less than the amount of the draft.

Moreover, the record does not disclose a controversy as to the value of the flour. The evidence as to this amply supported a finding that the flour was at least worth the amount of the draft, and indeed it could not be said that a different conclusion would have had adequate support in the proof. Mr. Friedburg, officer of the Russo-Chinese Bank, testified that he did not know "the price of the flour," but that, so far as he knew, "during the siege of Port Arthur the price of flour was a little higher than before the outbreak of the war, but there was a lot of flour in the go-downs of the government and no scarcity was felt of it." Mr. Clarkson testified, referring to the Ginsburg sale: "The first I heard was that the flour had been sold at two roubles a sack. I firmly believe at that time, that as war had broken out, the flour that [416] was in Port Arthur at the time was worth fully Rbls. 3.00 a sack; consequently I considered that any sale made at Rbls. 2. was at least one rouble below the market value. To the best of my knowledge and belief the selling price before hostilities commenced was from Rbls. 2.50 to Rbls. 2.60 a sack. . . . Acting under instructions from me, the bank in Port Arthur refused to let Ginsburg & Company have the flour at Rbls. 2.00, whereupon Ginsburg & Company agreed to pay Rbls. 2.40." Mr. Short, when asked "the market price of the flour" at the time he left, said: "It was selling from two forty to two sixty-five roubles a sack." Mr. Davidson testified that there was "no market price of flour at that time;" but when asked whether "there were not two separate bills of sale" made by him to Ginsburg & Company for that flour, one at 2. roubles and the other at 2.40 roubles," he answered that it was "quite true there were two prices" arranged by him, and that "the lower price was sufficient to meet the draft." He added: "I made the sale to Ginsburg & Company at what I considered a fair market value under the circumstances; namely, that I had to leave Port Arthur, and that there was no one there I considered eligible to succeed me. The profit was 20 to 25 per cent, as near as I can remember." It cannot be said that the evidence warranted a finding that the value of the flour was less than the amount of the draft.

The Russo-Chinese Bank received the draft, with documents attached, for collection. It was instructed that "documents are to be delivered on payment." It was on these terms that it was intrusted with the bill of lading, indorsed in blank, which represented the flour. It was its plain duty not to permit Clarkson & Company, upon whom the draft was drawn, to have the control and disposition of the flour until the draft was paid. See Milwaukee Nat. Bank v. City Bank, 103 U. S. 668, 670, 671, 26 L. ed. 417, 418. It is no answer to say that Clarkson & Company were the agents of the steamship [417] company, for, while they might be able to obtain custody of the flour, it would only be in their capacity as such agents, and without the right of disposition. Nor was the case altered by the acceptance of the draft, for the condition attached to the delivery of the flour with the *jus disponendi* was payment, not acceptance. If, in these circumstances, the bank entered into an agreement with Clarkson & Company, as was testified, that the latter were to take over the flour and sell it, promising to account for the proceeds, this was manifestly a misappropriation of the property, and there arose in consequence liability to account for its value. This action was brought by the Russo-Chinese Bank to recover money which it had paid to the Seattle bank, and, with respect neither to the express promise to refund nor the promise implied in law, can it be said that the plaintiff was entitled to succeed if, at the time of the payment to the Seattle bank, it paid merely what it owed. There is no theory which permits it to

recover, save that it paid under a mistake of fact; that is, that upon the actual facts it was not liable to make the payment it did make. If, however, it appeared that the value of the flour was equal to the amount of the draft, and it was found that the bank, contrary to its instructions, had permitted Clarkson & Company to take and dispose of the flour, it would necessarily follow that the Russo-Chinese Bank was accountable to the Seattle bank to the amount of the draft, and was in the same position, so far as the right of the Seattle bank against it was concerned, as if it had received the avails of the draft. It could not, by an agreement in violation of its duty, invest Clarkson & Company with the right of disposition, without accountability. The instruction, to which we have referred, affords no ground for reversal.

Error is also assigned with respect to the instruction to the jury that the Russo-Chinese Bank became invested with the title and ownership of the flour, and that it could [418] not be excused from an obligation to account by saying that the flour had disappeared without its knowledge. It is argued that the relation between the banks was that of principal and agent, not of vendor and vendee; that it took the draft for collection. But the charge, as we view it, was not to the effect that the relation of vendor and vendee was created, but, on the contrary, it was distinctly stated to the jury that the Russo-Chinese Bank "was obligated as an agent to act in good faith and protect the rights of the National Bank of Commerce in the collection of the draft," and that, as "the agent" for the owner, it "was obligated to account for the amount of the draft, to account for the security which the bill of lading constituted." In view of the special finding that the draft had been paid, it is not necessary to inquire as to whether there would otherwise have been liability on the part of the plaintiff because of a failure to exercise reasonable care. The special finding, supported by adequate evidence, was based, under the instructions of the court, upon the transaction with Clarkson & Company to which we have referred, and it must be deemed controlling. We find no instruction with reference to that transaction, or its legal effect if found to be as testified, which was prejudicial to the plaintiff.

Complaint is also made with respect to certain requests for instructions and rulings on the admission of evidence, but they are wholly without merit and it is unnecessary to review them. It is said that the Seattle bank suffered no loss because it had a guaranty from the Centennial Mill Company; but the Seattle bank, in view of its relation to the commercial paper involved, was entitled to demand an accounting from its correspondent, and on the same ground to resist this action for the recovery back of the money which it had received upon the draft.

As we discover no error in the record, the judgment must be affirmed.

Judgment affirmed.

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[419] ST. LOUIS & KANSAS CITY LAND COMPANY, Chicago, Burlington, & Quincy Railroad Company, et al., Plffs. in Err.,

v.

KANSAS CITY.

(See S. C. Reporter's ed. 419-431.)

Error to state court — scope of review — questions of local law.

1. The extent of the authority conferred upon a city by its charter with respect to assessments for benefits to pay an award for property condemned for street widening purposes, the construction of the

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NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required generally to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194, and Ulman v. Baltimore, 11 L.R.A. 225.

As to the validity of class legislation, generally—see notes to State v. Goodwill, 6 L.R.A. 621, and State v. Loomis, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection, generally—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

On the necessity of providing in statute for notice and hearing on question of damages or compensation in eminent domain proceedings—see note to Sterritt v. Young, 4 L.R.A.(N.S.) 169.

On landowner's right to notice and hearing with respect to assessments for improvements—see note to Chicago, M. & St. P. R. Co. v. Janesville, 28 L.R.A.(N.S.) 1201.

various provisions of the charter, the validity, scope, and effect under the state law of the ordinances adopted by the city, the scope and effect of the original and supplementary proceedings, and the rights of the parties thereto under the state law, are all state questions, as to which the decision of the state court is controlling on writ of error from the Federal Supreme Court.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal question.

2. The ruling of a state court as to the effect with respect to a supplemental curative proceeding to assess benefits from the widening of a street of a decree in a court of the same state, holding the original assessments void for want of the required notice as to the complainant in that suit and certain interveners, does not present a Federal question which may be reviewed by the Federal Supreme Court on writ of error.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — public improvements — hearing.

3. Owners of property assessed for benefits from the widening of a street are not entitled, by virtue of the due process of law clause of U. S. Const., 14th Amend., to be heard either in the original or supplemental curative proceedings upon the amounts of the awards to the owners of the property condemned, although the city charter provides a single proceeding, embracing both the proposed condemnation and the assessment for benefits, and requires notice to the property owner within the benefit district.

[For other cases, see Constitutional Law, 745–763, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — public improvements.

4. The equal protection of the laws is not denied to the owners of property assessed in a supplemental curative proceeding for benefits from the widening of a street, without any opportunity to be heard upon the amounts of the awards to the owners of the property condemned, because in the original proceeding there was such opportunity, together with a right to appeal, where the asserted inequality springs solely from the fact that certain assessed owners, despite the defect in the publication of notice in the original proceeding, appeared and acquiesced therein.

[For other cases, see Constitutional Law, 371–379, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —equal protection of the laws — public improvements.

5. The owners of property sought to be assessed in a supplemental curative proceeding for benefits from the widening of a street are not entitled, by virtue of U. S. Const., 14th Amend., to a redetermination of the assessments laid upon the property of other owners in the original proceedings, which those owners, despite the defects in such original proceedings, accepted and paid.

[For other cases, see Constitutional Law, 371–379, 559–581, in Digest Sup. Ct. 1908.]

Error to state court — scope of review — non-Federal question.

6. Whether the assessment of benefits in street-widening proceedings upon a portion of one's property is in effect an adjudication that the other portions were not benefited, so as to preclude their assessment in supplemental curative proceedings, is a question of state law which is not open for review in the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —equal protection of the laws — public improvements.

7. There is nothing in the Federal Constitution to prevent the assessment in supplemental curative proceedings for benefits from the widening of a street of property omitted from the original proceeding.

[For other cases, see Constitutional Law, 371–379, 559–581, in Digest Sup. Ct. 1908.]

Constitutional law — application of Federal Constitution to states.

8. State courts are not bound by the provision of U. S. Const., 7th Amend., that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

[For other cases, see Constitutional Law, II. b, in Digest Sup. Ct. 1908.]

[No. 261.]

Argued March 7, 1916. Decided June 5, 1916.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Jackson County, in that state, enforcing assessments for benefits from the widening of a street. Affirmed.

See same case below, 260 Mo. 395, 169 S. W. 62.

The facts are stated in the opinion.

Messrs. I. N. Watson, Kenneth McC. Deweese, and H. M. Langworthy argued the cause, and, with Mr. Edward White, filed a brief for plaintiffs in error:

In condemnation proceedings property owners whose properties are sought to be charged with benefits to pay damages for property taken or damaged are entitled to notice and opportunity to be heard in order to constitute due process of law.

St. Louis v. Ranken, 96 Mo. 505, 9 S. W. 910; St. Louis v. Brinckwirth, 204 Mo. 302, 102 S. W. 1091; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Londoner v. Denver,

210 U. S. 375, 52 L. ed. 1108, 28 Sup. Ct. Rep. 708.

(a) Such proceedings are in violation of common law and common right, and the utmost strictness is required in order to give validity to them.

Ells v. Pacific R. Co. 51 Mo. 203; Whitely v. Platte County, 73 Mo. 30; Zimmerman v. Snowden, 88 Mo. 220; Anderson v. Pemberton, 89 Mo. 65, 1 S. W. 216; Chicago, R. I. & P. R. Co. v. Young, 96 Mo. 42, 8 S. W. 776; Williams v. Kirby, 169 Mo. 622, 70 S. W. 140; Spurlock v. Dornan, 182 Mo. 242, 81 S. W. 412; Tarkio v. Clark, 186 Mo. 285, 85 S. W. 329.

(b) Section 16 of Article 9 of the Constitution of Missouri requires all courts to take judicial notice of the provisions of the charter of Kansas City.

Walsh v. Missouri P. R. Co. 102 Mo. 589, 14 S. W. 873, 15 S. W. 757; St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54.

(c) Publication of the court's order for four consecutive weeks, the last insertion to be not more than one week prior to the date set for impaneling the jury, was a jurisdictional fact necessary to give the municipal court jurisdiction to hear and determine the cause.

Kansas City v. Duncan, 135 Mo. 580, 37 S. W. 513; St. Louis v. Brinckwirth, 204 Mo. 302, 102 S. W. 1091; St. Louis v. Ranken, 96 Mo. 505, 9 S. W. 910; St. Louis v. Koch, 169 Mo. 591, 70 S. W. 143.

This record shows that no legal notice was given to property owners in the benefit district of the proceedings, and such property owners had no opportunity to be heard in said proceedings.

The judgment in condemnation proceedings is *res judicata* as to the particular facts held in judgment.

Union Depot Co. v. Frederick, 117 Mo. 148, 21 S. W. 1118, 1130, 26 S. W. 350; Burke v. Kansas City, 118 Mo. 309, 24 S. W. 48; New Madrid County v. Phillips, 125 Mo. 61, 28 S. W. 321.

There was but one cause, one proceeding, one order, one jury, one verdict, and one judgment.

State ex rel. Holden v. Gill, 84 Mo. 248; Kansas City v. Mulkey, 176 Mo. 247, 75 S. W. 973; Kansas City v. Hennegan, 152 Fed. 249; Anderson v. Pemberton, 89 Mo. 66, 1 S. W. 216.

In this statutory and summary proceeding,—this legal *coupe de main*, in derogation of common law and common right,—the utmost strictness is required in order to give validity; and unless, upon the face of the proceedings had, it affirmatively appears that every essential prerequisite of the statute conferring the authority has been fully complied with, every step, from inception to termination, will be *coram non judice*.

Whitely v. Platte County, 73 Mo. 30; Colville v. Judy, 73 Mo. 651; Ells v. Pacific R. Co. 51 Mo. 200.

The charter of Kansas City has intrusted the estimate of damages and the assessment of benefits to the same jury, and there are many precedents for intrusting the performance of both duties to the same persons.

Bauman v. Ross, 167 U. S. 593, 42 L. ed. 289, 17 Sup. Ct. Rep. 966.

In the supplemental proceedings plaintiffs in error were denied rights accorded property owners in the benefit district in an original proceeding, and their property taken without due process of law, and they were denied the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

Stae ex rel. Tuller v. Seehorn, 246 Mo. 577, 151 S. W. 724; Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; Kansas City v. Duncan, 135 Mo. 580, 37 S. W. 513; St. Louis v. Meier, 77 Mo. 13; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 426, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1114; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112–171, 41 L. ed. 369–393, 17 Sup. Ct. Rep. 56.

A reassessment was a re-examination of a fact decided by a jury which could not be re-examined under the Constitution of the state of Missouri or under the second clause of the 7th Amendment to the Constitution of the United States without depriving the Union Depot Bridge & Terminal Railroad Company of its property without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 243–263, 41 L. ed. 987–994, 17 Sup. Ct. Rep. 581.

The jury were permitted in this supplemental proceeding to make another assessment of benefits against its property without any notice other than the supplemental ordinance and notice thereunder to the Union Depot Bridge & Terminal Railroad Company, that the city deemed any of its property had been omitted, or that a proper assessment had not been made against this property. Plaintiffs in error therefore contend that the ordinance and the order of publication thereunder were not sufficient to constitute due process of law against the

Union Depot Bridge & Terminal Railroad Company.

Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 43 L. ed. 460, 19 Sup. Ct. Rep. 205.

Plaintiffs in error were entitled to a hearing in relation to the proportion each piece of property should bear to the whole cost of the improvement in the benefit district.

Voigt v. Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public uses without compensation.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 174, 41 L. ed. 394, 17 Sup. Ct. Rep. 56; Norwood v. Baker, 172 U. S. 279, 43 L. ed. 447, 19 Sup. Ct. Rep. 187; French v. Barber Asphalt Paving Co. 181 U. S. 340, 341, 45 L. ed. 888, 889, 21 Sup. Ct. Rep. 625; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708.

The decision of the state supreme court in this case is more than the mere construction of a local statute. The effect of it is to arbitrarily take away from the plaintiffs in error and other property owners in the benefit district valuable rights, which were clearly granted them, and in the case of the Union Depot, Bridge, & Terminal Company it appears that property was acquired by it during the time that those rights were plainly in existence. This construction of the charter amounted to the unlawful taking of property, and was an impairment of contractual rights as well.

Muhlker v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Messrs. I. N. Watson, H. M. Langworthy, Edward White, Kenneth McC. De Weese, and E. M. Jones also filed a brief for plaintiffs in error on motion to dismiss or affirm.

Messrs. Jesse C. Petherbridge and Arthur F. Smith argued the cause, and, with Mr. Andrew F. Evans, filed a brief for defendant in error:

The assessment of benefits to pay for land taken in the widening of a public street is the exercise of the taxing power of a municipality, as distinguished from the exercise of its power of eminent domain, and therefore is not taking private property without due process of law, if notice of the time and place of the proposed assessment is given, as was done in this case; and plaintiffs in error were not denied the equal protection of the law, in violation of the 14th Amendment of the Federal Constitution.

Goodrich v. Detroit, 184 U. S. 432, 437, 46 L. ed. 627, 630, 22 Sup. Ct. Rep. 397; Voigt v. Detroit, 184 U. S. 115, 122, 46 L. ed. 459, 462, 22 Sup. Ct. Rep. 337; Lombard v. West Chicago Park Comrs. 181 U. S. 33, 45 L. ed. 731, 21 Sup. Ct. Rep. 507; Londoner v. Denver, 210 U. S. 373, 378, 52 L. ed. 1103, 1109, 28 Sup. Ct. Rep. 708; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23; State ex rel. Tuller v. Seehorn, 246 Mo. 583, 151 S. W. 724; Kansas City v. St. Louis & K. C. Land Co. 260 Mo. 395, 169 S. W. 62; St. Louis v. Ranken, 96 Mo. 507, 9 S. W. 910; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600.

The plaintiffs in error, not being the owners of any of the property taken in the original proceeding, were not necessary parties thereto, and were not entitled to notice of such original proceedings.

Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; Voigt v. Detroit, 184 U. S. 115, 120, 46 L. ed. 459, 461, 22 Sup. Ct. Rep. 337; Weyerhaueser v. Minnesota, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; 1 Page & J. Taxn. p. 213; State ex rel. Tuller v. Seehorn, 246 Mo. 583, 151 S. W. 724; Kansas City v. St. Louis & K. C. Land Co. 260 Mo. 395, 169 S. W. 62; St. Louis v. Ranken, 96 Mo. 507, 9 S. W. 910; St. Louis v. Brinckwirth, 204 Mo. 303, 102 S. W. 1091; St. Louis v. Calhoun, 222 Mo. 53, 120 S. W. 1152; Kansas City v. Ward, 134 Mo. 179, 35 S. W. 600.

The construction placed on a statute of a state, or on an ordinance or charter provision of a city in such state, by the highest judicial tribunal of that state, will be followed by this court.

King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Baltimore Traction Co. v. Baltimore Belt R. Co. 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587–590, 33 L. ed. 784, 785, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23; Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. ed. 322, 26 Sup. Ct. Rep. 159, 19 Am. Neg. Rep. 625.

Proceedings under the Kansas City charter were valid.

State ex rel. Tuller v. Seehorn, 246 Mo. 583, 151 S. W. 724; Kansas City v. St. Louis & K. C. Land Co. 260 Mo. 395, 169 S. W. 62.

A decision by the state supreme court that the formalities of the state or munici-

pal taxing laws have been observed presents no Federal question where the contention is that the manner of their observance was a denial of due process of law.

French v. Taylor, 199 U. S. 274, 50 L. ed. 189, 26 Sup. Ct. Rep. 76; Corry v. Campbell, 154 U. S. 629, and 24 L. ed. 926, 14 Sup. Ct. Rep. 1183.

The original proceedings were valid as to those who abided the judgment.

State ex rel. Tuller v. Seehorn, supra.

The judgment in the Union Pacific injunction case affected only the rights of plaintiffs in error as to their assessments in the original proceeding.

Kansas City v. St. Louis & K. C. Land Co. supra.

The provisions of the charter of Kansas City, Missouri, are regarded as having the same force as a legislative enactment, and ordinances passed in pursuance thereof are binding.

Morrow v. Kansas City, 186 Mo. 683, 85 S. W. 572; McGhee v. Walsh, 249 Mo. 266, 155 S. W. 445; Ex parte Smith, 231 Mo. 122, 132 S. W. 607.

The charter of Kansas City is a public act of which the courts take judicial notice.

Kansas City v. Smart, 128 Mo. 298, 30 S. W. 773.

Mr. Justice Hughes delivered the opinion of the court:

This was a supplemental proceeding to assess certain parcels of land in Kansas City, Missouri, for benefits. The assessments were for the purpose of meeting an unpaid portion of damages which had been awarded for property condemned in widening Sixth street. Judgment for the assessments was entered on the verdict of a jury and was affirmed by the supreme court of Missouri, *in banc*. 260 Mo. 395, 169 S. W. 62. This writ of error is prosecuted by owners of property thus assessed.

In October, 1909, the common council of Kansas City passed an ordinance providing for the condemnation of property within specified limits, and for the raising of the amount of the award by special assessments against property within a described benefit district, in accordance with article 6 of the city's charter. Proceedings accordingly [421] were then brought in the municipal court of Kansas City, resulting in an award of $166,299.57 for property taken and in the making of assessments of like amount for benefits. There were over 13,000 different tracts within the benefit district. No appeal was taken from the judgment. The city collected on the assessments about $89,000. It was discovered that the publication of the required notice of the proceeding was defective, and in an appropriate suit in equity, brought by the Union Pacific Railroad Company, a decree was obtained in favor of that company, and of certain interveners, annulling the assessments against their properties; and no appeal was taken from that decree.

Thereupon, Kansas City attempted to repeal the original ordinance, presumably—as the state court suggests—for the purpose of abandoning the proceeding and returning the assessments paid. At the suit of owners of the land condemned—who were entitled to the awards—decree was entered enjoining the city from abandoning the condemnation proceedings. The city then enacted a "supplemental or curative ordinance," basing its action on the authority of § 23[1] of article 6 of the city's charter. [422] "The object of said sensible charter

[1] Section 23 is as follows:

"Sec. 23. Defective proceedings—supplemental.—When by reason of any error, defect, or omission in any proceedings, or in the verdict or judgment therein that may be instituted under the provisions of this article, a portion of the private property sought to be taken, or some interest therein, cannot be acquired, or an assessment is made against private property which cannot be enforced or collected, or when, by reason of any such defect, private property in the benefit district is omitted, the city may, by ordinance, institute, carry on and maintain supplemental proceedings to acquire the right and title to such property or interest therein intended to be taken by the first proceeding, but which cannot on account of such defect, error or omission, be acquired thereunder, or to properly assess against any piece or parcel of private property against which an assessment was in the first proceeding erroneously made or omitted to be made, the proper amount such private property, exclusive of the improvements thereon, is benefited by the proposed improvement to be determined by the verdict of the jury in such supplemental proceedings; and the original assessments may be revived, corrected, increased or diminished as may be necessary or equitable under the provisions of this article for the original proceedings. Such supplemental proceedings shall be instituted and conducted as to the particular piece or pieces of private property sought to be acquired or assessed in like manner and with like effect as in the original proceedings, and shall be known and described as supplemental proceedings for the purposes specified in the original ordinance; and a supplemental verdict and assessment shall be made, confirmed and copies of the original verdict certified in every particular as in the original proceedings; and the assessments as established and corrected by such supplemental verdict shall be collected by the city treasurer in the same manner and under like conditions and restrictions, powers and duties as in the case of original proceedings."

provision," it is said by the state court, "was to afford a remedy when by any error, defect, or omission in condemnation proceedings, assessments made against private property cannot be enforced or collected, or where property in the benefit district is omitted, etc. In such case it was provided that the city may, by ordinance, institute and carry on supplemental proceedings to make a proper assessment against any parcel of property in the benefit district erroneously omitted or erroneously made in the first proceeding, etc." 260 Mo. p. 406.

Under this ordinance the supplemental proceeding was instituted in the municipal court. The notice required by the charter was given and the plaintiffs in error (with the exception of the Union Depot Bridge & Terminal Railroad Company) appeared. The jury returned a verdict which was "the same as to the amount of benefits as the verdict returned in the original proceeding." State ex rel. Graham v. Seehorn, 246 Mo. 541, 552, 151 S. W. 716; see 260 Mo. p. 406. An appeal was taken from the judgment to the circuit court of Jackson county. While [423] the case was pending in that court, the presiding judge, having announced that he purposed to "try out the question of the amount of damages awarded to property owners whose property was taken or damaged under the original proceeding as well as the question of assessing benefits over nonpaying properties within the benefit district," two prohibition suits were brought in the supreme court of the state. The one was brought by owners of property in the benefit district who contended that the municipal court had no jurisdiction of either the original or the supplemental proceedings, and hence that the circuit court had no jurisdiction on appeal. This contention was overruled and the writ denied. State ex rel. Graham v. Seehorn, supra; see 260 Mo. p. 407. The other prohibition suit was brought by the owners of property which was sought to be taken for public use. They urged that there was no provision for an appeal in a supplemental proceeding begun in the municipal court, and that, in any event, the circuit court had no jurisdiction to award damages. The court sustained the right of appeal, but it was held that the verdict and judgment in the original proceedings were valid "as to those who appeared and accepted them;" that the original proceedings, unappealed from, became *res judicata*. The jury were not to include in their verdict "assessments of benefits and damages upon property properly included in the first verdict." In answer to the contention that property owners in the benefit district were entitled to be heard on the question of the amount to be paid for the property taken in condemnation, the court ruled that, while it was entirely proper as a matter of grace to permit such owners to aid the city in preventing an unduly high valuation of the property condemned, they were not necessary parties in the determination of that issue, and that this question was not open to retrial in the supplemental proceedings where the owners of the property condemned [424] had acquiesced in the awards. Accordingly, a writ issued prohibiting the circuit court from retrying the question of the amount of damages awarded to the owners of property condemned. State ex rel. Tuller v. Seehorn, 246 Mo. 568, 151 S. W. 724; see 260 Mo. 407–409.

The circuit court then resumed the trial of the appeal in the supplemental proceeding. The plaintiffs in error appearing (with the exception of the Union Depot Bridge Company) challenged the validity of the proceedings under the state law, and each company also claimed protection under the due process and equal protection clauses of the 14th Amendment from any assessment of benefits until it had "opportunity to be heard upon the amount of damages that shall be awarded to property owners and the benefits assessed against it, as provided by the charter of Kansas City in the original proceedings," and that it was entitled to notice of those proceedings. The right to retry the amount of the award in condemnation was frequently reiterated during the progress of the cause and denied. It was also unsuccessfully contended that the decree in favor of the Union Pacific Railroad Company, and interveners, annulling the former assessments as to them, was a bar. The court further ruled, over exceptions, that under the decision of the supreme court the jury was concluded from changing the assessments on the property of those owners who had paid under the original proceedings; and a general offer of testimony assailing such assessments was rejected. It appeared that, after deducting from the total awards of damages for property condemned the amount which had already been paid by property owners, there remained a balance of $76,981.98. Among the instructions given to the jury (and to each of which a general exception was taken) were the following:

"This balance you may assess against the city generally, including any benefit to any property of the city [425] within the benefit district, and against such of the remaining private property, lots, tracts, and parcels of land, exclusive of the improvements thereon, in the benefit district, as you may deem is benefited, if any, and in the proportion which you may deem the same benefited, by the opening and widening of

Sixth street, and upon which no assessments have been paid under the original proceedings."

"If the jury find and believe from the evidence that the benefits to the city at large and the special benefits to all the property within the benefit district does not equal the damages heretofore awarded for the proposed taking of property for widening Sixth street from Broadway to Bluff streets, or if the jury find that the damages so awarded exceeds in amount all such benefits as would accrue from such widening of Sixth street,—then the jury will so state in their verdict and will assess no benefits in these proceedings."

"The jury are instructed that, in determining the special benefit, if any, to be assessed against any piece of property, they are not allowed to assess any sum against any piece of property except such sum as they may find said property is actually and specially benefited and enhanced in value, as distinguished from any general benefit such property may receive, if any, in common with other property of the city, by reason of the widening of Sixth street."

"In passing upon the issue as to whether or not the damages in this case exceed the benefits, the jury should not and must not be influenced by the fact that the damages have been determined by another jury in another proceeding. Private property must not be assessed in excess of the actual benefits accruing thereto, if any, as distinguished from the benefits accruing to the city in general."

"Upon your request for further instruction in regard [426] to your duties as to assessing benefits in this proceeding, you are instructed that you may not assess any benefits in this supplemental proceeding against any property in the benefit district which was adjudged in the original proceeding to have been damaged by reason of a part thereof being taken for the widening of Sixth street from Broadway to Bluff street."

Among the instructions refused was one (apparently asked by a party not one of the plaintiffs in error, but in whose exception the others joined) to the effect that the property owner was entitled under the 14th Amendment "to introduce evidence and be heard upon the questions (a) of the cost of the improvement in question to pay which such benefits are to be assessed, and (b) of what proportion of the total benefit, if any, of said improvement, should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property;" and that, inasmuch as the alleged right had been denied, the jury should not assess any benefit.

The jury rendered a verdict laying assessments upon the properties of the plaintiffs in error, and motions for a new trial were denied. The Union Depot Bridge Company was assessed with two others, jointly, and appeared and objected to the verdict. Thereupon, the court recalled the jurors and directed separate assessments, which were made. The Union Depot Bridge Company asked for an instruction to the effect that a portion of its property had been assessed in the original proceeding, that the assessment had been paid, and that the remainder of the lands were then found not to be benefited and should not be assessed. This instruction was refused. This company also moved for a new trial, insisting that it was deprived of its property without due process of law and denied the equal protection of the laws, in violation of the 14th Amendment.

[427] On appeal the supreme court of the state entered judgment of affirmance, and it is to review that judgment that this writ of error has been sued out.

The extent of the authority conferred upon the city by its charter, the construction of the various provisions of the charter, the validity, scope, and effect under the state law of the ordinances adopted by the city, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions, as to which the decision of the state court is controlling. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229; King v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23. So, the ruling as to the effect, with respect to the supplemental proceeding, of the decree in a court of the same state, holding the prior assessments void for want of the required notice, as to the complainant in that suit and certain interveners, does not present a Federal question. Phœnix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 185, 40 L. ed. 660, 664, 16 Sup. Ct. Rep. 471.

It is also well settled that an owner of property which may be assessed for benefits in order to pay an award for property condemned is not entitled, by virtue of the 14th Amendment, to insist upon being made a party to the condemnation proceeding, or to be heard with respect to the amount of the award. He may not demand, as a Federal right, that the power of eminent domain shall not be exercised save upon

notice to him. Voigt v. Detroit, 184 U. S. 115, 122, 46 L. ed. 459, 462, 22 Sup. Ct. Rep. 337; Goodrich v. Detroit, 184 U. S. 432, 437, 438, 46 L. ed. 627, 630, 631, 22 Sup. Ct. Rep. 397; Londoner v. Denver, 210 U. S. 373, 378, 52 L. ed. 1103, 1109, 28 Sup. Ct. Rep. 708. As well might it be argued, as was suggested in Goodrich v. Detroit, supra, that whenever the city contemplated a public improvement of any description, it would be necessary to give notice to all those who might be taxed to pay for it. The established rule is "that it is only those whose property is proposed to be taken for a public improvement [428] that due process of law requires shall have prior notice." (Ibid.)

Nor is there ground for a distinction because the charter of Kansas City provided a single proceeding, embracing both the proposed condemnation and assessment for benefits, and required notice to the property owners within the benefit district. The question under the 14th Amendment is one of state power, not of state policy; of what the state must accord, not of what it may grant or withhold in its discretion. Castillo v. McConnico, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23. With respect to neither proceeding, original or supplementary, was it essential to due process of law in making assessments that the assessed owners should be heard on the amount of the awards in condemnation. Nor was there a denial of the equal protection of the laws because in the original proceeding there was such an opportunity, together with a right of appeal. The asserted inequality sprang solely from the fact that certain assessed owners, despite the defective publication of notice, appeared and acquiesced in the proceedings. There is no ground for the charge of a denial of equal protection because some owners were willing to waive defects in procedure and others were not. Differences due to voluntary action and diverse individual choices constantly arise under equal laws. We conclude that the contention based on the refusal to reopen the case as to the damages awarded is wholly without merit.

With respect to the amount of the assessments to pay these damages, it is apparent that the question presented relates solely to the right to insist upon a re-determination of the assessments laid upon the properties of other owners, which those owners had accepted and paid. Under the rulings of the court, none of the plaintiffs in error were assessable except for benefits actually and specially accruing to their respective properties; they were heard as [429] to these benefits and as to the amount of their own assessments. Their objection as to the matter of apportionment struck at the finality of the other assessments. In the only instance in which it could be said that any right under the Federal Constitution was specially and appropriately set up as to apportionment it was urged that these owners were entitled to be heard upon "what proportion of the total benefit, if any, of said improvement, should be assessed against other property in the benefit district, that upon the plat of which is marked the word 'paid' as well as all other property;" and because this was not allowed, and the assessments which had been acquiesced in and paid by other owners were held to be final, a peremptory instruction was asked that the jury should assess no benefits. It is apparent that this objection goes directly to the validity of the supplemental proceeding as such, and denies the power of the state to authorize it. It means that the only proceeding that could constitutionally be taken in such a case would be to have a trial *de novo* as to all the assessments; and thus, where, as in this instance, thousands of tracts are involved, if a defect is found in the publication of the notice in the original proceeding, and a property owner challenges his assessment upon that ground, it would not be sufficient to give him a hearing as to the amount of his own assessment, but he could demand as a constitutional right a re-determination of the assessments of all others.

This contention is inadmissible. It is true that all taxes and assessments are laid by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and constitutes a plain abuse, it may be condemned as violative of the fundamental conceptions of justice embodied in the 14th Amendment. The principles involved in such cases have recently been discussed and need not be restated. Wagner v. Leser, 239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66; Houck v. Little River Drainage Dist. 239 U. S. 254, 265, ante, 266, 274, 36 Sup. Ct. Rep. 58; [430] Myles Salt Co. v. Iberia & St. M. Drainage Dist. 239 U. S. 478, 485, ante, 392, 396, 36 Sup. Ct. Rep. 204; Gast Realty & Invest. Co. v. Schneider Granite Co. 240 U. S. 55, 58, 59, ante, 523, 525, 36 Sup. Ct. Rep. 254; Embree v. Kansas City & L. B. Road Dist. 240 U. S. 242, 250, 251, ante, 624, 628, 629, 36 Sup. Ct. Rep. 317. But the mere fact that there may be inequalities is not enough to invalidate state action. Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. ed. 616, 620; Walston v. Nevin, 128 U. S. 578, 582, 32 L. ed. 544, 546, 9 Sup. Ct. Rep. 192;

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 176, 177, 41 L. ed. 369, 394, 17 Sup. Ct. Rep. 56; Houck v. Little River Drainage Dist. 239 U. S. 478, 485, ante, 392, 396, 36 Sup. Ct. Rep. 58. Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment, and upon all questions properly entering into that determination. "If the legislature," as has frequently been stated, "provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer v. Merchant, 125 U. S. 345, 355, 356, 31 L. ed. 763, 767, 768, 8 Sup. Ct. Rep. 921; Paulsen v. Portland, 149 U. S. 30, 41, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750; Bauman v. Ross, 167 U. S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Goodrich v. Detroit, 184 U. S. 432, 437, 438, 46 L. ed. 627, 630, 631, 22 Sup. Ct. Rep. 397. What is meant by his "proportion of the tax" is the amount which he should be required to pay, or with which his land should be charged. As was said in Fallbrook Irrig. Dist. v. Bradley, 164 U. S. p. 176, 41 L. ed. 394, 17 Sup. Ct. Rep. 56, when it is found that the land of an owner has been duly included within a benefit district, "the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay." See also French v. Barber Asphalt Paving Co. 181 U. S. 324, 341, 45 L. ed. 879, 888, 21 Sup. Ct. Rep. 625. It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all unless the assessments of other owners who have paid without [431] question and are not complaining shall be reopened and redetermined. The 14th Amendment affords no basis for a demand of that sort.

The separate contention of the Union Depot Bridge Company is, as the state court said, virtually one of *res judicata*. It was insisted that, as a portion of its property was assessed in the original proceeding, and the assessment had been paid, it could not be assessed on other portions in the supplemental proceeding; that it must be concluded that the jury in the original proceeding had found that the other tracts were not benefited. The question whether the first judgment had this effect was a matter of state law; there is nothing in the Federal Constitution to prevent the assessment in the supplemental proceedings of properties omitted from the first proceeding. Phœnix F. & M. Ins. Co. v. Tennessee, supra. The 7th Amendment, invoked in this connection, has no application. Minneapolis & St. L. R. Co. v. Bombolis, decided May 22, 1916 [241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595.] The company appeared in the supplemental proceeding and was heard, and, so far as any Federal question is concerned, does not appear to be in a different case from that of the other property owners.

We find no error in the decision of the Federal questions and the judgment is affirmed.

Judgment affirmed.

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[432] LEVINDALE LEAD & ZINC MINING COMPANY, W. H. Aaron, and M. L. Levin, Plffs. in Err.,

v.

CHARLES COLEMAN.

(See S. C. Reporter's ed. 432–440.)

Indian allotments — restrictions on alienation — nonmembers of tribe.

1. The restrictions on alienation of Osage Indian allotments, imposed by the act of June 28, 1906 (34 Stat. at L. 539, chap. 3572), do not apply to lands or any interest therein which have come into the possession of a white man not a member of the tribe, under allotments made in the right of certain deceased Indians to their respective heirs.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

Indian allotments — restrictions on alienation — nonmembers of tribe.

2. A restriction on alienation of Indian allotments which have come into the possession of a white man not a member of the tribe, under allotments made in the right of deceased Indian allottees to their respective heirs, was not imported into the Osage allotment act of June 28, 1906 (34 Stat. at L. 539, chap. 3572), by the provision of the amendatory act of April 18, 1912 (37 Stat. at L. 86, chap. 83), that "when the heirs of such deceased allottees have certificates of competency, or are not members of the tribe, the restrictions on alienation are hereby removed," but such provision should be regarded as intended to meet the ruling of an inferior state court, which had erroneously decided that the restrictions imposed by the earlier act applied to nonmembers of the tribe.

[For other cases, see Indians, VIII., in Digest Sup. Ct. 1908.]

[No. 322.]

Argued April 25, 1916. Decided June 5, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a decree which affirmed a decree of the District Court of Osage County, in that state, annulling a conveyance of an Indian allotment. Reversed and remanded for further proceedings.

See same case below, 43 Okla. 13, 140 Pac. 607.

The facts are stated in the opinion.

Mr. H. P. White argued the cause and filed a brief for plaintiffs in error.

Mr. Preston A. Shinn argued the cause and filed a brief for defendant in error.

[433] Mr. Justice Hughes delivered the opinion of the court:

Charles Coleman, the defendant in error, brought this suit to set aside a conveyance of an undivided interest in lands inherited from his Indian wife and child, who were members of the Osage Tribe. Judgment was entered annulling the conveyance upon the ground that it was executed in violation of restrictions imposed by Congress. The judgment was affirmed by the supreme court of the state (43 Okla. 13, 140 Pac. 607), and this writ of error has been sued out.

The case was decided upon a motion for judgment on the pleadings, and there were special findings of the facts which the pleadings disclosed. It appears that the plaintiff, Charles Coleman, was a white man, lawfully married to an Indian woman, Mary Chesewalla; that their child, Joseph Coleman, was born on February 27, 1906, and died on the same day, leaving his father and mother his sole heirs; that his mother died intestate on February 28, 1906, leaving as her sole heirs Charles Coleman, Herbert Chesewalla, and Floyd Chesewalla; that both decedents were duly enrolled as members of the Osage Tribe, and were entitled to allotments under the act of Congress of June 28, 1906 (34 Stat. at L. 539, chap. 3572); and that, after their death, allotments were made in their right to the heirs of each respectively, the allotment deeds being approved by the Secretary of the Interior and recorded in the year 1909. By the death of his wife and child the plaintiff took title as heir to an undivided one-half interest in the lands allotted in the right of the former, and to an undivided three-fourths interest in lands allotted in the right of the latter. These lands have not been partitioned. In February, 1909, Charles Coleman conveyed by warranty deed his undivided interest to the defendant (plaintiff in error) the Levindale Lead & Zinc Mining Company. It is further set forth that his wife had not received [434] a certificate of competency. There was no finding and no basis in the record for a finding that Charles Coleman was a member of the Osage Tribe by adoption, enrolment, or otherwise.

The lands prior to the allotment were Indian lands (17 Stat. at L. 228, chap. 310), and there is no controversy as to the power of Congress, in providing for allotments, to impose restrictions upon alienation. The question is as to the construction of the provisions of the allotment act of June 28, 1906.

That act provided that the roll of the Osage Tribe as it existed on January 1, 1906, with the additions specified, should be the roll of the tribe and constitute its "legal membership." Children born between January 1, 1906, and July 1, 1907, to persons whose names were on the roll on the first-mentioned date, "including the children of members of the tribe who have, or have had, white husbands," were to be recognized as members for the purposes of the division. (Sec. 1.) All lands were to be divided "among the members of said tribe, giving to each his or her fair share thereof in acres" as specifically set forth; that is, "each member" as shown by the roll was to be allowed to make three selections of 160 acres each in the manner described. (Sec. 2.) Restrictions were imposed as follows:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided." (Sec. 2, Fourth.)

After "each member" had made the three selections, the [435] remaining lands of the tribe, except as stated, were to be divided "as equally as practicable among said members by a commission to be appointed." (Sec. 2, Fifth.) The Secretary of the Interior in his discretion, at the request of any "adult member of the tribe," was to issue "to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee," if, upon investigation, "he shall find any such member fully competent" to care for his affairs. It was provided that upon the issuance of such a certificate of competency the lands of such

"member," except homestead lands, should "become subject to taxation," and that "such member," except as provided, should have the right to "manage, control and dispose of his or her lands the same as any citizen of the United States." It was further provided that the surplus lands should be "nontaxable" for the period of three years from the approval of the act "except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress." (Sec. 2, Seventh.) Oil, gas, coal or other minerals "covered by the lands" were "reserved to the Osage Tribe for a period of twenty-five years." (Id. § 3.) All funds belonging to the tribe, and moneys accruing to it, were to be "held in trust by the United States for the period of twenty-five years" from January 1, 1907, except as provided. The funds of the tribe, and moneys accruing from the sale of Kansas lands, together with those due upon claims against the United States, were to be segregated and placed to the credit of the "individual members" of the tribe "on a basis of a *pro rata* division," or "to their heirs as hereinafter provided," and such credit was to draw interest, to be "paid quarterly to the members entitled thereto;" and the disposition of royalties [436] from mineral leases was specially prescribed. (Sec. 4.) At the expiration of twenty-five years from January 1, 1907, the lands, mineral interests, and moneys held in trust by the United States were to be the absolute property of the "individual members" of the tribe, according to the roll, "or their heirs, as herein provided," and deeds were to be issued accordingly. (Sec. 5.) Sections 6 and 7 are as follows:

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests, must go to the mother and father equally.

"Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Deeds to the Osage lands were to be executed by the principal chief, but were not to be valid until approved by the Secretary of the Interior (§ 8), and it was further provided that whatever was necessary to carry into effect the provisions of the act should be done under the authority [437] of this officer (§ 12). Regulations have been adopted by the Secretary of the Interior governing the leasing (under §§ 7, 12) of lands "allotted to Osage Indians." These provide, among other things, that "lands of deceased allottees may be leased by the heirs jointly," as stated. (Regulations 11, 12, approved October 25, 1910; 8, approved June 17, 1913.)

The provisions of the allotment act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians, —wards of the United States. The establishment of restrictions against alienation "evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning." Heckman v. United States, 224 U. S. 413, 436, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; United States v. Kagama, 118 U. S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; United States v. Rickert, 188 U. S. 432, 437, 438, 47 L. ed. 532, 536, 23 Sup. Ct. Rep. 478; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 316, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; Williams v. Johnson, 239 U. S. 414, 420, ante, 358, 360, 36 Sup. Ct. Rep. 150. This policy did not embrace white men,—persons not of Indian blood,—who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.

Taken in their natural sense, the provisions of the fourth paragraph of § 2 apply only to allotments made to members of the tribe. There is nothing to suggest that a nonmember should designate a "homestead," and unless lands were thus segregated the restrictions as to "homesteads" would not apply. With respect to "surplus lands," it will be observed that it is only selections of each "member," and the share of remaining lands "allotted to the member," which constitute lands so described and thus come under the stated restrictions. It was early ruled administratively that under § 6 the

right to the member's share, though unallotted in his lifetime, passed to his legal heirs as there [438] defined, and this we assume to be the meaning of the statute. But the fact that the nonmember takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (Bowling v. United States, 233 U. S. 528, 58 L. ed. 1080, 34 Sup. Ct. Rep. 659), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were nonmembers of the tribe. Emphasis is placed by the defendant in error on the provisions of § 7 as to leases; but it would be an inadmissible construction of this section to say that the word "heirs" was there used in contradistinction to "members." This provision as to leases, in the light of the purpose of the act, had reference, we think, to the "individual members" who received allotments and the Indian heirs of such members.

The view we have taken of the inapplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to nonmembers certificates of competency. Under the seventh paragraph of § 2, any "adult member" of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business, might obtain a certificate and thus be enabled to dispose of his "surplus land;" but a competent white man, not a member, could not be relieved. It would seem to be evident that such an incongruous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions.

It is insisted that subsequent legislation *in pari materia* indicates the contrary. Reference is made to the acts [439] of March 3, 1909 (35 Stat. at L. 778, chap. 256), and of April 18, 1912 (37 Stat. at L. 86, chap. 83). The former does not aid this contention, but is rather opposed to it. The statute authorized the Secretary of the Interior to sell "part or all of the surplus lands of any member" of the Osage Tribe, but contained no authority to deal with lands of nonmembers. It will also be observed that prior to this act there was a joint resolution of February 27, 1909 (35 Stat. at L. 1167), providing that "homesteads of members of the Osage Tribe" may consist of land designated from any one or more "of their first three allotment selections;" this does not suggest that nonmembers were supposed to designate "homesteads." But it is the act of 1912 upon which chief reliance is placed. This was "supplementary to and amendatory of" the act of 1906, and provides, among other things, in § 6, relating to the lands "of deceased Osage allottees," that "when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed." We lay aside the suggestion that "deceased Osage allottees" may be taken to mean only members who received allotments in their own right while living, expressing no opinion upon that point. For not only is a legislative declaration of the intent of a previous act not absolutely controlling, but we think that in the present instance the purpose of Congress is manifest. This suit had been decided in the district court of the state in December, 1910, and it had been there held that the restriction applied to nonmembers. The case had been appealed, but it may well be supposed that Congress intended to remove the restriction upon a nonmember, if such a restriction could be deemed to exist. That, we are satisfied, was the object of the provision, and it was not an attempt to import into the earlier act a restriction which lay wholly outside its express terms and the policy of guardianship it was intended to execute.

[440] We confine ourselves to the single point presented. There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequately to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the act of 1906 placed no restrictions upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McReynolds took no part in the consideration and decision of this case.

PACIFIC LIVE STOCK COMPANY, Appt.,
v.
JOHN H. LEWIS, James T. Chinnock, and George T. Cochran, Constituting the State Water Board of the State of Oregon, et al.

(See S. C. Reporter's ed. 440–455.)

Appeal — from district court — case remanded to state court.

1. An order of a Federal district court, remanding a cause to a state court, is not subject to review by the Federal Supreme Court, either directly or indirectly.

[For other cases, see Appeal and Error, III. d, 3, b, in Digest Sup. Ct. 1908.]

Courts — conflicting jurisdiction — priority — identity of proceedings.

2. The proceeding before the State Water Board, authorized by 3 Lord's (Or.) Laws, tit. 43, chap. 6, Laws 1913, chaps. 82, 86, and 97, looking to the complete ascertainment and adjudication of the relative rights of all the claimants to the waters of a stream for irrigation and other beneficial purposes, is so essentially different from pending private suits between a few only of such claimants, previously begun in a Federal court, to restrain alleged encroachments upon plaintiff's rights in the water of the stream, as to preclude the application of the rule that where the same matter is brought before courts of competent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction.

[For other cases, see Courts, VI. g, 1, in Digest Sup. Ct. 1908.]

Federal courts — following state court decision — construction of local statute.

3. The Federal Supreme Court will accept the view of the highest state court, the necessary result of the highest court's construction of a state statute, that the proceeding authorized and controlled by 3 Lord's (Or.) Laws, tit. 43, chap. 6, Laws 1913, chaps. 82, 86, and 97, for the determination of the relative rights of all the claimants to the water of the stream for irrigation or other beneficial purposes, is, while pending before the State Water Board, merely preliminary and administrative, not judicial.

[For other cases, see Courts, VII. e, 3, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — proceedings before State Water Board — fees.

4. A claimant to rights in the waters of a stream is not deprived of property without due process of law, contrary to U. S. Const., 14th Amend., because, in the preliminary administrative proceeding before the State Water Board, initiated under 3 Lord's (Or.) Laws, tit. 43, chap. 6, Laws 1913, chaps. 82, 86, and 97, to determine the relative rights of all the claimants to the water of the stream for irrigation and other beneficial purposes, he is required, at his own expense, notwithstanding the inconclusiveness of the board's findings and order, to assert and prove his claim before the board, and to pay for having it considered, a fee of 15 cents per acre for the first 100 acres, 5 cents per acre for the next 900 acres, and 1 cent per acre for any excess over 1,000 acres,—all under penalty of forfeiting his claim if he refuses,—where all the evidence laid before the board goes before the court on final hearing, there to be accorded its proper weight and value.

[For other cases, see Constitutional Law, IV. b, 8, a, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law —proceedings before State Water Board — evidence.

5. The proceedings before the State Water Board authorized and controlled by 3 Lord's (Or.) Laws, tit. 43, chap. 6, Laws 1913, chaps. 82, 86, and 97, for the purpose of determining the relative rights of all the claimants to the water of a stream for irrigation and other beneficial purposes, are not wanting in due process of law because the sworn statements of claimants are taken *ex parte* in the first instance, and the state engineer's report is accepted, though not sworn to by him, as prima facie evidence, where claimants' statements are open to public inspection, opportunity is given for contesting them, and, upon the hearing of the contest, witnesses may be examined, including those making the statements, and any appropriate evidence may be produced, and where the measurements and examinations shown in the engineer's report are made and reported in the discharge of his official duties and under sanction of his oath of office, and timely notice of the date when they are to begin is given to all claimants.

[For other cases, see Constitutional Law, IV. b, 8, d, in Digest Sup. Ct. 1908.]

Note.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see notes to Gwin v. United States, 40 L. ed. U. S. 741, and B. Altman & Co. v. United States, 56 L. ed. U. S. 894.

As to state decisions and laws as rules of decision in Federal courts—see notes to Clark v. Graham, 5 L. ed. U. S. 334; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; Mitchell v. Burlington, 18 L. ed. U. S. 351; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508, and Snare & T. Co. v. Friedman, 40 L.R.A.(N.S.) 380.

As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

Constitutional law — due process of law — prima facie correctness of administrative order.

6. The requirement of 3 Lord's (Or.) Laws, tit. 43, chap. 6, Laws 1913, chaps. 82, 86, 97, that, pending final adjudication by the court, the waters of a stream shall be distributed to the various claimants according to the administrative order of the State Water Board unless a suitable bond is given to stay the operation of such order, is not wanting in due process of law, where the order is made only after adequate notice and full opportunity to be heard.

[For other cases, see Constitutional Law, IV. b, 8, a, in Digest Sup. Ct. 1908.]

[No. 300.]

Argued March 16, 1916. Decided June 5, 1916.

APPEAL from the District Court of the United States for the District of Oregon to review a decree dismissing the bill in a suit to enjoin a proceeding before the State Water Board for the determination of the relative rights of the claimants to the water of a stream for irrigation and other beneficial purposes. Affirmed.[1]

See same case below, on motion for interlocutory injunction, 217 Fed. 95.

The facts are stated in the opinion.

Mr. **Edward F. Treadwell** argued the cause, and, with Messrs. Alexander Britton, Evans Browne, and F. W. Clements, filed a brief for appellant:

A water right by appropriation or by virtue of riparian ownership is a vested right of property as much as the land on which it is enjoyed or of which it is a part.

San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, 233 U. S. 454, 58 L. ed. 1041, 34 Sup. Ct. Rep. 652; Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997.

If such a taking of property be deemed a taking for a public use, then it is taken without compensation, and the taking of private property for public use without compensation is a taking without due process of law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

If such taking be considered as for the private benefit of other appropriators, then the taking of private property for a private use is equally in violation of the due process provision of the Constitution.

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616.

Even when the state desires to take the property of an individual for public use, and proceeds to do so by the ordinary process of eminent domain, the owner cannot be made to bear any portion of the expense incident to such proceeding, either in the trial court or in any appellate court to which the proceeding may be taken by either side.

San Diego Land & Town Co. v. Neale, 88 Cal. 67, 11 L.R.A. 604, 25 Pac. 977; San Francisco v. Collins, 98 Cal. 263, 33 Pac. 56.

One of the essentials of due process of law is the existence of a tribunal having jurisdiction to decide the matter in issue.

Carr v. Brown, 20 R. I. 215, 38 L.R.A. 294, 78 Am. St. Rep. 855, 38 Atl. 9; Chicago, B. & Q. R. Co. v. Chicago, supra; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14.

The distinction between requiring one to submit his rights to a special tribunal having jurisdiction and authority to make a final and binding adjudication as to the rights of property, and requiring the submission of the same to a mere ministerial board having no such authority, has been clearly and emphatically recognized by this court.

United States v. Throckmorton, 4 Sawy. 42, Fed. Cas. No. 15,121; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525.

Following the same course of reasoning, it has been held that the owner of a vested water right cannot be held liable for the expenses of a mere administrative proceeding for the purpose of ascertaining the extent and existence of his rights. This was directly held by the supreme court of South Dakota, passing upon the water law of that state, in the case of St. Germain Irrig. Ditch Co. v. Hawthorne Ditch Co. 32 S. D. 260, 143 N. W. 124.

The immunity of the owner of a vested right in water from the acts of the state engineer under the water law of the state of Nevada has been recently passed upon by the supreme court of the state of Nevada in the case of Knox v. Kearney, 37 Nev. 393, 142 Pac. 526. In that case the legislature of the state of Nevada had passed an act providing in substance the same as the Oregon act for a proceeding before the state engineer for the determination of water rights, and requiring all claimants to appear in such proceeding and to set up and establish their rights on pain of forfeiting the same. Knox, the owner of a vested water right, brought his bill in equity against the state engineer, alleging

[1] Leave granted to present petition for rehearing herein within thirty days, on motion of Mr. Evans Browne in behalf of counsel for the appellant.

June 12, 1916.

the ownership of such right and the threatened interference therewith by the state engineer, pursuant to the provisions of that act. In fact, his complaint was, in all substantial particulars, the same as the bill of complaint here under review.

See also Anderson v. Kearney, 37 Nev. 314, 142 Pac. 803.

The opinion of the United States district court, in sustaining the demurrer to the bill of complaint in the case at bar, is based on the contention that it was optional with complainant to appear or not to appear in the adjudication proceeding. This is contrary to the decision of the supreme court of Oregon, construing this act.

Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668.

Of course it is well settled that a decision of the highest court of a state, construing an act of the legislature of the state, is binding and conclusive in the Federal courts.

Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508, note; Esty, Fed. Proc. 9th ed. pp. 808 et seq.

If the proceeding to adjudicate water rights be held to be a judicial proceeding for the final determination of water rights, the Federal court, having acquired jurisdiction over the subject-matter, as between the complainant and the defendants, the William Hanley Company, the Silvies River Irrigation Company, and Harney Valley Improvement Company, before such proceeding was instituted, that court should retain that jurisdiction to the end, and should enjoin the defendants from prosecuting and proceeding in the state tribunal in such a manner as to interfere with the prior jurisdiction of the Federal court; and the bill of complaint herein should have been sustained for the purpose of protecting that jurisdiction and giving that relief.

Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287, 290; Harkrader v. Wadley, 172 U. S. 148, 164, 43 L. ed. 399, 404, 19 Sup. Ct. Rep. 119; Prout v. Starr, 188 U. S. 537, 544, 47 L. ed. 584, 587, 23 Sup. Ct. Rep. 398; Ex parte Young, 209 U. S. 123, 161, 162, 52 L. ed. 714, 729, 730, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 262, 54 L. ed. 1032, 1038, 31 Sup. Ct. Rep. 11; Pitt v. Rodgers, 43 C. C. A. 600, 104 Fed. 390; Mercantile Trust & D. Co. v. Roanoke & S. R. Co. 109 Fed. 6; Iron Mountain R. Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 131; Home Ins. Co. v. Virginia-Carolina Chemical Co. 109 Fed. 689; Starr v. Chicago, R. I. & P. R. Co. 110 Fed. 6; State Trust Co. v. Kansas City, P. & G. R. Co. 110 Fed. 12; Central Trust Co. v. Western North Carolina R. Co. 112 Fed. 471; Stewart v. Wisconsin C. R. Co. 117 Fed. 782; Equitable Trust Co. v. Pollitz, 124 C. C. A. 634, 207 Fed. 74; French v. Hay, 22 Wall. 238, 253, 22 L. ed. 854, 858; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497; Western U. Teleg. Co. v. Louisville & N. R. Co. 120 C. C. A. 257, 201 Fed. 922; St. Louis, I. M. & S. R. Co. v. Bellamy, 211 Fed. 172.

Where a case is removed, a bill in equity will lie to restrain proceedings in a state court.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 244, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251; Wagner v. Drake, 31 Fed. 853; Baltimore & O. R. Co. v. Ford, 35 Fed. 173; Abeel v. Culberson, 56 Fed. 331; Mutual L. Ins. Co. v. Langley, 145 Fed. 415; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 908, affirmed in 22 L.R.A.(N.S.) 350, 90 C. C. A. 431, 164 Fed. 785; McAlister v. Chesapeake & O. R. Co. 85 C. C. A. 316, 157 Fed. 743, 13 Ann. Cas. 1068; Donovan v. Wells, F. & Co. 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 371.

The proceeding was removable:

(a) The suggestion that a proceeding to determine water rights is in the nature of a partition suit, and therefore not removable, is not sustainable, for the reason that it is universally held that appropriators of water are not tenants in common, nor joint tenants, but that the right of each is separate.

Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Senior v. Anderson, 138 Cal. 723, 72 Pac. 349; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; Telluride v. Davis, 33 Colo. 355, 108 Am. St. Rep. 101, 80 Pac. 1051; Hildreth v. Montecito Creek Water Co. 139 Cal. 22, 72 Pac. 395; McMullen v. Halleck Cattle Co. 193 Fed. 282; Stanbrough v. Cook, 3 L.R.A. 400, 38 Fed. 369; Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; Sharp v. Whiteside, 19 Fed. 150; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366; Elkins v. Howell, 140 Fed. 157; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Searl v. School Dist. 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Sugar Creek, P. B. & P. C. R. Co v. McKell, 75 Fed. 34; Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co. 152 Fed. 824.

(b) The claim that the proceeding is not judicial, because the board has no power to make an adjudication of the rights of the claimants, is unfounded under the terms of the act.

Wattles v. Baker County, 59 Or. 255, 117 Pac. 417; Gray, Nature & Sources of Law, p. 110.

(c) If the suggestion be adopted that the proceeding is, to all intents and purposes, in the court all the time, and the board is in effect a standing examiner, created by the state, charged with the duty, when requested by the users of water, of examining into and reporting to the court the facts on which the rights of the various claimants are based, so that such rights may be authoritatively settled and determined by a judicial tribunal,—then we are as much entitled to have the evidence taken and the facts found in the Federal courts as we are to have the adjudication made therein.

Prentis v. Atlantic Coast Line Co. 211 U. S. 210, 238, 53 L. ed. 150, 163, 29 Sup. Ct. Rep. 67; Smyth v. Ames, 169 U. S. 478, 42 L. ed. 838, 18 Sup. Ct. Rep. 418; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Des Moines City R. Co. v. Des Moines, 151 Fed. 854.

(d) The third ground relied upon, namely, that the proceeding is by the state, finds no support in the act. The state has no title to the water whatever.

Howell v. Johnson, 89 Fed. 556; Palmer v. Railroad Commission, 167 Cal. 163, 138 Pac. 997; Keene v. Smith, 44 Or. 525, 75 Pac. 1065.

(e) The main ground, however, for the contention that the proceeding is not removable, is the claim that the proceeding is administrative, and not judicial. The proceeding is judicial no matter what may be the nature of the action of certain officials therein.

People ex rel. Morgan v. Hayne, 83 Cal. 111, 7 L.R.A. 348, 17 Am. St. Rep. 217, 23 Pac. 1; Re Silvies River, 199 Fed. 495.

(f) There is one, and only one, proceeding provided or contemplated from the inauguration of the proceeding.

The jurisdiction of the Federal courts cannot in any way be affected, abridged, or defeated by state legislation prescribing new or different modes of procedure for the determination of civil rights, or creating special tribunals to determine such rights, or prescribing new forms of procedure for the ascertainment and determination thereof.

Pennsylvania v. Wheeling & B. Bridge, 13 How. 518, 562, 14 L. ed. 249, 268; Dodge v. Woolsey, 18 How. 331, 346, 15 L. ed. 401, 407; Barber v. Barber, 21 How. 582, 589, 16 L. ed. 226, 229; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Mississippi Mills v. Cohn, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; Williams v. Crabb, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193; Ray v. Tatum, 18 C. C. A. 464, 30 U. S. App. 635, 72 Fed. 112; Robinson v. Campbell, 3 Wheat. 212, 4 L. ed. 372; Lorman v. Clarke, 2 McLean, 568, Fed. Cas. No. 8,516; Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864; Gordon v. Hobart, 2 Sumn. 401, Fed. Cas. No. 5,609; Parsons v. Lyman, 5 Blatchf. 170, Fed. Cas. No. 10,780; Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Suydam v. Broadnox, 14 Pet. 67, 10 L. ed. 357; Union Bank v. Vaiden, 18 How. 503, 15 L. ed. 472; Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; Borer v. Chapman, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; Craigie v. McArthur, 4 Dill. 474, Fed. Cas. No. 3,341; Foley v. Hartley, 72 Fed. 570; Re Foley, 76 Fed. 390; Toms v. Owen, 52 Fed. 417; Wood v. Paine, 66 Fed. 807; Heaton v. Thatcher, 59 Fed. 731; Wickham v. Hull, 60 Fed. 326; Zimmerman v. Carpenter, 84 Fed. 747; Brown v. Ellis, 86 Fed. 357; Domestic & F. Missionary Soc. v. Gaither, 62 Fed. 422; Continental Nat. Bank v. Heilman, 81 Fed. 36; Brendel v. Charch, 82 Fed. 262; Re Cilley, 58 Fed. 977; Comstock v. Heron, 5 C. C. A. 266, 6 U. S. App. 626, 55 Fed. 803; Martin v. Fort, 27 C. C. A. 428, 54 U. S. App. 316, 83 Fed. 19; Hayes v. Pratt, 147 U. S. 557, 37 L. ed. 279, 13 Sup. Ct. Rep. 503; Jordan v. Taylor, 98 Fed. 646; Hale v. Coffin, 114 Fed. 574; Hale v. Tyler, 115 Fed. 834; Carrau v. O'Calligan, 60 C. C. A. 347, 125 Fed. 663; Gallivan v. Jones, 42 C. C. A. 408, 102 Fed. 427; Re Jarnecke Ditch, 69 Fed. 161; Colorado Midland R. Co. v. Jones, 29 Fed. 193; Goldey v. Morning News, 156 U. S. 518, 523, 39 L. ed. 517, 519, 15 Sup. Ct. Rep. 559; Black's Dillon, Removal of Causes, §§ 22, 90, 148; Simkins, Federal Eq. Suit, p. 828; Barney v. Globe Bank, 5 Blatchf. 107, Fed. Cas. No. 1,031; Richmond v. Brookings, 48 Fed. 241.

A proceeding for the adjudication of relative water rights as between private individuals is a judicial proceeding, and is a case within the meaning of the Federal statutes regarding the right of removal.

1. For definition of judicial power, judicial proceedings, actions, suits, and cases, see:

Johnston v. Com. 1 Bibb 598; State ex rel. Newell v. Newell, 13 Mont. 302, 34 Pac. 28; People ex rel. Bendon v. County Judge, 13 How. Pr. 398; McBride's Appeal, 72 Pa. 480; Jacoby v. Shafer, 105 Pa. 610; Cohen v. Virginia, 6 Wheat. 407, 5 L. ed. 291; Marion v. Ganby, 68 Iowa, 142, 26 N. W. 40; Harris v. Phœnix Ins. Co. 35 Conn. 310; Osborn v. Bank of United States, 9 Wheat.

738, 819, 6 L. ed. 204, 223; Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; People v. Board of Education, 54 Cal. 375; Sinking Fund Cases, 99 U. S. 761, 25 L. ed. 516; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; Wulzen v. San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; Grider v. Tally, 77 Ala. 424, 54 Am. Rep. 65; Hereford v. People, 197 Ill. 222, 64 N. E. 310; Martin v. Simpkins, 20 Colo. 438, 38 Pac. 1092.

2. The tribunals given jurisdiction in the adjudication proceeding are courts.

3 Bl. Com. 23; Stenberg v. State, 48 Neb. 312, 67 N. W. 190; Tissier v. Rhein, 130 Ill. 110, 22 N. E. 848; Re Allison, 13 Colo. 528, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820; Shoultz v. McPheeters, 79 Ind. 376; Mason v. Woerner, 18 Mo. 570; White County v. Gwin, 136 Ind. 562, 22 L.R.A. 402, 36 N. E. 237; Malone v. Murphy, 2 Kan. 250; People ex rel. Garling v. Van Allen, 55 N. Y. 31.

3. Proceedings to adjudicate water rights before state boards are held to be judicial.

Wattles v. Baker County, 59 Or. 255, 117 Pac. 417; Cleghorn's Appeal, 3 Haw. 216; Palolo Land & Improv. Co. v. Territory, 18 Haw. 30; Thorp v. Woolman, 1 Mont. 168, 8 Mor. Min. Rep. 87; Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Whiting v. Townsend, 57 Cal. 515; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Anderson v. Kearney, 37 Nev. 314, 142 Pac. 803; 3 Kinney, Irrigation, 2d ed. p. 2901.

4. The fact that the proceeding is before the state water board does not prevent it from being a "case," and removable.

Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 137; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Searl v. School Dist. 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Colorado Midland R. Co. v. Jones, 29 Fed. 193; Mineral Range R. Co. v. Detroit & L. S. Copper Co. 25 Fed. 515.

5. The power here claimed to be "nonjudicial" has in other cases been held or assumed to be so strictly "judicial" that it could be vested only in a court or other body authorized to perform judicial functions.

People ex rel. Kern v. Chase, 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454; People ex rel. Deneen v. Simon, 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; People ex rel. Smith v. Crissman, 41 Colo. 450, 92 Pac. 949; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

6. Under the act, all claimants in the stream are defendants and parties to the action, whether they appear or suffer a default.

Vanderpoel v. Van Balkenburgh, 6 N. Y. 198; Bonnemort v. Gill, 167 Mass. 340, 45 N. E. 768; Botiller v. Dominquez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Robbins v. Chicago, 4 Wall. 657, 672, 18 L. ed. 427, 430.

7. In a proceeding under the act, all unknown claimants are adverse parties from the beginning. The mere possibility of adverse parties would, however, be sufficient to render a proceeding "judicial."

Re Pacific R. Commission, 32 Fed. 241; Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478.

8. Various classes of proceedings held to be judicial, analogous to those authorized by the act, here claimed to be nonjudicial. (a) The Torrens act of the various states, and the burnt records act of Illinois and California. (b) Proceedings for the confirmation of tax titles, etc.

Worthen v. Ratcliffe, 42 Ark. 330; Parker v. Overman, 18 How. 137, 15 L. ed. 318; Thomas v. Lawson, 21 How. 331, 16 L. ed. 82.

(c) Suits under general equity jurisdiction to establish title.

Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Blight v. Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136; Hord v. Baugh, 7 Humph. 576, 46 Am. Dec. 91; Montgomery v. Kerr, 6 Coldw. 199; Bohart v. Chamberlain, 99 Mo. 622, 13 S. W. 85; Gwin v. Brown, 21 App. D. C. 312; Johnson v. Thomas, 23 App. D. C. 148; Harvey v. Miller, 24 App. D. C. 53; Moody v. Holcomb, 26 Tex. 714.

9. Determination even of future rights is judicial.

Bispham, Eq. pp. 51, 607; Cross v. De Valle, 1 Wall. 5, 15, 17 L. ed. 515, 519; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Pom. Eq. Jur. § 171.

The controversy between the petitioners who instituted the adjudication proceeding and the Pacific Live Stock Company is a separable controversy which that company is entitled to remove into the Federal court.

McMullen v. Halleck Cattle Co. 193 Fed. 282; Stanbrough v. Cook, 3 L.R.A. 400, 38 Fed. 369; Connell v. Smiley, 156 U. S. 335, 39 L. ed. 443, 15 Sup. Ct. Rep. 353; Sharp

v. Whiteside, 19 Fed. 150; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 53 L. ed. 551, 29 Sup. Ct. Rep. 366; Elkins v. Howell, 140 Fed. 157.

The same rule has been applied to a condemnation suit prosecuted against several defendants owning separate parcels of land.

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; Searl v. School Dist. 124 U. S. 197, 31 L. ed. 415, 8 Sup. Ct. Rep. 460; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 Fed. 34; Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co. 152 Fed. 824.

The mere fact that the legislature authorizes several suits to be brought in the same proceeding cannot affect the right of removal.

Barney v. Latham, 103 U. S. 205, 26 L. ed. 514; Hoge v. Canton Ins. Office, 103 Fed. 513; Union P. R. Co. v. Myers, 115 U. S. 1, 22, 29 L. ed. 319, 327, 5 Sup. Ct. Rep. 1113; Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co. 152 Fed. 824.

On appellees' own interpretation of the nature, character, and effect of the adjudication proceeding, the same is clearly in violation of fundamental constitutional principles.

The legislature has authorized a proceeding for the determination of water rights, which is not judicial, but purely administrative, and merely preliminary to the institution of judicial proceedings in the circuit court.

Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Re Silvies River, 199 Fed. 495.

Any owner of a water right is required to appear in this purely administrative proceeding and set up and defend his right on pain of forfeiting it.

Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668.

In such purely administrative proceeding the State Water Board thereupon proceeds to take evidence *ex parte*, and without any opportunity or right of cross-examination.

In such purely administrative proceeding the State Water Board collects data relating to the various rights on the stream entirely *ex parte* and without any opportunity for cross-examination.

The conclusions of the State Water Board are based either wholly or partially on this merely *ex parte*, hearsay, non-oathbound evidence, with no opportunity to cross-examine or to be confronted with the witnesses gathering or giving it.

Anyone filing his claim in this merely administrative proceeding is required to pay an arbitrary sum of money in the nature of a tax on his land.

Ibid.

This purely administrative determination, pending judicial proceedings to which it is merely preliminary, possibly extending over several years, is enforced as a judgment.

Wattles v. Baker County, 59 Or. 255, 117 Pac. 417.

Under the decisions of the supreme court of the state, this purely administrative determination is prima facie correct; in other words, anyone who questions it must affirmatively prove that it is wrong.

Re Willow Creek, supra.

Any determination based upon information gathered in an informal manner without an opportunity to confront and cross-examine the witness is in violation of fundamental constitutional principles.

Interstate Commerce Commission v. Louisville & N. R. Co. 227 U. S. 89, 57 L. ed. 432, 33 Sup. Ct. Rep. 185; Whitfield v. Hanges, 138 C. C. A. 199, 222 Fed. 754; United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 57 L. ed. 104, 33 Sup. Ct. Rep. 5; Stadtlander v. New York Edison Co. P.U.R.1915B, 688.

None of the cases based on the "co-owner" doctrine hold that ownership can be determined in an administrative proceeding.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560.

The power to establish rules of evidence does not authorize the state to make a mere administrative fiat prima facie evidence of ownership.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Bailey v. Alabama, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243; People v. McBride, 234 Ill. 146, 123 Am. St. Rep. 82, 84 N. E. 865, 14 Ann. Cas. 994; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26.

The police power is not sufficient to justify an *ex parte* legislative determination of property rights.

White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 43 Pac. 1028; Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co. 39 Colo. 332, 90 Pac. 1023; Com. v. Alger, 7 Cush. 63.

Mr. George M. Brown, Attorney General of Oregon, and Messrs. George T. Cochran and Will R. King argued the cause, and, with Messrs. J. O. Bailey, James T. Chinnock, and Percy A. Cupper, filed a brief for appellees:

The proceedings to determine water rights provided for by the statutes of Oregon, while pending before the State Water Board, are administrative in character, the statutory provisions therefor are a valid exercise of the police power of the state, and since a hearing and sufficient notice are provided for, the statutes attacked do not conflict with any provision of the 14th Amendment to the Constitution of the United States.

Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Farmers' Independent Ditch Co. v. Agricultural Ditch Co. 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; Farm Invest. Co. v. Carpenter, 9 Wyo. 110, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Louden Irrigating Co. v. Handy Ditch Co. 22 Colo. 102, 43 Pac. 535; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; Willey v. Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210; Cookinham v. Lewis, 58 Or. 498, 114 Pac. 88, 115 Pac. 342; Wattles v. Baker County, 59 Or. 261, 117 Pac. 417; Re Silvies River, 199 Fed. 495; Montezuma Canal Co. v. Smithville Canal Co. 218 U. S. 371, 385, 54 L. ed. 1074, 1080, 31 Sup. Ct. Rep. 67; Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668; Combs v. Farmers' Highline Canal & Reservoir Co. 38 Colo. 420, 88 Pac. 396; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 794; Enterprise Irrig. Dist. v. Tri-State Land Co. 92 Neb. 121, 138 N. W. 179; Pacific Live Stock Co. v. Lewis, 217 Fed. 95; Anderson v. Kearney, 37 Nev. 314, 142 Pac. 803; McCook Irrig. & Water Power Co. v. Crews, 70 Neb. 115, 96 N. W. 996, 102 N. W. 249.

The determination and adjudication of existing rights is a necessary and essential part of the regulation and control which the state has assumed over its waters in the interest of the people of the state, and the statutory proceedings provided for by the legislation attacked by appellant are well within the police power of the state, and a necessary prerequisite to the orderly distribution of the waters of the state among those entitled thereto.

Farm Invest. Co. v. Carpenter, 9 Wyo. 148, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Montezuma Canal Co. v. Smithville Canal Co. 218 U. S. 371, 385, 54 L. ed. 1074, 1080, 31 Sup. Ct. Rep. 67; 1 Wiel, Water Rights, 3d ed. § 756, p. 830; White v. Farmers' High-Line Canal & Reservoir Co. 22 Colo. 197, 31 L.R.A. 828, 43 Pac. 1028; Com. v. Alger, 7 Cush. 84; Holden v. Hardy, 169 U. S. 366, 392, 42 L. ed. 780, 791, 18 Sup. Ct. Rep. 383; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 77, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irrigated Land Co. 39 Colo. 341, 90 Pac. 1023; Broad Run Invest. Co. v. Deuel & S. Improv. Co. 47 Colo. 579, 108 Pac. 755; Ormsby County v. Kearney, 37 Nev. 314, 142 Pac. 803; Clark v. Nash, 198 U. S. 361, 368, 49 L. ed. 1085, 1087, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 159, 160, 41 L. ed. 369, 388, 389, 17 Sup. Ct. Rep. 56; Enterprise Irrig. Dist. v. Tri-State Land Co. 92 Neb. 121, 138 N. W. 179; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 794; Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N. W. 286; American Land Co. v. Zeiss, 219 U. S. 47, 60, 55 L. ed. 82, 94, 31 Sup. Ct. Rep. 200; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Hamp v. State, 19 Wyo. 377, 118 Pac. 653; McLean v. Farmer's High Line Canal & Reservoir Co. 44 Colo. 184, 96 Pac. 16; 3 Kinney, Irrig. & Water Rights, 2d ed. §§ 1341, 1568, pp. 2430, 2842; Meade, Irrig. Inst. pp. 6, 80, 82, 274, 369; Whited v. Cavin, 55 Or. 107, 105 Pac. 396; Carson v. Gentner, 33 Or. 515, 43 L.R.A. 130, 52 Pac. 506; Donnelly v. Cuhna, 61 Or. 76, 119 Pac. 331; Turner v. Cole, 31 Or. 159, 49 Pac. 971; Caviness v. La Grande Irrig. Co. 60 Or. 431, 119 Pac. 731; Andrews v. Donnelly, 59 Or. 147, 116 Pac. 569; Re Willow Creek, 74 Or. 622, 144 Pac. 505, 146 Pac. 475; Little Walla Walla Irrig. Co. v. Finis Irrig. Co. 62 Or. 351, 124 Pac. 666, 125 Pac. 270; Nevada Ditch Co. v. Bennett, 30 Or. 91, 60 Am. St. Rep. 777, 45 Pac. 472; Dreyer v. Illinois, 187 U. S. 83, 84, 47 L. ed. 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253.

The proceeding here questioned being one well within the police powers of the state, it does not constitute a taking of property in any sense, and the question of compensation for property taken for a public use does not enter into the case.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Noble State Bank v. Haskell, 219 U. S. 104, 110, 111, 55 L. ed. 112, 116, 117, 32 L.R.A.

(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487.

The essential elements of due process are, first, notice, and second, opportunity to be heard.

Davidson v. New Orleans, 96 U. S. 97, 102, 107, 24 L. ed. 616, 618, 620; Public Clearing House v. Coyne, 194 U. S. 497, 508, 48 L. ed. 1092, 1097, 24 Sup. Ct. Rep. 789; Ballard v. Hunter, 204 U. S. 241, 255, 51 L. ed. 461, 471, 27 Sup. Ct. Rep. 261, 266; Sheldon v. Hoyne, 261 Ill. 225, 103 N. E. 1021; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Dreyer v. Illinois, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Re Silvies River, 199 Fed. 501; Farm Invest. Co. v. Carpenter, 9 Wyo. 134, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258.

The appellant may be required to appear in these proceedings before the State Water Board and submit its claim; and should it refuse to do so, within the time required by statute and in the manner therein provided, the decree of the circuit court will be final and conclusive, to the same extent as in any other suit or action in which a party is in default.

Pacific Livestock Co. v. Cochran, 73 Or. 428, 144 Pac. 668; Re Silvies River, 199 Fed. 502; Anderson v. Kearney, 37 Nev. 314, 142 Pac. 803; Miles v. Strong, 68 Conn. 287, 36 Atl. 55; United States v. Throckmorton, 4 Sawy. 42; Botiller v. Dominguez, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; Patterson v. Northern Trust Co. 170 Ill. App. 511; Upshur County v. Rich, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651; Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 137; Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535.

The statutory provision requiring claimants at the time of their appearance in the proceedings to pay certain fees is not a denial of due process of law nor of the equal protection of the law. Whatever other expense the appellant may incur is a matter of discretion with it, optional to a large extent, and controllable by it.

Flint v. Stone Tracy Co. 220 U. S. 108, 169, 55 L. ed. 389, 420, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668.

If it should be the opinion of the court that the section providing for fees is invalid for any reason, it is clearly separable from the rest of the act.

Sheldon v. Hoyne, 261 Ill. 222, 103 N. E. 1021; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; McMahan v. Olcott, 65 Or. 549, 133 Pac. 836; Flint v. Stone-Tracy Co. 220 U. S. 107, 177, 55 L. ed. 389, 424, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Louisville & N. R. Co. v. Finn, 235 U. S. 601, 610, 59 L. ed. 379, 384, P. U. R.1915A, 121, 35 Sup. Ct. Rep. 146.

The determination of the State Water Board is not a final decree or adjudication of rights, but is prima facie correct and binding until modified by the circuit court in subsequent proceedings in that court.

Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Pacific Livestock Co. v. Cochran, 73 Or. 429, 144 Pac. 668; Re Silvies River, 199 Fed. 502; State ex rel. Atty. Gen. v. Hawkins, 44 Ohio St. 109, 5 N. E. 228; Underwood v. McDuffee, 15 Mich. 368, 93 Am. Dec. 194; Mackin v. Detroit-Timkin Axle Co. — Mich. —, 153 N. W. 53; Johnson v. Wabash R. Co. 259 Mo. 534, 168 S. W. 713.

Appeals may be taken from administrative boards or officers.

Carothers v. Wheeler, 1 Or. 194; Portland v. Kamm, 5 Or. 362; Re Schollmeyer, 69 Or. 210, 138 Pac. 211; Kadderly v. Portland, 44 Or. 155, 74 Pac. 710, 75 Pac. 222; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 137.

There can be no question but that the legislature of Oregon has power to make the findings of the board prima facie correct, and to require the claimant aggrieved thereat to assume the burden of establishing the incorrectness of those findings.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 196, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691.

It is within the power of the state to prescribe the rules of evidence, and to alter them, and to put the burden of proof upon one or the other of the parties by creating disputable presumptions.

Fong Yue Ting v. United States, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 81, 55 L. ed. 369, 378, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160.

So, it was held that a statute making the findings and order of the Interstate Commerce Commission prima facie evidence of facts therein stated in judicial proceedings

was merely the establishment of a rule of evidence, and would in no wise work a denial of due process of law.

Meeker v. Lehigh Valley R. Co. and Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, supra.

There can be no constitutional objection, under the Federal Constitution, because the legislature of Oregon has provided a proceeding of a special character not known to the common law, or because rules of evidence or forms and matters of procedure are changed by the act in question.

Tyler v. Registration Ct. Judges, 175 Mass. 74, 51 L.R.A. 433, 55 N. E. 812; State ex rel. Oregon R. & Nav. Co. v. Railroad Commission, 52 Wash. 31, 100 Pac. 179, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Brown v. New Jersey, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; Fong Yue Ting v. United States, 149 U. S. 698, 729, 37 L. ed. 905, 918, 13 Sup. Ct. Rep. 1016; League v. Texas, 184 U. S. 156, 158, 46 L. ed. 478, 480, 22 Sup. Ct. Rep. 475; Holmes v. Hunt, 122 Mass. 506, 23 Am. Rep. 381; Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691; Ballard v. Hunter, 204 U. S. 255, 51 L. ed. 471, 27 Sup. Ct. Rep. 261; Hurtado v. California, 110 U. S. 516, 537, 28 L. ed. 232, 239, 4 Sup. Ct. Rep. 111, 292; Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Twining v. New Jersey, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14; Simon v. Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836.

The statute provides proper notice and ample opportunity to be heard, and therefore due process of law is afforded.

Re Willow Creek, 74 Or. 614, 144 Pac. 505, 146 Pac. 475; Tyler v. Registration Ct. Judges, 175 Mass. 79, 51 L.R.A. 433, 55 N. E. 812; Farm Invest. Co. v. Carpenter, 9 Wyo. 152, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Grannis v. Ordean, 234 U. S. 385, 394, 58 L. ed. 1363, 1368, 34 Sup. Ct. Rep. 779; Ballard v. Hunter, 204 U. S. 241, 254, 51 L. ed. 461, 471, 27 Sup. Ct. Rep. 261, 266; Hamilton v. Brown, 161 U. S. 256, 274, 40 L. ed. 691, 699, 16 Sup. Ct. Rep. 585; American Land Co. v. Zeiss, 219 U. S. 47, 70, 55 L. ed. 82, 98, 31 Sup. Ct. Rep. 200.

A hearing before final decree, with full opportunity to appear and defend, after notice, is all that can be adjudged vital under the guaranty of due process of law.

Holden v. Hardy, 169 U. S. 366, 387, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; Wilson v. Standefer, 184 U. S. 399, 415, 46 L. ed. 612, 619, 22 Sup. Ct. Rep. 384; Hooker v. Los Angeles, 188 U. S. 314, 318, 47 L. ed. 487, 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; Carnegie Natural Gas Co. v. Swiger, 72 W. Va. 557, 46 L.R.A.(N.S.) 1080, 79 S. E. 3.

The statutes here involved do not deny appellant the equal protection of the law.

Duncan v. Missouri, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 155, 41 L. ed. 369, 387, 17 Sup. Ct. Rep. 56.

Appellant cannot, by a bill in equity to restrain the State Board or tribunal from further proceedings under the statutes, review the action of the Federal district court in remanding the proceedings to the State Board, upon the ground that it had no jurisdiction.

Ex parte Hoard, 105 U. S. 578, 580, 26 L. ed. 1176, 1177; Ex parte Detroit River Ferry Co. 104 U. S. 519, 520, 26 L. ed. 815, 816; Morey v. Lockhart, 123 U. S. 56, 57, 31 L. ed. 68, 69, 8 Sup. Ct. Rep. 65; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Manley v. Olney, 32 Fed. 708; Teel v. Chesapeake & O. R. Co. 47 L.R.A.(N.S.) 21, 123 C. C. A. 240, 204 Fed. 918.

A bill in equity to restrain the State Board from proceeding under a valid statute cannot be maintained upon the theory that appellant is deprived of its property without due process of law because the United States district court refused jurisdiction, and remanded the proceeding to the State Board.

Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Black's Dill. Removal of Causes, § 225, p. 366; Germania F. Ins. Co. v. Francis, 52 Miss. 466, 24 Am. Rep. 674; Knahtla v. Oregon Short Line & U. N. R. Co. 21 Or. 140, 27 Pac. 91; Kentucky v. Powers, 201 U. S. 1, 24, 50 L. ed. 633, 644, 26 Sup. Ct. Rep. 387, 5 Ann. Cas. 692.

The contention that, since complainant has taken the steps necessary to remove the proceeding to the Federal court, this suit may be maintained to restrain either the members of the board or the other defendants, is unfounded, because the Federal court heretofore remanded the proceeding to the State Board.

Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 245, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251; Chesapeake &

O. R. Co. v. Cockrell, 232 U. S. 146, 155, 54 L. ed. 544, 548, 34 Sup. Ct. Rep. 278; Springer v. American Tobacco Co. 208 Fed. 199; Birdseye v. Shaeffer, 37 Fed. 827, affirmed in 140 U. S. 117, 35 L. ed. 402, 11 Sup. Ct. Rep. 885; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

The proceeding before the board is administrative, and though it may subsequently become a judicial proceeding, while it remains administrative, and pending before administrative officers, it is not a suit or action brought in a state court, and cannot be removed to the Federal courts.

Re Silvies River, 199 Fed. 501; Re Willow Creek, 74 Or. 610, 144 Pac. 505, 146 Pac. 475; Kaw Valley Drainage Dist. v. Metropolitan Water Co. 108 C. C. A. 393, 186 Fed. 319; Weston v. Charleston, 2 Pet. 449, 464, 7 L. ed. 481, 486; Upshur County v. Rich, 135 U. S. 467, 477, 34 L. ed. 196, 200, 10 Sup. Ct. Rep. 651; Re Jarnecke Ditch, 69 Fed. 161; Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 137; Reetz v. Michigan, 188 U. S. 505, 507, 47 L. ed. 563, 565, 23 Sup. Ct. Rep. 390; Black's Dill. Removal of Causes, p. 28, § 16.

If it be admitted that the proceeding is judicial in character, and in a court, and a suit, it was not removable, because there was no separable controversy.

Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 143; Hough v. Porter, 51 Or. 370, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Fraser v. Jennison, 106 U. S. 191, 194, 27 L. ed. 131, 132, 1 Sup. Ct. Rep. 171; Re Jarnecke Ditch, 69 Fed. 168; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Ayres v. Wiswall, 112 U. S. 187, 193, 28 L. ed. 693, 695, 5 Sup. Ct. Rep. 90; Fidelity Ins. Trust & S. D. Co. v. Huntington, 117 U. S. 280, 281, 29 L. ed. 898, 899, 6 Sup. Ct. Rep. 733; McMullen v. Halleck Cattle Co. 193 Fed. 282; Farm Invest. Co. v. Carpenter, 9 Wyo. 134, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Montezuma Canal Co. v. Smithville Canal Co. 218 U. S. 371, 54 L. ed. 1074, 31 Sup. Ct. Rep. 67.

Whether the proceeding was removable or not at the time appellant attempted to remove it can only be determined from the record in the state tribunal at the time of the application for removal, and not by the allegations contained in the petition for removal, or subsequent proceedings had before the State Board.

Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 86; Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; Rife v. Lumber Underwriters, 122 C. C. A. 346, 204 Fed. 32; Indiana use of Delaware County v. Alleghany Oil Co. 85 Fed. 872; Corbin v. Van Brunt, 105 U. S. 576, 577, 26 L. ed. 1176; Re Jarnecke Ditch, 69 Fed. 168; Ex parte Nebraska, 209 U. S. 436, 441, 52 L. ed. 876, 878, 28 Sup. Ct. Rep. 581; Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 188, 46 L. ed. 144, 146, 22 Sup. Ct. Rep. 47; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413, 55 L. ed. 521, 31 Sup. Ct. Rep. 460; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 96, 97, 42 L. ed. 673–675, 18 Sup. Ct. Rep. 264; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 153, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278.

The proceeding was not removable because the state is a necessary party to the proceeding.

Kansas v. Colorado, 206 U. S. 46, 93, 51 L. ed. 956, 973, 27 Sup. Ct. Rep. 655; Bouquillas Land & Cattle Co. v. Curtis, 213 U. S. 339, 53 L. ed. 822, 29 Sup. Ct. Rep. 493; United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770; Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Hudson County Water Co. v. McCarter, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Williams v. Altnow, 51 Or. 275, 95 Pac. 200, 97 Pac. 539; Hedges v. Riddle, 63 Or. 257, 127 Pac. 548; Pacific Livestock Co. v. Davis, 60 Or. 258, 119 Pac. 147; Re Silvies River, 199 Fed. 503; Ex parte Nebraska, 209 U. S. 436, 445, 52 L. ed. 876, 880, 28 Sup. Ct. Rep. 581; Indiana use of Delaware County v. Alleghany Oil Co. 85 Fed. 870; Re Willow Creek, 74 Or. 613, 144 Pac. 505, 146 Pac. 475; Ferguson v. Ross, 3 L.R.A. 322, 38 Fed. 161.

The defendants other than the members of the State Water Board, who were parties to certain suits brought by appellant in the Federal court, should not be enjoined from protecting their rights before the State Board and state court in these proceedings, because of these prior suits in the Federal court.

Watson v. Jones, 13 Wall. 679, 715, 20 L. ed. 666, 671; Buck v. Colbath, 3 Wall, 334, 345, 18 L. ed. 257, 261; Farm Invest. Co. v. Carpenter, 9 Wyo. 135, 50 L.R.A. 747, 87 Am. St. Rep. 918, 61 Pac. 258; Re Willow Creek, 74 Or. 690, 144 Pac. 505, 146 Pac. 475; Re Silvies River, 199 Fed. 501;

tles v. Baker County, 59 Or. 261, 117 Pac. 417; Claypool v. O'Neill, 65 Or. 513, 133 Pac. 349; Cooper v. Cedar Rapids Water Power Co. 42 Iowa, 398; Hanson v. Willard, 12 Me. 142, 28 Am. Dec. 162; Spensely v. Janesville Mfg. Co. 62 Wis. 549, 22 N. W. 574; Warren v. Westbrook Mfg. Co. 88 Me. 58, 35 L.R.A. 388, 51 Am. St. Rep. 372, 33 Atl. 665; Roberts v. Claremont R. & Lighting Co. 74 N. H. 220, 124 Am. St. Rep. 962, 66 Atl. 485; Caviness v. La Grande Irrig. Co. 60 Or. 421, 119 Pac. 731; Jones v. Conn, 39 Or. 37, 54 L.R.A. 630, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068; Pacific Livestock Co. v. Davis, 60 Or. 258, 119 Pac. 147; Wiel, Waters Rights in the Western States, 3d ed. p. 678, § 624; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 54 L. ed. 1032, 31 Sup. Ct. Rep. 11; Watson v. Jones, 13 Wall. 679, 20 L. ed. 666; Hough v. Porter, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728; Umatilla Irrig. Co. v. Umatilla Improv. Co. 22 Or. 366, 30 Pac. 30; Nevada Ditch Co. v. Bennett, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472; Whited v. Cavin, 55 Or. 98, 105 Pac. 396; Davis v. Chamberlain, 51 Or. 305, 98 Pac. 154; Watts v. Spencer, 51 Or. 262, 94 Pac. 39; Little Walla Walla Irrig. Co. v. Finis Irrig. Co. 62 Or. 348, 124 Pac. 666, 125 Pac. 270; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13; Pacific Live-Stock Co. v. Hanley, 98 Fed. 327.

The allegations of the bill of complaint as to certain threatened acts and proposed future orders and regulations of the board, which, it is alleged, will impair appellant's vested rights, do not bring this case within the class of cases arising under the provisions of the 14th Amendment, and raise no Federal question.

Monongahela Bridge Co. v. United States, 216 U. S. 177, 195, 54 L. ed. 435, 443, 30 Sup. Ct. Rep. 356; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Murray v. Wilson Distilling Co. 213 U. S. 151, 171, 53 L. ed. 742, 751, 29 Sup. Ct. Rep. 458; Re Willow Creek, 74 Or. 616, 144 Pac. 505, 146 Pac. 475.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a bill in equity to enjoin a proceeding before the State Water Board of Oregon, looking to the ascertainment and adjudication of the relative rights of the various claimants to the waters of Silvies river, in that state, the grounds upon which such relief is sought being (a) that it is essential to protect a jurisdiction previously acquired by the district court, and (b) that the local statute, 3 Lord's Oregon Laws, title XLIII., chap. 6, Laws 1913, chaps. 82, 86, and 97, authorizing and controlling the proceeding, is repugnant to the due process of law clause of the 14th Amendment. An interlocutory injunction was denied by the district court, three judges sitting (217 Fed. 95), and motions to dismiss the bill, as disclosing no right to relief, were afterwards sustained.

The plaintiff, a California corporation, owns large tracts of land along the river, and claims a vested right to use upon these lands a portion of the waters of the stream for irrigation and other beneficial purposes. The defendants are the members of the State Water Board, and a few out of many persons and corporations claiming similar rights in the waters of the river. The statute under which the proceeding assailed is being conducted was enacted in 1909 and amended in 1913, and most of the rights affected by the proceeding are claimed to have arisen prior to the [443] statute,—the plaintiff's as much as thirty years before. All claimants to the waters of the river, including the plaintiff, were brought into the proceeding by due notice and in conformity with the statute.

A general outline of the statute, as it has been construed by the supreme court of the state,[1] will serve to simplify the questions to be considered. It recognizes that in Oregon rights to use the waters of streams for irrigation and other beneficial purposes may be acquired by appropriation, adopts a comprehensive scheme for securing an economical, orderly, and equitable distribution of the waters among those entitled to their use, incidentally prescribes a mode of determining the relatives rights of the various claimants to the waters of each stream, and in large measure commits the administration of the scheme to the State Water Board and officers acting under the supervision of its members. When one or more users of water from any stream request it, the board, if finding that the conditions justify it, is required to set in motion a proceeding looking to an ascertainment and adjudication of all rights to the waters of that stream. Every material step in the proceeding is to be attended with notice and an opportunity to be heard, the adequacy of which is manifest. In the beginning each claimant is required to present to the division superintendent a sworn

[1] See Wattles v. Baker County, 59 Or. 255, 117 Pac. 417; Pringle Falls Power Co. v. Patterson, 65 Or. 474, 484, 128 Pac. 820, 132 Pac. 527; Claypool v. O'Neill, 65 Or. 511, 133 Pac. 349; Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668; Re Willow Creek, 74 Or. 592, 144 Pac. 505, 146 Pac. 475; Re North Powder River, 75 Or. 83, 144 Pac. 485, 146 Pac. 475.

statement of his claim, showing its nature, inception, and extent, and all the particulars upon which it is based. These statements are to be exposed to public inspection, so that every claimant may determine whether there is occasion for him to oppose or contest the claims of others. The state engineer, or a qualified assistant, is to measure the flow of the stream, the carrying capacity of the several ditches taking water [444] therefrom, and the land irrigated or susceptible of irrigation from each ditch, and also to take such other observations as may be essential to a proper understanding of the claims involved, a report of all of which is to be made in writing. Any claimant desiring to contest the claim of another may present to the division superintendent a sworn statement showing the grounds of contest, and obtain a hearing before that officer, at which the parties may present whatever evidence they have, and may secure the attendance of witnesses by compulsory process. After the evidence in the contests is taken, it and the sworn statements of the several claimants, with the report of the engineer's measurements and observations, are to be laid before the board, —the statements and the report both being regarded as evidence appropriate to be considered. The board is then to examine all the evidence, make findings of fact therefrom, enter an order embodying the findings and provisionally determining the relative rights of the several claimants, and transmit the evidence and a copy of the order to the circuit court of the county wherein the stream or some part of it lies. Exceptions to the board's findings and order may be presented to the court, and in disposing of them the court is to follow as near as may be the practice prevailing in suits in equity. All parties in interest, including the board, as representing the state, are to be fully heard. Further evidence may be taken by the court, or the matter may be remanded with directions that additional evidence be taken, and that the matter be again considered by the board, in which event the evidence and a copy of the further order of the board are to be transmitted to the court as in the first instance. In short, upon exceptions the court may reexamine the whole matter, and enter such decree as the law and the evidence may require, whether it be an affirmance or a modification of the board's order. And even where no exceptions are presented, a decree giving effect [445] to the order is to be entered; that is to say, the matter is not to be left as if the order in itself constituted an effective adjudication. An appeal from the court's decree may be taken to the supreme court of the state "as in other cases in equity," except that the time therefor is substantially shortened. When the rights involved are adjudicated the decree is to be "conclusive as to all prior rights and the rights of all existing claimants," and the right of each claimant as so settled is to be appropriately entered and shown upon the records of the board and upon those of the proper county. Each claimant also is to receive from the board a certificate setting forth the priority, extent, and purpose of his right, and, if it be for irrigation purposes, a description of the land to which it is appurtenant. That the statute is not intended to take away or impair any vested right to any water or to its use is expressly declared in its 1st and 70th sections, 3 Lord's Oregon Laws, §§ 6594, 6595.

At the time the statute was adopted, and continuously until this suit was begun, there were pending undetermined in the district court[2] two suits in equity brought by the present plaintiff, one against two Oregon corporations and the other against another corporation of that state, in each of which suits the relative rights of the parties thereto in the waters of Silvies river were in controversy. These rights are reasserted and again brought in controversy in the proceeding before the board.

When that proceeding was first set in motion, the Pacific Live Stock Company, the plaintiff in this suit, presented to the board a petition and bond for the removal of the proceeding, or a part of it, alleged to involve a separable controversy, to the district court of the United States, [446] upon the ground that it was a suit between citizens of different states. But the attempted removal was not sustained, for the district court remanded the proceeding, and in that connection held that, while it was pending before the board, it was essentially preliminary and administrative, and not a suit at law or in equity within the meaning of the removal statute. 199 Fed. 495.

Thereafter the plaintiff presented to the division superintendent a sworn statement of its claim, accompanied by the fee prescribed,—at the same time protesting that the fee was extortionate, that the matter should be adjudicated in the Federal court, and that the local statute was repugnant to the 14th Amendment. More than two hundred other claimants also appeared and submitted statements of their claims, all being described as higher up the stream than that of the plaintiff. When the statements were opened to public inspection many contests were initiated. Several of

[2] The suits were begun in the circuit court, and, when it was abolished, were transferred to the district court.

these were against the plaintiff's claim; a large number were by the plaintiff against other claims, and there were others in which, it is said, the plaintiff was not directly concerned. It was at this stage of the proceeding, and before any evidence was taken in any of the contests, that this suit was brought.

Upon the assumption (1) that the removal proceedings were effective, (2) that the proceeding before the board is substantially identical with the pending suits, and (3) that that proceeding is essentially judicial in its nature, the plaintiff insists that the continued prosecution of the proceeding before the board constitutes an inadmissible interference with the district court's jurisdiction, and that this jurisdiction should be maintained and protected by an appropriate injunction.[3] The insistence must [447] be overruled, because the assumption upon which it rests cannot be indulged.

Nothing was accomplished by the removal proceedings. The district court did not take jurisdiction under them, but, on the contrary, by its remanding order, adjudged that they were unauthorized. That order is not subject to review, either directly or indirectly, but is final and conclusive. Judicial Code, § 28 [36 Stat. at L. 1094, chap. 231, Comp. Stat. 1913, § 1010]; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 580-583, 40 L. ed. 536, 542, 543, 16 Sup. Ct. Rep. 389; McLaughlin Bros. v. Hallowell, 228 U. S. 278, 286, 57 L. ed. 835, 839, 33 Sup. Ct. Rep. 465. In so holding, it is not intimated that the result would be different if the order were now open to review. See Upshur County v. Rich, 135 U. S. 467, 474, et seq., 34 L. ed. 196, 199, 10 Sup. Ct. Rep. 651, and cases cited.

The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, and will maintain and protect its jurisdiction by an appropriate injunction, is confined in its operation to instances where both suits are substantially the same; that is to say, where there is substantial identity in the interests represented, in the rights asserted, and in the purposes sought. Buck v. Colbath, 3 Wall. 334, 345, 18 L. ed. 257, 261; Watson v. Jones, 13 Wall. 679, 715, 20 L. ed. 666, 671; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 262, 54 L. ed. 1032, 1038, 31 Sup. Ct. Rep. 11. This is not such an instance. The proceeding sought to be enjoined, although in some respects resembling the prior suits, is essentially different from them. They are merely private suits brought to restrain alleged encroachments upon the plaintiff's water right, and, while requiring an ascertainment of the rights of the parties in the waters of the river, as between themselves, it is certain that they do not require any other or further determination respecting those waters. Unlike them, the proceeding in question is a quasi public proceeding, set in motion by a public agency of the state. All claimants are required to appear and prove their claims; no one can refuse without [448] forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses, with its recognized infirmities and uncertainties; and, third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

Referring to a situation resembling that to which this proceeding is addressed, the supreme court of Maine said in Warren v. Westbrook Mfg. Co. 88 Me. 58, 66, 35 L.R.A. 388, 51 Am. St. Rep. 372, 33 Atl. 665: "To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty—to leave one to encroach upon the other—to leave each to use as much as he can, and leave the other to sue at law after the injury—is to leave the whole subject-matter to possible waste and destruction." In considering the purpose of the state in authorizing the proceeding, the supreme court of Oregon said in Re Willow Creek, 74 Or. 592, 613, 617, 144 Pac. 505: "To accelerate the development of the state, to promote peace and good order, to minimize the danger of vexatious controversies wherein the shovel was often used as an instrument of warfare, and to provide a convenient way for the adjustment and recording of the

[3] See Rev. Stat. § 720; Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287, 290; French v. Hay (French v. Stewart) 22 Wall. 250, 253, 22 L. ed. 857, 858; Rickey Land & Cattle Co. v. Miller & Lux, 218 U. S. 258, 262, 54 L. ed. 1032, 1038, 31 Sup. Ct. Rep. 11; Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 154, 58 L. ed. 544, 547, 34 Sup. Ct. Rep. 278.

rights of the various claimants to the use of the water of a stream or other source of supply at a reasonable expense, the state enacted the law of 1909, thereby [449] to a limited extent calling into requisition its police power. . . . Water rights, like all other rights, are subject to such reasonable regulations as are essential to the general welfare, peace, and good order of the citizens of the state, to the end that the use of water by one, however absolute and unqualified his right thereto, shall not be injurious to the equal enjoyment of others entitled to the equal privilege of using water from the same source, nor injurious to the rights of the public." The district court, when making the remanding order, said: "The water is the *res* or subject-matter of the controversy. It is to be divided among the several claimants according to their respective rights. Each claimant is therefore directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims." [199 Fed. 502.] And that court further said that what was intended was to secure in an economical and practical way a determination of the rights of the various claimants to the use of the waters of the stream, "and thus [to] avoid the uncertainty as to water titles and the long and vexatious controversies concerning the same which have heretofore greatly retarded the material development of the state." In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined. As against other claimants and the public the determination would amount to nothing. And so, upon applying the test before indicated, it is apparent that the assumed substantial identity between the proceeding and the pending suits does not exist.

The supreme court of the state holds that while the proceeding is pending before the board it is merely preliminary [450] and administrative, not judicial, and as this holding is a necessary result of that court's construction of the statute, we accept it as correct. The question was first suggested in Pacific Livestock Co. v. Cochran, 73 Or. 417, 144 Pac. 668, and the court then said, p. 429: "It is not necessary here to decide whether the proceeding by the board to determine water rights is judicial or administrative. To a large extent it is administrative, but like many proceedings of that character, the board must also act in a quasi judicial capacity. A determination of the water rights to a stream finally ends as a report to the circuit court, and a decree of final determination by that court." Afterwards the question was both raised and determined in Re Willow Creek, 74 Or. 592, 144 Pac. 505. The court there reviewed the several provisions bearing upon the duties and powers of the board, and said, pp. 610, 612, 614: "Their duties are executive or administrative in their nature. In proceedings under the statute the board is not authorized to make determinations which are final in character. Their findings and orders are prima facie final and binding until changed in some proper proceeding. The findings of the board are advisory rather than authoritative. It is only when the courts of the state have obtained jurisdiction of the subject-matter and of the persons interested, and rendered a decree in the matter, determining such rights, that, strictly speaking, an adjudication or final determination is made. It might be said that the duties of the water board are quasi judicial in their character. Such duties may be devolved by law on boards whose principal duties are administrative. . . . The duties of the board of control are similar to those of a referee appointed by the court. . . . By proceeding in accordance with the statute, when the matter is presented to the court for judicial action, it is in an intelligible form. The water board and state may then be represented by counsel."

[451] As an alternative to its first contention, which we hold untenable, the plaintiff insists that the statute is repugnant to the due process of law clause of the 14th Amendment, first, because it requires a claimant, at his own expense, to assert and prove his claim before the board, and to pay an extortionate fee for having it considered,—all under penalty of forfeiting his claim if he refuses,—notwithstanding the board acts only administratively and its findings and order are not conclusive; second, because it permits the board to accept and act upon the sworn statements of claimants taken *ex parte* and upon the data set forth in the unsworn report of the engineer, without, as is asserted, affording any opportunity for showing their true value, or the want of it, by cross-examination or otherwise; and, third, because it requires that the board's findings and order, although only administrative in character, be followed and given effect in the distribution of the water pending the action of the circuit court upon them.

A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that be-

fore the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report, the board merely paves the way for an adjudication by the court of all the rights involved. As the supreme court of the state has said, the board's duties are much like those of a referee. (And see Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 526, 527, 56 L. ed. 863, 868, 869, 32 Sup. Ct. Rep. 535.) All the evidence laid before it goes before the court, where it is to be accorded its proper weight and value. That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable. [452] And so, the fact that the board acts administratively and that its report is not conclusive does not prevent a claimant from receiving the full benefit of submitting his claim and supporting proof to the board. That he is to do this at his own expense affords no ground for objection; on the contrary, it is in accord with the practice in all administrative and judicial proceedings. The fee alleged to be extortionate is a charge graduated according to the amount of land irrigated under the claim submitted, and is 15 cents per acre for the first 100 acres, 5 cents per acre for the next 900 acres, and 1 cent per acre for any excess over 1,000 acres. The purpose with which it is exacted is explained in the following excerpt from the opinion of the supreme court of the state in Pacific Livestock Co. v. Cochran, 73 Or. 417, 429, 430, 144 Pac. 668: "The board is required to take testimony which consumes the time of a stenographer paid by the state; to make, through the state engineer, an examination of the stream and the works diverting water therefrom, including the measurement of the discharge of the stream and of the capacity of the various ditches and canals; to examine and measure the irrigated lands, and to gather such other data as may be necessary; to reduce the same to writing and make it a matter of record in the office of the state engineer; to make maps and plats of the various ditches and of the stream,—all at the expense of the state. That these services are beneficial to the claimant and necessary to the preservation of his rights in the stream and the protection and assurance of his title goes without saying. . . . It is reasonable to assume that the expense to the state of the investigation, mapping, taking testimony, and other acts involved in the determination of the claimant's rights, will equal and in many cases exceed the amount of the fee charged; and that the method indicated by the act by which the amount is determined is [453] eminently fair." In our opinion, the charge is not extortionate and its exaction is not otherwise inconsistent with due process of law.

Upon examining the statute and the decisions of the supreme court of the state construing and applying it, we are persuaded that it is not intended that the board shall accept and act upon anything as evidence that is devoid of evidential value, or in respect of which the claimants concerned are not given a fair opportunity to show its true value, or the want of it, in an appropriate way. On the contrary, the statute discloses a fixed purpose to secure timely notice to all claimants of every material step in the proceeding, and full opportunity to be heard in respect of all that bears upon the validity, extent, and priority of their claims. And while it is true, according to the concessions at the bar, that the sworn statements of claim are taken *ex parte* in the first instance, it also is true that they are then opened to public inspection, that opportunity is given for contesting them, and that, upon the hearing of the contests, full opportunity is had for the examination of witnesses, including those making the statements, and for the production of any evidence appropriate to be considered. Thus the fact that the original statements are taken *ex parte* becomes of no moment. And while it is true that the state engineer's report is accepted as evidence, although not sworn to by him, it also is true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all, and is accepted as prima facie evidence, but not as conclusive. Re Willow Creek, 74 Or. 592, 628, 144 Pac. 505. Of the occasion for such a report, the supreme court of the state says in that case, p. 613: "In a proceeding [454] before the board, provision is made for an impartial examination and measurement of the water in a stream, of the ditches and canals, and of the land susceptible of irrigation, and for the gathering of other essential data by the state engineer, including the preparation of maps, all to be made a matter of record in the office of the state engineer, as a foundation for such hearing and to facilitate a proper understanding of the rights of the parties interested. Under the old procedure

such information was often omitted. When measurements were made by the various parties to a suit they were nearly always made by different methods and were conflicting. The other evidence in regard thereto, being mere estimates, rendered a determination extremely difficult for the court and of questionable accuracy and value when made." Considering the nature of the report, and that claimants may oppose it with other evidence, it is plain that its use as evidence is not violative of due process. Meeker v. Lehigh Valley R. Co. 236 U. S. 412, 430, 59 L. ed. 644, 657, P.U.R.1915D, 1072, 35 Sup. Ct. Rep. 328.

The provision that the water shall be distributed in conformity with the board's order pending the adjudication by the court has the sanction of many precedents in the legislation of Congress and of the several states, notably in the provision in the interstate commerce act directing that the orders of the Commission shall be effective from a date shortly after they are made, unless their operation be restrained by injunction. These legislative precedents, while not controlling, are entitled to much weight, especially as they have been widely accepted as valid. Although containing no provision for an injunction, the statute under consideration permits the same result to be reached in another way, for it declares that the operation of the board's order "may be stayed in whole or in part" by giving a bond in such amount as the judge of the court in which the proceeding is pending may prescribe, conditioned for the payment of such damages [455] as may accrue by reason of the stay. It is not, therefore, as if the requirement were absolute. As has been seen, the order is made only after adequate notice and full opportunity to be heard, and when made is, with reason, deemed prima facie correct. It relates to flowing water, to the use of which there are conflicting claims. Unless diverted and used, the water will pass on and be lost. No claimant is in possession, and all assert a right to take from the common source. In this situation we think it is within the power of the state to require that, pending the final adjudication, the water shall be distributed according to the board's order, unless a suitable bond be given to stay its operation. Such a requirement is not arbitrary, does not take from one and give to another, and is not otherwise offensive to a right conception of due process. Detroit & M. R. Co. v. Michigan R. Commission, 240 U. S. 564, ante, 802, 36 Sup. Ct. Rep. 424; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 59 L. ed. 405, 411, P.U.R.1915A, 106, 35 Sup. Ct. Rep. 214; Montezuma Canal Co. v. Smithville Canal Co. 218 U. S. 371, 385, 54 L. ed. 1074, 1080, 31 Sup. Ct. Rep. 67.

Decree affirmed.

ALEJANDRO MONTELIBANO Y RAMOS and Liceria Montelibano y Conlu, Appts. and Plffs. in Err.,

v.

LA COMPAÑIA GENERAL DE TABACOS DE FILIPINAS.

(See S. C. Reporter's ed. 455–461.)

Appeal — mode of review.

1. Appeal is the proper method of reviewing, in the Federal Supreme Court, under the act of July 1, 1902 (32 Stat. at L. 695, chap. 1369, Comp. Stat. 1913, § 1225), § 10, a decree of the supreme court of the Philippine Islands in an action of an equitable nature.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Appeal — from Philippine Islands supreme court — following decision below.

2. The concurrent views of the two lower courts that certain contracts should be construed as creating an agency rather than as being contracts of sale will not be disturbed by the Federal Supreme Court on appeal from the supreme court of the Philippine Islands, unless convinced that such view is clearly erroneous.

[For other cases, see Appeal and Error, VIII. m, 1, in Digest Sup. Ct. 1908.]

[No. 217.]

Submitted March 8, 1916. Decided June 5, 1916.

ON APPEAL from, and IN ERROR to, the Supreme Court of the Philippine Islands, to review a decree which affirmed a decree of the Court of First Instance of the Judicial District of Manila, in favor of defendant in a suit in which plaintiffs, in addition to claiming damages, prayed for the cancelation of a certain contract and of the mortgages given to secure it, and defendant asked for affirmative relief, and for an accounting and damages. Writ of error dismissed. Decree affirmed on the appeal.

The facts are stated in the opinion.

Mr. Henry W. Van Dyke submitted the cause for appellants and plaintiffs in error:

Since the action is one that involves not alone claims for damages, but, on the one

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NOTE.—On distinction between appeal and writ of error—see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

On appellate jurisdiction of Federal Supreme Court over supreme court of Philippine Islands—see note to Martinez v. International Bkg. Corp. 55 L. ed. U. S. 438.

side, prayers for the rescinding of contracts and cancelation of mortgages, and, on the other, for an accounting, for the appointment of a receiver, and for relief in the nature of specific performance, it is essentially an action of an equitable character, and, as such, under the rulings of the court in De la Rama v. De la Rama, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502, and Gsell v. Insular Collector of Customs, 239 U. S. 93, ante, 163, 36 Sup. Ct. Rep. 39, reviewable here on appeal.

Even if the writ of error, and not the appeal, should be sustained in this case, the court might consider not, of course, questions of fact, but the facts as found by the court of first instance, for the purpose of determining whether those facts are sufficient to support the judgment (Allen v. St. Louis Nat. Bank, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599); or at least—that is, if the findings in the case should be regarded not as special findings of fact, and therefore as not falling within the principle established in those and other like cases—the court may consider them, nevertheless, for the purpose of determining whether the principles of law the courts below applied to them were properly applied.

Mr. Clement L. Bouvé submitted the cause for appellee and defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

This action was commenced by appellants on the 4th day of March, 1911, in the court of first instance of the city of Manila. It was in its nature a suit in equity. The whole controversy turns upon the construction of certain instruments in writing, the provisions of which will be outlined in stating the case. The complaint averred that on October 25, 1905, the parties entered into a written contract whereby the tobacco company, through a representative, "delivers to Don Alejandro Montelibano for the purpose of collection, under the conditions hereinafter expressed, the following credits." There followed a detailed statement of the credits, mentioning the names of the debtors and the amount due from each, the aggregate being P:179,177.86. The company guaranteed the existence and legitimacy of the credits, but not the solvency of the debtors. Montelibano obligated himself to pay to the company as the value of the credits the sum of P.130,000 in instalments of P.20,000 in the month of December in each of the years 1906, 1907, 1908, and 1909, and the balance of P.50,000 in December, 1910. It was agreed that if he should pay the P.130,000 at the times provided "all the credits and documents of the debtors [457] which are now delivered to him as specifically stated in paragraph one, will be transferred to him, and consequently Don Alejandro Montelibano agreed to pay in cash to the Compañia General de Tabacos de Filipinas in the instalments set out the sum of 130,000 pesos, in order to acquire the ownership of the rest of the credits." All cancelations of credits were to be made by the company upon the proposal of Don Alejandro, "the latter, however, being authorized to issue partial receipts for whatever sums he may collect." The company was not to advance to him any sum for use in the collection of the credits, nor to accept responsibility for actions instituted by him for their collection, "said party accepting whatever responsibilities may arise by reason of his negotiations." The company conferred upon him authority to conduct upon his own responsibility all negotiations by him deemed requisite for the collection of the credits; "and in the event of any judicial action being instituted, the company shall sell to Mr. Montelibano the credit which is the object of such litigation." The contract was publicly ratified by Montelibano and his wife, who is the other appellant, on the 10th day of November following its date, and in the ratification the instrument, besides being copied at large, was described as the document "in which the said company ceded to the said Mr. Montelibano all the credits set forth in the same to the end that the cessionary might carry into effect the collection from all the debtors of the company of the debts set forth in the inserted document, the total amount of which aggregates the sum of 179,177 pesos and 86 centavos, by means of the authority conferred by said company upon said Mr. Montelibano to enable him to carry out upon his own responsibility all the negotiations he might deem necessary for the collection of the credits mentioned, and that in the event [458] of any judicial action being instituted the company would cede in sale to Mr. Montelibano the credit which was the object of said litigation." The wife joined in the contract and the ratification in order to pledge certain real estate owned by her as security for the performance of the contract by her husband.

The complaint averred that appellants had taken all steps possible to carry into effect the collection of the credits, but had only been able to collect amounts aggregating P.29,491.04; that the remaining credits

set forth in the first clause of the contract did not exist in the amount therein stated, and were not legitimate in their nature, and for this reason, in spite of plaintiff's efforts to collect them, it had been impossible to do so. Plaintiffs claimed that defendant company was responsible to the plaintiffs for damages in the sum of P.129,734.29, and prayed that they might recover this amount, and that the contract of October 25, 1905, and the mortgages given to secure it, might be canceled.

The appellee filed an answer and a cross complaint setting up the contract of October 25, 1905, and the ratification of November 10, and also an agreement afterwards made between the parties under date December 7, 1908, supplemental to and modifying in certain respects the previous contract; setting up that defendant had complied with all the terms and conditions of these contracts on its part to be performed; that Montelibano had paid defendant only P.20,736.95 on account of the instalments agreed to be paid "under the provisions of said contracts whereby the said plaintiff had the option of purchasing and acquiring the ownership of said credits for the sum of P.130,000;" that after the expiration of the term of the option, when he was by the terms and conditions of the contracts obligated to account for all sums of principal and interest collected on account of said credits, and to return to defendant all credits remaining [**459**] uncollected, defendant demanded of said plaintiff an accounting of his transaction in connection with the credits as agent of the defendant, and payment of all sums of principal and interest collected, but he refused to comply with the demand to pay over any sum collected by him, to render accounts, or in any manner to comply with his obligations under the contracts. Defendant prayed that the action of plaintiffs be dismissed; that the plaintiff Alejandro Montelibano be required to render an accounting of the sums collected by him, of the credits remaining uncollected, and of all his transactions under the contracts, and that judgment be rendered in favor of defendant and against the plaintiff Alejandro for the sum found to be due; that a receiver be appointed to care for the uncollected credits and the mortgaged property; and for other relief.

Before trial plaintiffs asked for a dismissal of the action. The motion to this effect was denied, and the case came on for hearing upon defendant's prayer for affirmative relief and for an accounting and damages. The trial court treated the contract as turning over the credits to Montelibano for collection for defendant's account, subject to an option to purchase the entire amount of credits for the sum of P.130,000, payable in instalments strictly as prescribed by the contract; found that he had not only failed to pay the stipulated instalments in order to avail himself of the option, but had not turned over or accounted for the amount actually collected by him; that he had collected P.61,715.98, and paid over only P.20,736.95, leaving a balance collected by him and undelivered to the defendant of P.40,979.03, in addition to which certain claims against Emilio Escay and Quirino Gamboa had been prosecuted to judgment and execution, and the property of the debtors acquired by Montelibano through the execution sales, and that these properties were held by Montelibano in trust for the [**460**] company. "The conclusions are that the plaintiff having failed to perform the contract on his part, the defendant is entitled to a return of his [its] property in so far as it can be returned, and to judgment for the value of the balance which cannot be returned, which value must be determined as the proceeds which the plaintiff received from such claims, together with legal interest upon the amount of cash received by the plaintiff upon such claims from the time of the commencement of this action, which was by filing the complaint herein on the 4th day of March, 1911."

Judgment was therefore entered in favor of the defendant and against the plaintiff Montelibano for the sum of P.40,979.03, less P.22,086.43 (the amount of the Escay debt) if defendant should seek to recover the Escay property from plaintiff, with interest from March 4, 1911, the date of the commencement of the action; also for the possession and delivery of certain enumerated credits aggregating P.103,645.70; also for the Escay property, and in case delivery thereof could not be had, the sum of P.40,000, the value thereof, provided defendant did not elect to take the full judgment for money collected as above stated, and if such election should be made, then this clause in relation to the return of the property to be annulled; also for the property known as the Gamboa property, or, in case delivery thereof could not be had, the sum of P.6,178.10; and for the costs.

The supreme court of the Philippine Islands affirmed this judgment, holding that the title to the credits never passed to the plaintiff Alejandro Montelibano; that they were delivered into his possession for collection, with an agreement that he could become the owner thereof by paying P.130,000 in the manner specified; that none of these payments having been made as agreed, the credits remained the property of the defendant company, and a refusal to deliver

them was properly the basis of a demand for affirmative relief.

[461] The case comes to this court under § 10 of the act of July 1, 1902 (chap. 1369, 32 Stat. at L. 691, 695, Comp. Stat. 1913, §§ 3804, 1225), on account of the amount in controversy. The action being of an equitable nature, the proper method of review is by appeal, and the writ of error will be dismissed. De la Rama v. De la Rama, 201 U. S. 303, 309, 50 L. ed. 765, 767, 26 Sup. Ct. Rep. 485; Gsell v. Insular Collector of Customs, 239 U. S. 93, ante, 163, 36 Sup. Ct. Rep. 39; De la Rama v. De la Rama, 241 U. S. 154, 160, ante, 932, 934, 36 Sup. Ct. Rep. 518.

The principal contention of appellants, and the one upon which all others turn, is that the court of first instance and the supreme court of the Islands erred in holding that, under the terms of the contracts of October 25, 1905, and December 7, 1908, the credits involved were delivered to the appellant Alejandro Montelibano not as purchaser, but merely as agent for purposes of collection, with an option to purchase that was not carried out, and that therefore the tobacco company was entitled to the proceeds so far as collected, and a return of the uncollected credits or their value. In support of this there is an elaborate argument respecting the construction of the instruments in question. It concedes that many of their clauses are consistent with the view that Montelibano had but an option to purchase the credits, and that if this option were not accepted he was to account to the company for all that he collected; but it is argued that other clauses and the general intent of the agreements are to the contrary. It would be tedious to recite the argument in detail, and we content ourselves with saying that it has not convinced us that the courts below clearly erred; and since they concurred in their findings both upon questions of fact and upon questions of law, it is our duty to affirm their judgment. Ker & Co. v. Couden, 223 U. S. 268, 279, 56 L. ed. 432, 435, 32 Sup. Ct. Rep. 284; De Villanueva v. Villanueva, 239 U. S. 293, 299, ante, 293, 296, 36 Sup. Ct. Rep. 109.

Writ of error dismissed.

Decree affirmed on the appeal.

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[462] CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,

v.

CLAUDE L. PROFFITT.

(See S. C. Reporter's ed. 462–469.)

Trial — requested instruction — assumption of risk.

1. A requested instruction, in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), brought by the head brakeman of a "manifest train," whose injury was due to the "working" of the train at both ends at the same time, that if the jury believed from the evidence that the method adopted by the carrier in making up the train on the occasion in question was the usual and ordinary one, then plaintiff assumed all the risks incident thereto, and could not recover because of any injury received on account of such method, even though it was the direct and proximate cause of the injury, is properly refused because (a) it failed to define what state of facts should charge plaintiff with an assumption of the risk, the evidence leaving in doubt what method was adopted in making up the train in question; (b) it ignored the question whether plaintiff had knowledge or was chargeable with notice of the customary method; and (c) it required the acquittal of defendant if the usual method of doing the work was pursued, irrespective of the question of the negligence of the rear-end switching crew in carrying it out.

[For other cases, see Trial, VII. d, in Digest Sup. Ct. 1908.]

Appeal — reversible error — modification of instruction.

2. The master has no valid cause for complaint because a requested instruction on the assumption of the risk of an extraordinary danger growing out of customary methods, which ignored the question whether the injured employee knew or had notice of such methods, was modified so as to exclude the assumption of risk as a defense unless the customary method was one that a reasonably careful employer would have adopted.

[For other cases, see Appeal and Error, 5142, 5143, in Digest Sup. Ct. 1908.]

[No. 273.]

Argued March 10, 1916. Decided June 5, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Virginia in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 134 C. C. A. 37, 218 Fed. 23.

The facts are stated in the opinion.

NOTE.—On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A. 1915C, 47.

Generally, as to servant's assumption of risk—see notes to Pidcock v. Union P. R.

Messrs. **Walter Leake** and **David H. Leake** argued the cause, and, with Mr. **Henry Taylor, Jr.**, filed a brief for plaintiff in error:

Under the common-law doctrine of assumed risks, as construed and applied in the Federal courts, the servant assumes the risks arising from the master's method of doing the work where the dangers or defects are open and obvious or known to the servant, and he continues in the employment of the master, even though such risks may have been originally due to the master's negligence.

1 Labatt, Mast. & S. § 274; Butler v. Frazee, 211 U. S. 466, 467, 53 L. ed. 285, 29 Sup. Ct. Rep. 136; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 698, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

The doctrine of assumed risks, as applicable to common carriers, has not been changed by the employers' liability act except in the one case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury and death of an employee.

Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 33 Sup. Ct. Rep. 426, 8 N. C. C. A. 806; Seaboard Air Line R. Co. v. Moore, 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603; Hall v. Vandalia R. Co. 169 Ill. App. 12; Neil v. Idaho & W. N. R. Co. 22 Idaho, 102, 125 Pac. 331; Barker v. Kansas City, M. & O. R. Co. 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Southern R. Co. v. Crockett, 234 U. S. 730, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

The method of conducting the business in this case, that is, of shifting and coupling at both ends of the train at the same time, without any notice and warning to those working at the other end of the train, was open, obvious, and known to the plaintiff, and he, therefore, assumed the risk of any injury from that source.

Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; Johnson v. Southern P. Co. 196 U. S. 19, 49 L. ed. 370, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

Instruction "B," on the subject of the assumption of risks, as asked for by the defendant, should have been given, and the modification thereof by the court was improper, and should not have been given, since it was a violation of the doctrine of assumed risks.

Butler v. Franzee, 211 U. S. 466, 467, 53 L. ed. 285, 29 Sup. Ct. Rep. 136.

There was no evidence in the case showing or tending to show that the violence of the impact caused by the cars coupled from the rear of the train was the proximate cause of the injury to the plaintiff.

Patton v. Texas & P. R. Co. 179 U. S. 663, 45 L. ed. 364, 21 Sup. Ct. Rep. 275.

The instruction given by the court on the measure of damages, as asked for by the plaintiff, was erroneous on the question of the allowance of compensation (a) for any physical pain the plaintiff will suffer in the future, and (b) for being unable to follow his calling or to do any other work he would have done had he not been injured.

13 Cyc. 139; Smith v. Milwaukee Builders' & T. Exch. 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; Ford v. Des Moines, 106 Iowa, 94, 75 N. W. 630, 4 Am. Neg. Rep. 379; Shultz v. Griffith, 103 Iowa, 150, 40 L.R.A. 117, 72 N. W. 445; Norfolk R. & Light Co. v. Spratley, 103 Va. 388, 49 S. E. 502; Watson, Personal Injuries, § 384; Washington & G. R. Co. v.

Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374, and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On *volenti non fit injuria* as defense to action by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 162.

As to whether servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

As to servant's assumption of risk of dangers imperfectly appreciated—see note to Tuckett v. American Steam & Hand Laundry, 4 L.R.A.(N.S.) 990.

Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 584, 37 L. ed. 289, 13 Sup. Ct. Rep. 557; 1 Joyce, Damages, §§ 246, 276; Richmond & D. R. Co. v. Elliott, 149 U. S. 267, 37 L. ed. 729, 13 Sup. Ct. Rep. 837; Boston & A. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 35 Sup. Ct. Rep. 143, 7 N. C. C. A. 814.

Messrs. **Hill Carter** and **C. V. Meredith** argued the cause and filed a brief for defendant in error:

Not only did the court in Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, declare that, by reason of the language of the employers' liability act, the doctrine of the so-called assumption of risk from the negligence of a fellow servant had been abolished, but, in all cases arising under such act, so far as we have found, this court has refused to allow a master's exemption from liability for the negligence of a fellow servant upon the old doctrine of being fellow servants.

Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 94, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130; Southern R. Co. v. Gadd, 233 U. S. 572, 58 L. ed. 1099, 34 Sup. Ct. Rep. 696; McGovern v. Philadelphia & R. R. Co. 235 U. S. 389, 59 L. ed. 283, 35 Sup. Ct. Rep. 127, 8 N. C. C. A. 67; New York C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Where a requested instruction should not have been given, because there was no evidence to warrant it, the judgment will not be reversed because it was improperly modified.

Decatur Cereal Mill Co. v. Gogerty, 180 Ill. 197, 54 N. E. 231.

A judgment will not be reversed because of an erroneous instruction unless the court is satisfied that the jury was thereby misled.

Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, 35 Sup. Ct. Rep. 481; Bicknese v. Brandl, 46 Ind. App. 269, 91 N. E. 41; Larson v. Chicago & N. W. R. Co. 89 Neb. 247, 131 N. W. 201; Devine v. Chicago & C. River R. Co. 168 Ill. App. 450; McCary v. Alabama G. S. R. Co. 182 Ala. 597, 62 So. 18; Richardson v. Wood, 113 Me. 328, 93 Atl. 836.

Neither can the motion to set aside the verdict in the case at bar because it is contrary to the law and evidence, or because it is excessive, be considered by this court. Such questions are left to the discretion of the trial court, and are not reviewable by and in the courts of the United States.

New York, L. E. & W. R. Co. v. Winter, 143 U. S. 61–75, 36 L. ed. 76–81, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690; Northern P. R. Co, v. Charless, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; Hughes, Fed. Proc. 2d ed. 1913, § 148, p. 411; Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; Moore v. United States, 150 U. S. 57, 37 L. ed. 996, 14 Sup. Ct. Rep. 26; South Penn Oil Co. v. Latshaw, 49 C. C. A. 478, 111 Fed. 598, 21 Mor. Min. Rep. 600; Victor-American Fuel Co. v. Peccarich, 126 C. C. A. 390, 209 Fed. 568; St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 35 Sup. Ct. Rep. 704, 9 N. C. C. A. 754.

Mr. Justice **Pitney** delivered the opinion of the court:

This was an action brought in the United States district court under the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657).

Plaintiff was a brakeman in defendant's employ, and, during the night of July 2, 1912, was called for duty at Gladstone, Virginia, to take his place as head brakeman on a fast interstate freight train, known as a "manifest train," comprising about forty cars, which had just come into the division terminal yard at Gladstone and was about to be taken forward. He got upon the road engine and this was attached to the train, plaintiff making the coupling. Just after this he met the yard master, who had charge of all the work done in the yard, whose orders plaintiff was bound to obey, and who told plaintiff, according to his testimony, to "cut out three cars at the head end of the train [numbers 2, 3, and 4] and switch them off on a side track and come back and couple up, and they would be ready to go." Plaintiff proceeded with the road engine and crew to take out the three cars, returned to the main track with the engine and car number 1, coupled the latter to the forward end of the train, and was in the act of coupling up the air hose, an operation that required him to step between the rails. While [464] he was in this position, a collision took place, caused by the acts of the yard crew, who (unknown to plaintiff), under orders of the yard master, and with the aid of the yard engine, were engaged in switching cars at the rear end of the train, and who, negligently, as the jury doubtless found, drove a cut of twenty-nine cars into the standing cars

(about eight in number) with undue violence. According to the testimony of the road engineer and fireman the jar of the impact was such that, although their engine was standing, with its independent brakes set, it was thrown forward 20 feet along the track. Naturally plaintiff was knocked down and run over, and he sustained serious personal injuries, including the loss of an arm.

In view of the character of the question that is to be passed upon, a somewhat particular recital of the evidence is necessary. There was testimony that when a manifest train came into a terminal yard such as Gladstone, destined to points further along the line, the engine and caboose were changed and sometimes cars were taken out and others brought into the train; and that, in order to save time, it was customary to have such shifting operations, when necessary, done at both ends of the train, the road engine and road crew operating at the front, the yard engine and yard crew at the rear. Whether plaintiff knew of this custom was, under the evidence, open to dispute. He at one time denied that he knew it was customary for both ends of a manifest train to be "worked" at the same time; and while this was afterwards qualified, it appears not to have been withdrawn. He admitted that it was customary to follow the instructions of the yard master, but denied that on this occasion the yard master told him anything to the effect that the rear end of the train was to be worked. He testified that he had no notice that anything was to be done at that end of the train beyond attaching the caboose, and that [465] after putting the second, third, and fourth cars upon the side track, and coming back to the train, he looked up the track, which was straight, saw no lamp or other signal, and then proceeded with his coupling operations, with the result already mentioned. Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that "it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling." Two of defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by plaintiff; the other declaring that "all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given;" while another and experienced witness, called by defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: "Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car." Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on a manifest train. He testified that he had been employed as brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was "pulled off the local freight."

Plaintiff recovered a verdict for substantial damages, [466] and the judgment was affirmed by the circuit court of appeals. 134 C. C. A. 37, 218 Fed. 23.

There are numerous assignments of error, but most of them are manifestly unfounded. The only ones requiring notice are based upon the refusal of the trial court to instruct the jury in accordance with defendant's Request B, and the modified instruction that was given in its stead. The requested instruction was, in substance: That if the jury believed from the evidence that the method adopted by defendant in making up the train on the occasion in question was the usual and ordinary method of doing this work, then plaintiff assumed all the risks incident to that method, and they should not find a verdict in his favor because of any injury received on account of said method of doing the work, even though it was the direct and proximate cause of his injury. The instruction given was, in substance: That defendant had the right to adopt reasonable rules and regulations for the conduct and method of handling its trains in its yards, and of making up trains for their departure therefrom, and that if the jury believed from the evidence that the custom prevailed in the Gladstone yard of making up the train from both ends at the same time, that is to say, by working the train engine and crew at the forward end and the yard engine and its crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of the business, then the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains, and they should not find a verdict in his favor because of any injury received solely on account of said method of making

up the train, although they believed from the evidence that the method adopted was the proximate cause of the injury.

The argument for plaintiff in error is that an employee assumes the risks arising from the employer's method of [467] doing the work, where the dangers are open, obvious, or known to the employee, even though they be due to the employer's negligence in establishing the method or system; that the customary method of shifting and coupling cars at both ends of a manifest train at the same time, without notice or warning to those working at the other end, was open, obvious, and known to plaintiff; and that he therefore assumed the risk of any injury from that source.

It appears to have been conceded by plaintiff in the circuit court of appeals that the attaching and detaching of cars by working on both ends of the train at the same time was customary at the Gladstone yard; but it does not appear to have been conceded in that court or in the trial court that plaintiff knew of this custom, or had had such opportunity for knowledge as to be charged with notice of it. Nor was it conceded that the custom included the pushing in of a cut of cars without a man at their head to give warning to other workmen and to signal the engineer to slacken speed. As already shown, the evidence left these matters open to dispute.

There are several reasons why error cannot be attributed to the trial court for refusing the requested instruction B.

(a) The evidence left it in doubt what method was adopted in making up the train in question and what was the usual and ordinary method, and the request therefore failed to define what state of facts should charge plaintiff with an assumption of the risk.

(b) The request ignored the question whether plaintiff had knowledge or was chargeable with notice of the customary method. The argument in effect concedes, what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train, arising from switching operations conducted by another crew at the other end, is not among the ordinary [468] risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. Texas & P. R. Co. v. Archibald, 170 U. S. 665, 671, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777, 4 Am. Neg. Rep. 746; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Am. Neg. Rep. 24, 15 Am. Neg. Rep. 230; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; Gila Valley, G & N. R. Co. v. Hall, 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

(c) The request required defendant to be acquitted if the usual method of doing the work was pursued, irrespective of the question of the negligence of the yard crew in carrying it out. Negligence in the doing of the work was the *gravamen* of plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently [469] dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it. Had the instruction been given in form as requested, the jury, in view of the issue and the evidence, might easily have interpreted it as meaning that if defendant's employees usually and customarily made up trains in such a manner that by a violent collision produced by negligent switching operations at the rear end of a long train a brakeman engaged in the performance of his duties at the forward end, and having no notice or warning of the rear-end switching, was in danger of serious personal injury, there was no liability. This, of course, is not the law.

Nor is the modification of the requested instruction a matter of which defendant may complain. The court evidently under-

stood the request as meaning no more than what it said, and as not intended to embrace the hypothesis that plaintiff knew or had notice that the usual method of making up trains was that adopted on the occasion in question. In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted. It was this finding that the modification called for.

Judgment affirmed.

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[470] CHICAGO & NORTHWESTERN RAILWAY COMPANY, Plff. in Err.
v.
WILLIAM BOWER.

(See S. C. Reporter's ed. 470–476.)

Trial — sufficiency of evidence to go to the jury — negligence.

1. The submission to the jury of the question whether a railway company was negligent in furnishing a high-pressure locomotive with a lubricator having tubular glasses is proper where there is evidence tending to show that this type of appliance had been kept in use after its insufficiency had been demonstrated by experience, and perhaps under conditions materially different from those which obtained when its use began, in the face of notice that it was not safe and suitable.

[For other cases, see Trial, VI. b, in Digest Sup. Ct. 1908.]

Master and servant — assumption of risk — increased hazard.

2. An experienced railway engineer, though aware of certain dangers naturally incident to the use of a lubricator having tubular glasses, does not assume the increased risk of explosion of the glasses attributable to the railway company's negligence in maintaining such a type of appliance on a high-pressure engine, where he did not know and had no ground to believe that the railway company had been wanting in the exercise of proper care for his safety, or that, because of such want of care, the danger to him was greater than it should have been.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

[No. 301.]

Argued March 16 and 17, 1916. Decided June 5, 1916.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court for Holt County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Affirmed.

See same case below, 96 Neb. 419, 148 N. W. 145.

The facts are stated in the opinion.

Mr. A. A. McLaughlin argued the cause, and, with Mr. William G. Wheeler, filed a brief for plaintiff in error:

The mere happening of the accident is not evidence of negligence.

Patton v. Texas & P. R. Co. 179 U. S. 658, 663, 664, 45 L. ed. 361, 364, 365, 21 Sup. Ct. Rep. 275; Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748, 76 N. W. 462, 5 Am. Neg. Rep. 50; Cudahy Packing Co. v. Roy, 71 Neb. 600, 99 N. W. 231.

The fact that the Bull's Eye lubricator may have been a new and better appliance was not sufficient to show that the defendant was negligent in using the lubricator complained of.

4 Thomp. Neg. § 3993; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Westinghouse Electric & Mfg. Co. v. Heimlich, 62 C. C. A. 92, 127 Fed. 93; Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; Central Granaries Co. v. Ault, 75 Neb. 249, 106 N. W. 418, 107 N. W. 1015.

An employee assumes the risk of injury in using defective machinery or appliances when defects and dangers are known to him, or, in the exercise of reasonable care, the same should have been known to him.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 322, 57 L. ed. 852, 855, 856, 33 Sup. Ct. Rep. 518; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A.(N.S.) 387, 115 C. C. A. 515, 195 Fed. 729; Utah Consol. Min. Co. v. Bate-

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NOTE.—Generally, as to servant's assumption of risk—see notes to Pidcock v. Union P. R. Co. 1 L.R.A. 131; Foley v. Pettee Mach. Works, 4 L.R.A. 51; Howard v. Delaware & H. Canal Co. 6 L.R.A. 75; Hunter v. New York, O. & W. R. Co. 6 L.R.A. 246; Georgia P. R. Co. v. Dooly, 12 L.R.A. 342; Kehler v. Schwenk, 13 L.R.A. 374, and Southern P. Co. v. Seley, 38 L. ed. U. S. 391.

On *volenti non fit injuria* as defense to action by injured servants—see note to O'Maley v. South Boston Gaslight Co. 47 L.R.A. 162.

As to whether a servant may assume the risk of dangers created by the master's negligence—see note to Scheurer v. Banner Rubber Co. 28 L.R.A.(N.S.) 1215.

As to servant's assumption of risk of dangers imperfectly appreciated—see note to Tuckett v. American Steam & Hand Laundry, 4 L.R.A.(N.S.) 990.

man, 27 L.R.A.(N.S.) 958, 99 C. C. A. 365, 176 Fed. 63; St. Louis Cordage Co. v. Miller, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 511, 15 Am. Neg. Rep. 476; Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951, 13 Am. Neg. Rep. 552; Vanderpool v. Partridge, 79 Neb. 165, 13 L.R.A.(N.S.) 668, 112 N. W. 318; New York, N. H. & H. R. Co. v. Vizvari, L.R.A.1915C, 9, 126 C. C. A. 632, 210 Fed. 118; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561.

Instruction No. 3, requested by defendant in error, and given to the jury, was erroneous in that it advised the jury that if plaintiff in error was negligent in furnishing or maintaining lubricator glass, the defendant in error would not assume the risk, and the supreme court of Nebraska erred in not reversing the case because of the giving of such instruction.

Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 94, 101, 102, 58 L. ed. 521, 524, 525, 34 Sup. Ct. Rep. 229.

Messrs. A. A. McLaughlin, William G. Wheeler, and Wymer Dressler filed a separate brief for plaintiff in error.

Mr. Michael F. Harrington argued the cause and filed a brief for defendant in error.

Mr. Justice Pitney delivered the opinion of the court:

We have here under review a judgment of the supreme court of Nebraska, affirming a judgment in favor of defendant [471] in error in an action based upon the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), for the loss of an eye caused by the breaking of a lubricator glass on a locomotive engine upon which he was at work as engineer in the employ of plaintiff in error. 96 Neb. 419, 148 N. W. 145.

No question is made but that the cause of action arose in interstate commerce so as to bring the case within the Federal act. The facts upon which the question of liability depends are these: The plaintiff in the action (defendant in error) was an experienced locomotive engineer. At the time of his injury, which occurred at night in the month of November, 1910, he had just oiled his engine, taken it from the roundhouse, and placed it upon the outgoing track in readiness for his run. The engine was equipped with a Nathan lubricator, an appliance containing oil for the steam cylinders and the air pump, the oil being conducted to and within the parts where needed under steam pressure from the boiler. In order to give the engineer a view of the interior of the apparatus, and thus enable him to see that the oil was dropping, three cylindrical glass tubes were attached, one carrying the oil for each steam cylinder and one for the air pump. Each of these glasses was surrounded with a shield of perforated metal in two parts, hinged together and lightly clamped upon the glass tube by means of a spring to hold it in place. When the lubricator was in operation, the tubes were required to sustain the same steam pressure as the boiler. These tubular glasses would sometimes break. This was most liable to occur: (1) when a glass was newly installed, and before it had been properly tempered; (2) when it was subjected to a sudden change of temperature, as when steam was admitted to it while cold; and (3) they would, after six or seven weeks' use, sometimes "wear thin" and break for this reason. The metal shield was designed in part, at least, to prevent injury to the [472] engineer from flying pieces in case the glass should break. This type of lubricator had been in use for over twenty years, and had been used upon all defendant's engines down to a time between three and four years prior to the accident. Then a new type, known as the Bull's Eye, came into use, and was recognized as a better appliance because, being unbreakable, it was safer for the engineer, and at the same time obviated the loss of time and delay of trains attributable to breakage of lubricators of the Nathan type; and defendant began to instal Bull's Eye lubricators in the place of the older type upon engines already in use, and to place them upon all new engines. During the earlier period of the use of the Nathan, and before the construction of locomotives of classes Q and R, the engines carried only 140 to 150 pounds boiler pressure, while engines of the classes mentioned carried 190 pounds. An experienced witness called by defendant testified that, at the time of the trial (about a year after the accident), approximately 25 per cent of the engines were still using the Nathan lubricator and 75 per cent were equipped with the Bull's Eye; that the Bull's Eye was and had been, for three or four years, recognized as "the proper appliance;" that the Nathan was dangerous to the men, and that the change was being made partly because of this and partly because the breaking of the old style lubricator sometimes delayed trains.

Plaintiff testified that during most of the time for the past twenty years he had

operated locomotives equipped with Nathan lubricators having tubular glasses, but not all of these were high-pressure engines. The engine on which he was injured was of class R, and carried a boiler pressure of 190 pounds. He had operated it for about two months prior to the time of his injury. During his experience of twenty years, lubricator glasses had broken with him on three previous occasions, the last being about three weeks before the occurrence in question. At this [473] time he asked that a Bull's Eye be substituted on his engine. He testified that this was not because he considered the old lubricator dangerous, but because he wanted to save time on the road in the event of a breakdown. He also testified that he knew that when a new glass was put into a Nathan lubricator it was liable to burst if the steam was turned on suddenly, or if steam was turned on quickly in cold weather, and that on the occasion in question, following the correct practice, he first partially opened the throttles, admitting the steam to the tubes to warm them, afterwards fully opening the throttles, and that it was about seven minutes after this was done that the explosion occurred.

The trial court submitted the case to the jury with instructions to the effect that the burden of proof was upon plaintiff to show that defendant had carelessly and negligently maintained the shield and spring and glass in the lubricator in a weak and dangerous condition, that the lubricator glass was not of sufficient strength for use upon the engine in question or any other engine carrying 190 pounds of steam, and that this fact was known to defendant, or that its experience with said glass and lubricator had been such that it ought to have known that the same was insufficient and dangerous; and that if they believed from a preponderance of the evidence that defendant was thus negligent, and that plaintiff was injured as a result of it, they should find for the plaintiff, otherwise for the defendant.

The principal controversy is as to whether the evidence was sufficient to go to the jury upon the question of defendant's negligence in furnishing the locomotive in question with a lubricator having tubular glasses as described.

The rule of law is: That the employer is under a duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, [474] but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe and suitable. Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Patton v. Texas & P. R. Co. 179 U. S. 658, 664, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275. In our opinion, a correct application of this rule required the present case to be submitted to the jury. Properly limiting the inquiry (and, as we have seen, the trial court did so limit it), there was no question of attributing negligence to an employer for merely failing to promptly instal the latest, best, and safest appliance; it was a question of keeping an older type of appliance in use after its insufficiency had been demonstrated by experience, and perhaps under conditions materially different from those which had obtained when its use began, in the face of notice that it was not reasonably safe and suitable. It was reasonably inferable from the evidence that defendant's experience had shown that a glass tube capable of withstanding the lower pressures of 140 to 150 pounds could not be relied upon to withstand a pressure of 190 pounds, and that the difficulty could not be obviated, as was attempted, by using thicker glass for the tubes, because its very thickness increased the danger of bursting when steam was first admitted; there being evidence from a witness called by defendant that the older type of lubricater was a dangerous instrument to be used upon a high-pressure boiler, and that they broke rather frequently; that it was for this reason, in part, that defendant had introduced the Bull's Eye, beginning three or four years before the accident, installing them first upon high-pressure engines of the Q and R classes, and having already placed them upon a majority of defendant's engines of all sizes. In this state of the evidence it could not be said, as matter of law, that defendant was free from negligence in delaying so long to instal a Bull's Eye lubricator upon the engine in question.

[475] The only other question relates to whether plaintiff assumed the risk of performing his duty upon a locomotive equipped with the Nathan lubricator. Instructions were given to the jury upon the subject, but they are open to some criticism which perhaps can be obviated only by holding, as the supreme court of Nebraska held, that there was nothing in the evidence that would sustain a finding that plaintiff assumed the risk.

The crucial question is whether he knew or had sufficient notice of the increased danger attributable to the employer's negligence. Plaintiff testified without contradiction that it was his understanding—he had been "always taught to believe"—that the Nathan lubricator would stand the boil-

er pressure of 190 pounds. Assuming, as the undisputed evidence shows he had a right to assume, that the glass was being subjected to no greater bursting strain than it was designed to withstand, he still knew that, under special circumstances that have been pointed out, there was danger of a glass bursting unless precautions were taken. Any risk of this character, unaffected by his employer's negligence, he undoubtedly assumed, as a risk ordinarily incident to the occupation he pursued. But this throws no light upon his right to recover, because if he was subjected to no greater risk than that just now indicated, the employer was not negligent and there was no ground of recovery. Under the trial court's instructions, the jury must be presumed to have found that the Nathan lubricator glasses had been shown by experience to be incapable of withstanding a pressure of 190 pounds, that defendant knew of this, and nevertheless negligently maintained such glasses upon plaintiff's engine. There was present, therefore, an extraordinary danger, not normally incident to plaintiff's employment; it was in its nature latent, and not obvious; and there is no evidence in the record that plaintiff had received any notice or warning of the increased hazard attributable to his employer's [476] negligence. In short, while he knew there were certain dangers naturally incident to the use of tubular glasses upon the lubricator, there is nothing to show that he knew or had any ground to believe that his employer had been wanting in the exercise of proper care for his safety, or that because of such want of care the danger to him was greater than it ought to have been. Without this, he could not be held to have assumed the increased risk. Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 101, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 58 L. ed. 1062, 1070, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

Judgment affirmed.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Plff. in Err.,
v.
WILLIAM WAGNER.

(See S. C. Reporter's ed. 476–485.)

Appeal — record — noticing error not assigned.

1. The failure to plead or prove that plaintiff, in an action based on the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), was employed in interstate commerce at the time of his injury, will not be noticed as a "plain error" with which the Federal Supreme Court, on writ of error, may deal, under rule 21, ¶ 4, although not assigned, since (a) the omission may have been due to an oversight that would have been corrected if the point had been properly raised below, and (b) the safety appliance acts being in any event applicable,—the railway being admittedly a highway of interstate commerce,—whether plaintiff was employed in such commerce or not, the only materiality of the question whether the employers' liability act also applies is in its bearing on the defense of contributory negligence, and that defense not having been raised at the trial, the failure of pleading or proof should not be considered as a ground for reversal, it not having been made the basis of any assignment of error.

[For other cases, see Appeal and Error, V. t, in Digest Sup. Ct. 1908.]

Note.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C. 47.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

Error to state court in cases arising under Federal safety appliance acts.

Jurisdiction.

A party who insists, by way of objection to or requests for instructions, upon a construction of a Federal statute such as the safety appliance act of March 2, 1893, which will lead to a judgment in his favor, sets up a claim of a right or immunity, under such statute, within the meaning of U. S. Rev. Stat. § 709, governing writs of error from the Supreme Court of the United States to state courts. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464.

A decision of a state court adverse to plaintiff in error's contention that, by the true construction of the Federal employers'

Appeal — considering matters outside record.

2. The Federal Supreme Court will look only to the certified transcript of the record to ascertain what rulings on evidence were made by the trial court.

[For other cases, see Appeal and Error, V. h, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — defect in automatic couplers.

3. Evidence that the coupling pin on a box car failed to drop as it should have done at the first impact with a locomotive, and required manipulation in preparation for the second impact, and that the drawbar of the engine was so far out of line as to require adjustment in preparation for the second impact, together with the testimony of an experienced brakeman as an expert that when the coupling apparatus of automatic couplers is in proper condition and the couplers are properly connected they couple by impact automatically, is sufficient to sustain a finding that one or both couplers did not measure up to the standard prescribed by the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), *viz.*, "couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

[For other cases, see Evidence, XII. d, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — negligence — employers' liability.

4. A violation of the Federal safety appliance acts of March 2, 1893 (27 Stat. at

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liability and safety appliance acts, it could rely upon the common-law defense of assumption of risk, is reviewable in the Federal Supreme Court. Southern R. Co. v. Crockett, 234 U. S. 725, 58 L. ed. 1564, 34 Sup. Ct. Rep. 897.

Whether or not legislative power is unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the safety appliance act of March 2, 1893, § 5, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the Commission, is a Federal question within the meaning of U. S. Rev. Stat. § 709, governing writs of error from the Supreme Court of the United States to state courts. St. Louis, I. M. & S. R. Co. v. Taylor, supra.

A state court, by deciding that a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler, as required by the act of March 2, 1893, § 2, was, as a matter of law, guilty of contributory negligence in lifting his head a litle too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the Federal Supreme Court, where § 8 of that statute was specially invoked as excluding the defense of assumption of risk. Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

But no substantial Federal question which will sustain a writ of error from the Federal Supreme Court to a state court is presented by a contention that a state safety appliance act, if applicable, is repugnant to the due process of law clause of U. S. Const., 14th Amend., because it is construed by the state court to exact a usual and ordinary degree of care in the appliances to which it relates. Erie R. Co. v. Solomon, 237 U. S. 427, 59 L. ed. 1033, 35 Sup. Ct. Rep. 648.

And the contention that error, to the prejudice of an interstate railway carrier concerning the Federal safety appliance act, if that act applied, was committed by instructing the jury that it exacted a usual and ordinary degree of care in the appliances to which it relates, is too clearly lacking in merit to serve as the basis of a writ of error from the Federal Supreme Court to a state court. Ibid.

Review.

The question whether the right to recover for the negligent killing of a railway brakeman, based upon the company's noncompliance with the safety appliance acts of March 2, 1893, and March, 2, 1903, was barred as a matter of law because the brakeman, after unsuccessfully trying to work an automatic coupler, had attempted to effect the uncoupling by hand, contrary to a rule of the railway company forbidding him to step between moving cars, is not Federal in character, but is a question outside the Federal statutes, which cannot be considered by the Federal Supreme Court on a writ of error sued out under the Judicial Code, § 237, 36 Stat. at L. 1214, chap. 231, Comp. Stat. 1913, § 1214, to a state court. Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

A ruling that the evidence is insufficient to sustain a recovery under a petition which, while founded on the safety-appliance act of March 2, 1893, fails to state a cause of action under that statute, but at most shows a right of recovery at common law, does not involve a Federal question open to examination in the Federal Supreme Court on a writ of error to a state court. Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412.

The refusal to allow an amendment to the petition in an action founded on the original safety-appliance act of March 2, 1893, after the cause had twice been tried without decisive result, and the period of limitation had expired, so as to allege that the cars were used in moving interstate traffic, involves only a question of pleading and practice under the local law, which is not reviewable in the Federal Supreme Court on writ of error to a state court. Ibid.

L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), by an interstate carrier, is in itself negligence rendering the railway company liable for the resulting injury to an employee under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), as being the result of a "defect or insufficiency, due to its negligence, in its cars, engines, appliances," etc., within the meaning of the latter act.

[For other cases, see Master and Servant, II. a, in Digest Sup. Ct. 1908.]

[No. 311.]

Submitted April 14, 1916. Decided June 5, 1916.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Bexar County, in that state, in favor of plaintiff in an action under the Federal safety appliance and employers' liability acts. Affirmed.

See same case below, — Tex. Civ. App. —, 166 S. W. 24.

The facts are stated in the opinion.

Messrs. **Samuel Herrick, Rufus S. Day,** and **Robert J. Boyle** submitted the cause for plaintiff in error. Mr. A. B. Storey was on the brief:

There is no provision in the safety appliance acts prohibiting or precluding adjustment of the coupler prior to or at the time of impact, or providing directly or indirectly that a drawbar out of alignment shall be regarded as a defect in the automatic coupler or equipment, nor is the fact that the drawbar is out of alignment evidence *per se* of such defect, or that the cars are not equipped with couplers coupling automatically by impact, or that they cannot be coupled or uncoupled without the necessity of men going between the ends of the cars.

Morris v. St. Louis S. W. R. Co. — Tex. Civ. App. —, 158 S. W. 1055; Chicago, M. & P. S. R. Co. v. United States, 116 C. C. A. 444, 196 Fed. 882; Willett v. Illinois C. R. Co. 122 Minn. 513, 142 N. W. 883, 4 N. C. C. A. 479; Chicago, M. & St. P. R. Co. v. Voelker, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 526.

In order for the plaintiff to recover in an action for damages for personal injuries received by reason of the negligence of a common carrier, under § 2 of the safety appliance act, as amended by the act of March 2, 1903, and to eliminate the defense by the carrier of contributory negligence on *the* part of plaintiff under § 3 of the employers' liability act, it must first be established that that section of the safety appliance act has been violated by the carrier by showing that its cars were not equipped with couplers coupling automatically by impact, and that they could not be coupled and uncoupled without the necessity of men going between the ends of the cars, the test being whether the person operating the coupler is required, by reason of its defective condition, to go between the ends of the cars in order to effect a coupling or uncoupling.

Chicago, M. & St. P. R. Co. v. Voelker, supra; Wheeling Terminal Co. v. Russell, 126 C. C. A. 519, 209 Fed. 795; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Thornton, Federal Employers' Liability & Safety Appliance Acts, 1909 ed. § 72a.

The issues raised by defendant in the trial court in its special answer, stricken out by the court, whether or not its cars were properly equipped with couplers coupling automatically by impact, and whether they could be coupled and uncoupled without the necessity of plaintiff going between the ends of the engine and car, should have been submitted to the jury under all the evidence admissible by both plaintiff and defendant, it being necessary to establish the truth or falsity of the facts claimed by defendant in order to ascertain whether or not the Federal statute had been violated.

Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518; Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748, 7 Am. Neg. Cas. 369; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519; Union P. R. Co. v. Brady, 88 C. C. A. 579, 161 Fed. 719; Suttle v. Choctaw, O. & G. R. Co. 75 C. C. A. 470, 144 Fed. 668; Parker v. Atlantic City R. Co. 87 N. J. L. 148, 93 Atl. 574.

The safety appliance act which makes it the duty of common carriers to equip their cars with couplers which can be uncoupled without the necessity of men going between the ends of the cars imposes upon the employees the correlative duty of using these couplers when furnished, and of refraining from unnecessarily going between the ends of the cars to uncouple them; and failure of a servant to discharge this duty, which directly contributes to his injury, is fatal to an action for damages on account of it.

Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 27, 128 Fed. 529; Union P. R. Co. v. Brady, 88 C. C. A. 579, 161 Fed. 719; Suttle v. Choctaw, O. & G. R. Co. 75 C. C. A. 470, 144 Fed. 668; Morris v. Duluth, S. S. & A. R. Co. 47 C. C. A. 661, 108 Fed. 747; Chicago, B. & Q. R. Co. v. United States, 127 C. C. A. 438, 211 Fed. 12.

In the absence of any violation of the Federal saftey appliance act, contributory negligence is a legitimate defense by a common carrier in an action to recover damages for personal injuries, in order that the same may be diminished by the jury in proportion to the amount of negligence attributable to the person injured, the defendant in the trial court in the case being denied the right by the ruling of the court to plead this defense, or introduce its evidence to sustain such plea.

Southern R. Co. v. Snyder, 124 C. C. A. 60, 205 Fed. 868; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Lloyd v. Southern R. Co. 166 N. C. 24, 81 S. E. 1003, 7 N. C. C. A. 520; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Ellis v. Louisville, H. & St. L. R. Co. 155 Ky. 745, 160 S. W. 512; Cain v. Southern R. Co. 199 Fed. 211; Neil v. Idaho & W. N. R. Co. 22 Idaho, 74, 125 Pac. 331; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C, 172.

If a correct construction of § 2 of the safety appliance act imposes upon common carriers the absolute duty of equipping their engines and cars with couplers coupling automatically by impact, and which can be coupled and uncoupled without the necessity of men going between the ends of the cars, and further interprets a deflected drawbar at the time of such impact to be a defect or insufficiency in such coupler, then, in order to show a violation of the statute by the carrier, and afford an employee a cause of action under the employers' liability act, it must be proved that the misalignment of the drawbar at the time of such impact was due to the negligence of the carrier, before he will be entitled to recover damages for injuries sustained.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, L.R.A.1915C, 1, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 837, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Pennsylvania Co. v. Cole, 131 C. C. A. 244, 214 Fed. 948.

The coupler must be discovered in a defective and inoperative condition before the statute would be violated.

The court of civil appeals having held that the automatic coupler in use by plaintiff in error at the time of the accident should have been operative for each car as to the device of that particular car, in order that an employee would not have to go to another car to make the coupling of the car in question, such construction of the Federal safety appliance act imposes upon plaintiff in error and upon interstate commerce a double burden in that such interpretation, if sustained by this court, will require two employees, one at each car, in order to make the coupling now effected by one, and would thereby increase twofold not only the operating expense of plaintiff in error, but of every carrier by railroad throughout the United States.

Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; United States v. Montpelier & W. River R. Co. 175 Fed. 874; United States v. Philadelphia & R. R. Co. 162 Fed. 403.

In refusing to admit in evidence testimony showing that adjustment at times was necessary before the coupler would couple automatically by impact, the trial court thereby eliminated all expert testimony as to equipment and operation of the hand lever at the side of the car, and, in holding that a deflected drawbar was a defect and insufficiency in the coupler of the engine under the safety appliance act, and due to the negligence of defendant, without any evidence to support it, the court denied to defendant the defense of contributory negligence on the part of plaintiff in the trial court, permissible under the employers' liability act where there is no defect or insufficiency due to the negligence of the carrier, such court holding as a matter of law that plaintiff in error had violated the safety appliance act, and precluded it from proving under its special answer, the equipment of the car and couplers with a hand lever, and the negligence of the plaintiff in failing to use the same in preparing the couplers for coupling automatically by impact, which failure was negligence, and proximately caused or contributed to cause the injuries complained of.

United States v. Montpelier & W. River R. Co. supra; Wheeling Terminal R. Co. v. Russell, 126 C. C. A. 519, 209 Fed. 795; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582,

31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Long v. Southern R. Co. 155 Ky. 286, 159 S. W. 779; Helm v. Cincinnati, N. O. & T. P. R. Co. 156 Ky. 240, 160 S. W. 945; Ellis v. Louisville, H. & St. L. R. Co. 155 Ky. 745, 160 S. W. 512; Devine v. Chicago & C. R. R. Co. 259 Ill. 449, 102 N. E. 803; Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 837, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168.

In order to hold plaintiff in error liable for violation of the safety appliance-employers' liability acts, it must be shown that the employee's injuries resulted in whole or in part by reason of some defect or insufficiency in its couplers, due to its negligence, on the car or engine in question; and it must further be shown that a reasonable effort was made to operate the coupler by hand lever, and the same failed to work by that means, before such employee would be justified in going between the ends of the cars.

Nichols v. Chesapeake & O. R. Co. 115 C. C. A. 601, 195 Fed. 913; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Burho v. Minneapolis & St. L. R. Co. 121 Minn. 326, 141 N. W. 300; Morris v. St. Louis S. W. R. Co. — Tex. Civ. App. —, 158 S. W. 1055; United States v. Louisville & N. R. R. Co. 156 Fed. 193.

Under the rules of practice and the decisions of the Texas courts when either a foreign statute or contributory negligence is relied on as a defense, the same must be specially pleaded and proved, unless it appears from the pleading of plaintiff.

Foreign statute: Blethen v. Bonner, 93 Tex. 143, 53 S. W. 1016; Gill v. Everman, 94 Tex. 209, 59 S. W. 531; International & G. N. R. Co. v. Moody, 71 Tex. 614, 9 S. W. 465; Porcheler v. Bronson, 50 Tex. 555; Armendiaz v. De La Serna, 40 Tex. 304; Anderson v. Anderson, 23 Tex. 641.

Contributory negligence: Canadian P. R. Co. v. Clark, 20 C. C. A. 447, 38 U. S. App. 573, 73 Fed. 76; New York, S. & W. R. Co. v. Thierer, 137 C. C. A. 295, 221 Fed. 571; Missouri P. R. Co. v. Watson, 72 Tex. 631, 10 S. W. 731, 6 Am. Neg. Cas. 574; Missouri P. R. Co. v. Porter, 73 Tex. 304, 11 S. W. 324; San Antonio & A. P. R. Co. v. Bennett, 76 Tex. 151, 13 S. W. 319; Brown v. Sullivan, 71 Tex. 470, 10 S. W. 288; Gulf, C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 28 L. R. A. 538, 30 S. W. 902.

The construction placed upon the practice and procedure acts by the highest court of a state, and as to the sufficiency of the pleadings, is binding upon the Federal courts.

Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Halferty v. Wilmering, 112 U. S. 713, 28 L. ed. 858, 5 Sup. Ct. Rep. 364; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

The charge of the court, sustained on appeal, which omitted to instruct the jury as to the law of negligence or contributory negligence, was an assumption by the court that defendant had violated the safety appliance act, in which event contributory negligence was not a bar to plaintiff's right to recover, and logically followed in order and sequence the elimination of defendant's special exceptions and special defenses, and the exclusion of all evidence as to adjustment of the couplers prior to the impact, and sustained the allegation of plaintiff, without evidence to support it, that it was necessary for him to go between the ends of the cars to effect a coupling.

Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

Messrs. Perry J. Lewis and H. C. Carter submitted the cause for defendant in error. Mr. John Sehorn was on the brief.

Mr. Justice Pitney delivered the opinion of the court:

The judgment that is brought under review by this writ of error is the outcome of an action begun in the district court of Bexar county, Texas, by defendant in error against plaintiff in error, resulting in a judgment in his favor. This was affirmed by the court of civil appeals, a rehearing was denied (166 S. W. 24, 28), and our writ of error is directed to that court because the supreme court of Texas refused to review the judgment.

We shall describe the parties according to their attitude in the trial court. Plaintiff's petition alleged that on October 18, 1911, he was employed as a brakeman by defendant, a common carrier by railroad engaged in both interstate and intrastate commerce; that defendant had in use in both kinds of commerce a certain engine and a [478] certain car, and it became plaintiff's duty to couple them together; that the couplers would not couple automatically by impact, as required by law, "and for the purpose of making said coupling it became necessary for the plaintiff to stand upon the footboard of said engine, between said engine and car, and to shove the knuckle of the coupler on said engine so as to bring it into proper position to make

the coupling as aforesaid;" that plaintiff placed his left foot against the knuckle of the coupler of the engine for the purpose of pushing it into position, when he lost his balance, slipped and fell, and his left foot was caught between the couplers and crushed. Defendant interposed a general denial and certain special defenses, which latter were struck out on demurrer. They set up that defendant was a common carrier engaged in interstate commerce, and invoked the provisions of the Federal safety appliance act of March 2, 1893 (chap. 196, 27 Stat. at L. 531, Comp. Stat. 1913, § 8605), and the amendment of March 2, 1903 (chap. 976, 32 Stat. at L. 943, Comp. Stat. 1913, § 8613), averring that all couplers attached to railroad engines, tenders, or cars must have sufficient lateral motion to permit trains to round the curves, and must be provided with adjustable knuckles which can be opened and closed, and such couplers must be adjusted at times in order that they may couple automatically by impact, and that there is no kind of automatic coupler constructed or that can be constructed which will couple automatically at all times without previous adjustment, because of the lateral play necessary to enable coupled cars to round curves; that the engine and car upon which plaintiff was employed at the time of his injury were engaged in interstate commerce, and were equipped with automatic couplers which would couple automatically by impact as required by the acts of Congress, but an adjustment was necessary for this purpose, and could have been made by the plaintiff going between the cars while they were standing, but without going between the ends of the cars while in motion, or [479] between a moving engine and cars, and without kicking the coupling or in any manner endangering his own personal safety; with more to the same effect.

At the trial the evidence tended to show that plaintiff was engaged in switching at one of defendant's yards, and was riding upon the footboard at the rear of the engine in order to make a coupling between it and a box car; that at the first impact—to use plaintiff's words—"the coupling wouldn't make; I coupled up against them but it wouldn't make." He then signaled the engineer to draw ahead, and this having been done, he adjusted the knuckle and pin upon the box car, and "I gave the engineer a back-up signal to couple in again, and I got back on the footboard of the engine; when I got on the footboard I looked down and I seen the drawhead on the engine was shifted way over to my side, and I reached up with my left foot to shift the drawhead over so it would couple, and my right foot slipped on the wet footboard;" as a result of which his left foot was caught between the drawheads and crushed. He testified that at the first impact the drawhead on the engine was in line with that on the box car, and that the only thing that prevented the coupling at this time was the failure of the pin on the box car to drop. And further: "When the coupling apparatus of these automatic couplers are in proper condition and they are properly connected, they couple by impact automatically; . . . when the brakeman couples a car, he pulls a lever on the outside of the car; that opens the knuckle—that raises the pin and opens the coupler up; then all he has to do is to give a signal and they back right up. He has nothing to do with reference to fixing the knuckle, or anything of that sort." He testified in effect that the coupler was out of order. The court of civil appeals held that, so far as this was opinion evidence, it was admissible as the opinion of a qualified expert, plaintiff having been employed by defendant as a brakeman for eight years, and being acquainted with the [480] operation of couplers. A witness called by defendant testified: "These couplers are made to couple automatically by impact,—they are supposed to be in such condition as that, so when they come together they will couple without the necessity of men going in between the cars to couple or uncouple, and should be in that condition. If they do not couple with the automatic impact, they are not in proper condition."

The trial court instructed the jury that if the locomotive and car in question were not equipped with couplers coupling automatically by impact without the necessity of plaintiff going between the ends of the cars, and by reason of this and as a proximate result of it plaintiff received his injuries, the verdict should be in his favor; otherwise in favor of defendant; and that the burden of proof was upon plaintiff to establish his case by a preponderance of the evidence.

The court of civil appeals treated the case as coming within the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), and the assignments of error in this court and the argument thereon proceed upon that basis. We shall decide the case upon that assumption, although we find nothing in the record to show that, in fact, plaintiff was employed in interstate commerce at the time he was injured. We are asked to take notice of the omission of pleading and proof of the fact as a "plain error," and deal with it, although not assigned, under paragraph 4 of our Rule 21. We must decline

to do this, principally for two reasons: (a) The omission may have been due to an oversight that would have been corrected if the point had been properly raised by the present plaintiff in error in the state courts. (b) Since the safety appliance acts are in any event applicable,—defendant's railroad being admittedly a highway of interstate commerce,—whether plaintiff was employed in such commerce or not (Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 42, ante, 874, 878, 36 Sup. Ct. Rep. 482), [481] the only materiality of the question whether the employers' liability act also applies is in its bearing upon the defense of contributory negligence; the former act leaving that defense untouched (Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561), while the latter (§ 3, 35 Stat. at L. 66, Comp. Stat. 1913, § 8659) abolishes it in any case where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee, and in other cases limits its effect to the diminution of the damages. Now, an examination of the record discloses that defendant at the trial raised no question of contributory negligence. Such negligence was averred in the special defenses that were struck out, but not as constituting a defense against a violation of the safety appliance acts; and the special defenses contained an allegation to the effect that, at the time of his injury, plaintiff was engaged in interstate commerce. In this state of the record, we do not deem it proper to consider the omission to plead or prove that plaintiff's injury occurred in interstate commerce, as a ground for reversing the judgment, it not having been made the basis of any assignment of error.

In the court of civil appeals, as in this court, error was assigned upon the action of the trial court in striking out the special defenses. The appellate court held, however, that, under the general denial, defendant was at liberty to show all that had been averred in the special defenses respecting the couplers, and that it was permitted to prove all that it offered upon that subject. It is insisted here, and the insistence is many times repeated, that the trial court refused to admit in evidence testimony offered to show that all automatic couplers necessarily require adjustment at times in order that they may operate automatically upon impact, and that the adjustment is accomplished by means of hand levers fitted to the cars and operated by the trainmen without going between the cars; the object being to show that the engine and car [482] were equipped as required by law, and that the drawbar on the engine was thrown out of line by reason of plaintiff's failure to use the hand lever on the box car in preparation for the first impact. It is insisted, also, that certain testimony with reference to adjusting couplers on engines and cars, made necessary by lateral play, in order that they might couple automatically by impact, having been admitted, was afterwards excluded as inadmissible. There is nothing in the certified transcript to sustain either of these contentions. There is an assertion to the same effect in the motion for rehearing filed in the court of civil appeals, where it was stated that the exclusion of the testimony would be made to appear by reference to the stenographer's official report of the trial. The court of civil appeals declared, however, that no such document had been filed or would be filed in that court; proceeding thus: "This cause has been considered on the agreed statement of facts, approved by the trial judge, and the effect of such statement of facts cannot be impaired or destroyed by a document not filed among the papers, and which has no place among the papers. The statement of facts bears out the statement of this court that appellant was permitted to introduce all the testimony it desired on the subject of the coupler on the engine. The record fails to show that any testimony offered by appellant was withdrawn by the court from the jury."

Eliminating, therefore, because unsupported by anything in the record, the insistence that appellant was deprived of the opportunity of presenting at the trial the matters that had been set up in the special defenses, the remaining questions are few and easily disposed of.

There was sufficient evidence to warrant the jury in finding that the coupler upon the box car or that upon the engine, or both, were in bad repair, and that for this reason they did not measure up to the standard prescribed by the act of March 2, 1893, for such equipment, [483] *viz.*: "Couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." This standard was, by the 1st section of the 1903 amendment, made to apply "in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and was extended to "all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," subject to an exception not now material. As has been held repeatedly, this amendment enlarged the scope of the original act so as to embrace all locomotives, cars, and simi-

lar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles are at the time employed in interstate commerce or not. Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 37, ante, 874, 876, 36 Sup. Ct. Rep. 482.

That the act requires locomotives to be equipped with automatic couplers, and that its protection extends to men when coupling as well as when uncoupling cars, are points set at rest by Johnson v. Southern P. Co. 196 U. S. 1, 15, 18, 49 L. ed. 363, 368, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

It is insisted that neither the original act nor the amendment precludes adjustment of the coupler prior to or at the time of impact, or treats a drawbar out of alignment as a defect in the automatic coupler, or as evidence that the cars are not equipped with couplers measuring up to the statutory standard. The evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line; the fact that the coupling pin on the box car failed to drop as it should have done at the first impact, and required manipulation in preparation for the second impact, together with the fact that the drawbar on the engine was so far out of line as to require adjustment in preparation for the second [484] impact, and the opinion evidence, being sufficient to sustain a finding that the equipment was defective. The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves, or, if not, that an adjusting lever should have been provided upon the engine as upon the car, and that there was none upon the engine. We need not in this case determine, what was conceded in Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 320, 57 L. ed. 1204, 1205, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826, that the failure of a coupler to work at any time sustains a charge that the act has been violated.

It is argued that in actions based upon the employers' liability act the defendant cannot be held liable without evidence of negligence; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834, being cited. But in that case, as the opinion shows (p. 507), there was no question of a violation of any provision of the safety appliance act; and in what was said (p. 501) respecting the necessity of showing negligence, reference was had to causes of action independent of that act. The employers' liability act, as its 4th section very clearly shows, recognizes that rights of action may arise out of the violation of the safety appliance act. As was stated in Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 39, ante, 874, 877, 36 Sup. Ct. Rep. 482, 484,—"A disregard of the command of the statute [safety appliance act] is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." If this act is violated, the question of negligence in the general sense of want of care is immaterial. 241 U. S. 43, and cases there cited. But the two statutes are *in pari materia*, and where the employers' liability act refers to "any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances," etc., it clearly is the legislative intent to treat a violation of the safety appliance act as "negligence,"—what is sometimes called negligence *per se*.

[485] In various forms plaintiff in error raises the contention that it was plaintiff's improper management of the coupling operation that was the proximate cause of his injury. But any misconduct on his part was no more than contributory negligence, which, as already shown, is, by the employers' liability act, excluded from consideration in a case such as this.

Judgment affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
ADDIE KELLY, as Administratrix of Matt Kelly, Deceased.

(See S. C. Reporter's ed. 485–494.)

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

1. The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may, therefore, give effect, in actions under that statute, to a local

NOTE.—On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Damages — for death — future benefits — present cash value.

2. The present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance, according to the circumstances, for the earning power of money, is the proper measure of recovery in an action against an interstate railway carrier under the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), for the benefit of the widow and dependent children of an employee killed while engaged in interstate commerce.

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

[No. 321.]

Argued April 19 and 20, 1916. Decided June 5, 1916.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court for Montgomery County, in that state, in favor of plaintiff in an action under the Federal employers' liability act. Reversed and remanded for further proceedings.

See same case below, 160 Ky. 296, 169 S. W. 736; on rehearing, 161 Ky. 655, 171 S. W. 185.

The facts are stated in the opinion.

Messrs. **John T. Shelby, Robert L. Northcutt,** and **John Craig Shelby** argued the cause, and, with Messrs. H. T. Wickham, Henry Taylor, Jr., and Lewis Apperson, filed a brief for plaintiff in error:

Plaintiff should have been required to make out her case by a fair preponderance of the testimony.

Schuylkill & D. Improv. Co. v. Munson, 14 Wall. 442, 20 L. ed. 867; Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780; McGuire v. Blount, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 1.

Under the practice in Kentucky, it is the duty of the trial court, when it undertakes to give an instruction, to give a correct one on the subject; and if a party offers one that is incorrect, it then also becomes the duty of the court to give a correct instruction on the subject to which it refers.

Louisville, H. & St. L. R. Co. v. Roberts, 144 Ky. 824, 139 S. W. 1073.

The jury should have been told to award that sum which represented the present *cash value of* reasonable expectation of pecuniary advantage to the dependent widow and infant children.

Hackney v. Delaware & A. Teleg. & Teleph. Co. 69 N. J. L. 335, 55 Atl. 252; McCabe v. Narragansett Electric Lighting Co. 26 R. I. 427, 59 Atl. 112; Louisville & N. R. Co. v. Trammell, 93 Ala. 354, 9 So. 870; Benton v. North Carolina R. Co. 122 N. C. 1007, 30 S. E. 333; Watson v. Seaboard Aid Line R. Co. 133 N. C. 188, 45 S. E. 555; Rudiger v. Chicago, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 169; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803.

It was error for the jury to consider the high wages in the hazardous employment without also considering that the expectancy of life in that employment was less than normal.

Stewart v. Louisville & N. R. Co. 136 Ky. 724, 125 S. W. 154.

Messrs. John T. Shelby, E. L. Worthington, W. D. Cochran, Le Wright Browning, David H. Leake, Walter Leake, W. F. Evans, William H. Bremner, Frederick M. Miner, and Benjamin D. Warfield also filed a joint brief for plaintiffs in error in this and five other cases (Nos. 321, 399, 453, 478, 485, 743) on the question of the application of the 7th Amendment to the Federal Constitution:

The words "right of trial by jury," as found in the 7th Amendment to the Constitution of the United States, which is to be preserved in all suits at law when the amount in controversy exceeds $20, imply a common-law jury of twelve men, whose verdict must be unanimous.

Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

And the phrase "suits at common law" means not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights are to be ascertained and determined in contradistinction to rights in equity and admiralty.

Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732.

The right of trial by jury is not a mere matter of procedure, but a substantive right.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, and Springville v. Thomas, supra; Slocum v. New York L. Ins. Co. 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; Atlantic Coast

Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75; Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. St. Rep. 781.

The state courts do not take jurisdiction of these causes as a matter of comity, as held by the state supreme courts in the Minnesota and Virginia cases, but as agencies of the Federal system.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

The right of trial by jury, as provided by the 7th Amendment, is a fundamental right which inheres in every cause of action of common-law nature created by the Federal government, and applies wherever the law is sought to be enforced within the limits of the Federal Union; and Congress and the states (in such cases) are powerless to take it away.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 595, 41 L. ed. 837, 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Springville v. Thomas, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; Bauman v. Ross, 167 U. S. 548–592, 42 L. ed. 270–289, 17 Sup. Ct. Rep. 966; Thompson v. Utah, 170 U. S. 343–350, 42 L. ed. 1061–1066, 18 Sup. Ct. Rep. 620; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528–537, 43 L. ed. 796–800, 19 Sup. Ct. Rep. 513; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; Maxwell v. Dow, 176 U. S. 581, 596, 44 L. ed. 597, 603, 20 Sup. Ct. Rep. 448, 494; Black v. Jackson, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; Downes v. Bidwell, 182 U. S. 244, 270, 45 L. ed. 1088, 1100, 21 Sup. Ct. Rep. 770; Rassmussen v. United States, 197 U. S. 516–526, 49 L. ed. 862–865, 25 Sup. Ct. Rep. 514; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 55–59, 56 L. ed. 327, 348–350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Slocum v. New York L. Ins. Co. 228 U. S. 364, 377, 57 L. ed. 879, 885, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914 D, 1029; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75; Whallon v. Bancroft, 4 Minn. 109, Gil. 70; Norval v. Rice, 2 Wis. 22; Gaston v. Babcock, 6 Wis. 503; Ross v. Irving, 14 Ill. 171; Baltimore & O. & C. R. Co. v. Ketring, 122 Ind. 5, 23 N. E. 527; Swarz v. Ramala, 63 Kan. 633, 66 Pac. 649; State v. Doty, 32 N. J. L. 403, 90 Am. Dec. 671; Byers v. Com. 42 Pa. 89.

The judicial power of the United States extends to the *casus fœderis* in whatever forum presented, and necessarily the limitations upon that power extend along with it.

Cohen v. Virginia, 6 Wheat. 384, 5 L. ed. 286; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; Second Employers' Liability Cases (Moudou v. New York, N. H. & H. R. Co. 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914 C, 176; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672: Holmes v. Jennison, 14 Pet. 582, 10 L. ed. 600; Fox v. Ohio, 5 How. 434, 12 L. ed. 223; Spies v. Illinois, 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21, 22; Brown v. Walker, 161 U. S. 606, 40 L. ed. 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Central Vermont R. Co. v. White, 238 U. S. 512, 59 L. ed. 1436, 35 Sup. Ct. Rep. 865; Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, 35 Sup. Ct. Rep. 781; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199, ante, 226, 36 Sup. Ct. Rep. 75; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; Supreme Justices v. Murray, 9 Wall. 274, 19 L. ed. 658; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; Capital Traction Co. v. Hof, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

Congress has not granted jurisdiction of cases under the Federal employers' liability act to state courts which do not answer the requirements of the 7th Amendment.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; 3 Story, Const. § 1748; The Moses Taylor, 4 Wall. 411, 18 L. ed. 397; American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; Walker v. New Mexico & S. P. R. Co. 165 U. S. 595, 41 L. ed. 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; State v. Sinnott, 89

Me. 41, 35 Atl. 1007; Rogers v. Bonnett, 2 Okla. 553, 37 Pac. 1078; Clark v. Com. 29 Pa. 129; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 12, 56 L. ed. 327, 332, 32 Sup. Ct. Rep. 169, 38 L.R.A.(N.S.) 44, 1 N. C. C. A. 875; United States v. Curtis, 107 U. S. 671, 27 L. ed. 534, 2 Sup. Ct. Rep. 501; United States v. Hall, 131 U. S. 50, 33 L. ed. 97, 9 Sup. Ct. Rep. 663; Cohen v. Virginia, 6 Wheat. 414, 5 L. ed. 293; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Mr. Edward C. O'Rear argued the cause, and, with Messrs B. G. Williams and F. W. Clements, filed a brief for defendant in error:

The jury was correctly instructed as to the method of ascertaining the damages.

Chesapeake & O. R. Co. v. Dixon, 104 Ky. 613, 47 S. W. 615; Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466, 20 S. W. 539; Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Louisville & N. R. Co. v. Simrall, 127 Ky. 55, 104 S. W. 1011.

Messrs. Edward C. O'Rear, B. G. Williams, C. B. Stuart, A. C. Cruce, M. K. Cruce, R. S. Dinkle, George B. Martin, George B. Leonard, B. F. Procter, George H. Lamar, C. U. McElroy, D. W. Wright, C. W. Allen, and H. W. Walsh also filed a joint brief for defendants in error in this and five other cases (Nos. 321, 399, 453, 478, 485, 743), on the question of the application of the 7th Amendment to the Federal Constitution:

Federal rights are enforced in a state court as a subject of litigation between parties before it.

Federalist, No. 82; Claflin v. Houseman, 93 U. S. 130, 135, 23 L. ed. 833, 838; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

That Federal laws are laws of the several states does not change the nature of jurisdiction of the state courts.

Black, Law Dict. Jurisdiction; Claflin v. Houseman, supra; Gibson v. Bellingham & N. R. Co. 213 Fed. 48.

Federal rights are not enforced in state courts by a delegated authority from the Federal government.

Martin v. Hunter, 1 Wheat. 304, 330, 4 L. ed. 97, 103; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; Cohen v. Virginia, 6 Wheat. 264, 421, 5 L. ed. 257, 295; Cincinnati N. O. & T. P. R. Co. v. Gregg, 25 Ky. L. Rep. 2329, 80 S. W. 512; Illinois C. R. Co. v. Curry, 127 Ky. 643, 106 S. W. 294; Illinois C. R. Co. v. Eblin, 114 Ky. 817, 71 S. W. 919; McElvain v. St. Louis & S. F. R. Co. 151 Mo. App. 126, 131 S. W. 736; Western U. Teleg. Co. v. Bilisoly, 116 Va. 562, 82 S. E. 91; Southern R. Co. v. Jacobs, 116 Va. 189, 81 S. E. 99; Louisville & N. R. Co. v. Scott, 133 Ky. 724, 118 S. W. 990, 19 Ann. Cas. 392, affirmed in 219 U. S. 209, 55 L. ed. 183, 31 Sup. Ct. Rep. 171; Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 48, 58 L. ed. 838, 842, 34 Sup. Ct. Rep. 581; Federalist, No. 82; Kansas City Western R. Co. v. McAdow, 240 U. S. 51, ante, 520, 36 Sup. Ct. Rep. 252.

That the provisions of the 7th Amendment are applicable to the judiciary of the territories and the District of Columbia does not show that those provisions must be followed in state courts, in trying cases involving Federal laws. The United States has created those courts by virtue of its authority as soverign of the territory and of the district; but the United States has not created state courts. The reason the 7th Amendment applies to the territories and the District is that the United States is sovereign, and the 7th Amendment is binding upon the United States in creating its judiciary. The reason does not lie in the fact that the courts of the territories are enforcing Federal law.

Capital Traction Co. v. Hof, 174 U. S. 1, 5, 43 L. ed. 873, 874, 19 Sup. Ct. Rep. 580; Thompson v. Utah, 170 U. S. 343, 348, 42 L. ed. 1061, 1066, 18 Sup. Ct. Rep. 620; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, 7 L. ed. 242, 253.

The 7th Amendment applies to the Federal judiciary, not to Federal rights.

Barron v. Baltimore, 7 Pet. 243, 246, 249, 8 L. ed. 672, 674, 675; Walker v. Sauvinet, 92 U. S. 90, 92, 23 L. ed. 678, 679; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436; Ohio ex rel. Lloyd v. Dollison, 194 U. S. 447, 48 L. ed. 1065, 24 Sup. Ct. Rep. 703; Bolln v. Nebraska, 176 U. S. 87, 44 L. ed. 383, 20 Sup. Ct. Rep. 287, affirming 51 Neb. 581, 71 N. W. 444; Brown v. Walker, 161 U. S. 606, 40 L. ed. 824, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; Monongahela Nav. Co. v. United States, 148 U. S. 324, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; McElvaine v. Brush, 142 U. S. 158, 35 L. ed. 973, 12 Sup. Ct. Rep. 156; Eilenbecker v. District Ct. 134 U. S. 34, 33 L. ed. 803, 10 Sup. Ct. Rep. 424; Spies v. Illinois, 123 U. S. 131,

31 L. ed. 80, 8 Sup. Ct. Rep. 21; Edwards v. Elliott, 21 Wall. 552, 22 L. ed. 490; Supreme Justices v. Murray, 9 Wall. 277, 19 L. ed. 660; Fox v. Ohio, 5 How. 410, 12 L. ed. 213; Livingston v. Moore, 7 Pet. 551, 8 L. ed. 781.

State courts, whether providing a common-law jury or not, may take jurisdiction of cases involving Federal rights, and determine the case in accordance with their usual and customary methods of trial.

Winters v. Minneapolis & St. L. R. Co. 126 Minn. 260, 148 N. W. 106; Chesapeake & O. R. Co. v. Kelly, 161 Ky. 655, 171 S. W. 185; Louisville & N. R. Co. v. Winkler, 162 Ky. 843, 173 S. W. 151, 9 N. C. C. A. 146; Bombolis v. Minneapolis & St. L. R. Co. 128 Minn. 112, 150 N. W. 385; St. Louis & S. F. R. Co. v. Brown, — Okla. —, 144 Pac. 1075; Chesapeake & O. R. Co. v. Carnahan, — Va. —, 86 S. E. 865; Gibson v. Bellingham & N. R. Co. 213 Fed 488; 15 Columbia L. Rev. 616; 3 Va. L. Rev. 312; 1 Va. L. Reg. 721.

Mr. Justice Pitney delivered the opinion of the court:

In this action, which was founded upon the employers' liability act of Congress of April 22, 1908 (chap. 149, 35 Stat. at L. 65), as amended by act of April 5, 1910 (chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662), defendant in error, as administratrix of Matt Kelly, deceased, recovered a judgment in the Montgomery [487] circuit court for damages because of the death of the intestate while employed by plaintiff in error in interstate commerce. The verdict was for $19,011, which was apportioned among the widow and infant children of the deceased, excluding a son who had attained his majority. The court of appeals of Kentucky affirmed the judgment, and denied a rehearing. 160 Ky. 296, 169 S. W. 736, 161 Ky. 655, 171 S. W. 185.

Upon the present writ of error the first contention is that the limitation of the 7th Amendment to the Federal Constitution preserving the common-law right of trial by jury inheres in every right of action created under the authority of that Constitution, and that because, as is said, the courts of Kentucky are unable to secure that right to litigants by reason of a law of the state, passed pursuant to a provision of its Constitution, by the terms of which in all trials of civil actions in the circuit courts three-fourths or more of the jurors concurring may return a verdict, those courts are without jurisdiction of actions arising under the Federal employers' liability act. This contention has been set at rest by our recent decision in Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595.

The only other matter requiring consideration is the instruction of the trial court, affirmed by the court of appeals, respecting the method of ascertaining the damages. We may say in passing that while the act of Congress does not require that in such cases damages be apportioned among the beneficiaries (Central Vermont R. Co. v. White, 238 U. S. 507, 515, 59 L. ed. 1433, 1438, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265), it is not in the present case insisted that the act prohibits such an apportionment, and if there be any question about this it is not now before us.

Respecting the matter with which we have to deal, the trial court, after stating that if the jury should find for the plaintiff they should fix the damages at such sum [488] as would reasonably compensate the dependent members of Kelly's family for the pecuniary loss, if any, shown by the evidence to have been sustained by them because of Kelly's injury and death; and that, in fixing the amount, they were authorized to take into consideration the evidence showing the decedent's age, habits, business ability, earning capacity, and probable duration of life, and also the pecuniary loss, if any, which the jury might find from the evidence that the dependent members of his family had sustained because of being deprived of such maintenance or support or other pecuniary advantage, if any, which the jury might believe from the evidence they would have derived from his life thereafter,—proceeded as follows: "If the jury find for the plaintiff they will find a gross sum for the plaintiff against the defendant which must not exceed the probable earnings of Matt Kelly had he lived. The gross sum to be found for plaintiff, if the jury find for the plaintiff, must be the aggregate of the sums which the jury may find from the evidence and fix as the pecuniary loss above described, which each dependent member of Matt Kelly's family may have sustained by his death;" following this with an instruction respecting the apportionment, with which, as we have said, we are not now concerned. Defendant requested an instruction that the jury should "fix the damages at that sum which represents the present cash value of the reasonable expectation of pecuniary advantage . . . to said Addie Kelly during her widowhood and while dependent, and pecuniary advantage to said infant children while dependent and until they become twenty-one years of age." This was refused.

Laying aside questions of form, the court of appeals treated the instruction given and the refusal of the requested instruction as

raising the question "that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, [489] but the present cash value of such aggregate amount." Defendant's contention was overruled upon the ground that the whole loss of the beneficiaries is sustained at the time of the death of the party in question, the court saying: "While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of anyone less qualified than an actuary." [160 Ky. 303.]

We are constrained to say that, in our opinion, the court of appeals erred in its conclusion upon this point. The damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 70, 71, 57 L. ed. 417, 421, 422, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; American R. Co. v. Didricksen, 227 U. S. 145, 149, 57 L. ed. 456, 457, 33 Sup. Ct. Rep. 224; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806. So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future. Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages. Wicker v. Hoppock, 6 Wall. 94, 99, 18 L. ed. 752, 753; The Baltimore, 8 Wall. 377, 387, 19 L. ed. 463, 465; United States v. Smith, 94 U. S. 214, 218, 24 L. ed. 115; Warren v. Stoddart, 105 U. S. 224, 229, 26 L. ed. 1117, 1120; United States v. United States Fidelity & G. Co. 236 U. S. 512, 526, 59 L. ed. 696, 703, 35 Sup. Ct. Rep. 298. and [490] the putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

We do not mean to say that the discount should be at what is commonly called the "legal rate" of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least, without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing [491] the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return.

We are not in this case called upon to lay down a precise rule or formula, and it is not our purpose to do this, but merely to indicate some of the considerations that support the view we have expressed that, in computing the damages recoverable for the deprivation of future benefits, the principle of limiting the recovery to compensation requires that adequate allowance be made, according to circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.

We are aware that it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rests, and reach a

present cash value. Whether the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life, it is not for us in this case to say. Like other questions of procedure and evidence, it is to be determined according to the law of the forum.

But the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers' liability act it must be settled according to general principles of law as administered in the Federal courts.

We are not reminded that in any previous case in this court the precise question now presented has been necessarily involved. But in two cases the applicability of present values has been recognized.

Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, 7 Sup. Ct. Rep. 1, 10 Am. Neg. Cas. 574, was a [492] review of a judgment recovered in a circuit court of the United States in an action for personal injuries where the damages claimed included compensation for the impairment of plaintiff's earning capacity. Assuming, for purposes of illustration, that plaintiff's expectancy of life was thirty years, the trial judge instructed the jury (p. 551) that it would not be proper to allow him in gross the sum of the annual losses during his expectancy, "for the annuity will be payable one part this year and another part next year, and each of the thirty parts payable each of the thirty years. You must have a sum such that, when he dies, it will all be used up at the end of thirty years." Having called attention to certain tables that were in evidence, he proceeded to say: "Add that to the present worth of annuity if you find he was damaged." The judgment was reversed, not because of the recognition of the rule of present values, but because of the conclusive force that was given by the trial judge to the life and annuity tables. In the course of the opinion the court, by Mr. Justice Gray, said (p. 554) that the compensation should include "a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant. . . . In order to assist the jury in making such an estimate, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are competent evidence. . . . But it has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury."

In Pierce v. Tennessee Coal, Iron & R. Co. 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335, 5 Am. Neg. Rep. 747, which was an action founded upon defendant's breach and abandonment of a contract of employment construed by this court to be limited only by plaintiff's life, the trial court ruled (p. 6) that no recovery could be allowed beyond [493] the instalments of wages due up to the date of the trial, refusing to charge, as requested by plaintiff, that he was "entitled to the full benefit of his contract, which is the present value of the money agreed to be paid and the articles to be furnished under the contract for the period of his life, if his disability is permanent," etc. This court held (p. 10) that the circuit court had erred in restricting the damages as mentioned, and in declining to instruct the jury in accordance with plaintiff's request; citing Vicksburg & M. R. Co. v. Putnam, ubi supra, and quoting the reference to the "present value of a life annuity;" and also citing (p. 13) Schell v. Plumb, 55 N. Y. 592, and making the following quotation from the opinion of the court of appeals of New York in that case: "Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period; but the contract was entire, and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract."

That where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth is commonly recognized in the state courts. We cite some of the cases, but without intending to approve any of the particular formulæ that have been followed in applying the principle; since in this respect the decisions are not harmonious, and some of them may be subject to question. Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 355, 9 So. 870; McAdory v. Louisville & N. R. Co. 94 Ala. 272, 276, 10 So. 507; Central R. Co. v. Rouse, 77 Ga. 393, 408, 3 S. E. 307; Atlanta & W. P. R. Co. v. Newton, 85 Ga. 517, 528, 11 S. E. 776; Kinney v. Folkerts, 78 Mich. 687, 701, 44 N. W. 152, 84 Mich. 616, 624, 48 N. W. 283; Hackney v. Delaware & A. Teleg. & Teleph. Co. 69 N. J. L. 335, 337, 55 Atl. 252; Gregory v. New York, L. E. & W. R. Co. 55 Hun, 303, 308, 8 N. Y. Supp. 525; Benton v. North Carolina R. Co. 122 N. C. 1007, 1009, 30 S. E. 333; Poe v. Raleigh & A. Air Line R. Co. 141 N. C. 525, 528, 54 S. E. 406; [494] Johnson v. Seaboard Air Line R. Co. 163 N. C. 431, 452, 79 S. E. 690,

Ann. Cas. 1915B, 598, 4 N. C. C. A. 627; Goodhart v. Pennsylvania R. Co. 177 Pa. 1, 17, 55 Am. St. Rep. 705, 35 Atl. 191; Irwin v. Pennsylvania R. Co. 226 Pa. 156, 75 Atl. 19; Reitler v. Pennsylvania R. Co. 238 Pa. 1, 7, 85 Atl. 1000; McCabe v. Narragansett Electric Lighting Co. 26 R. I. 427, 435, 59 Atl. 112; Houston & T. C. R. Co. v. Willie, 53 Tex. 318, 328, 37 Am. Rep. 756; Rudiger v. Chicago, St. P. M. & O. R. Co. 101 Wis. 292, 303, 77 N. W. 169; Secord v. John Schroeder Lumber Co. 160 Wis. 1, 7, 150 N. W. 971. See also St. Louis, I. M. & S. R. Co. v. Needham (C. C. A. 8th) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371, 377; Baltimore & O. R. Co. v. Henthorne (C. C. A. 6th) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634, 641.

Judgment reversed and the cause remanded for further proceedings not inconsistent with this opinion.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plff. in Err.,
v.
JAMES R. GAINEY, JR.,[1] Administrator *de bonis non* of the Estate of Richard Dwyer, Deceased.

(See S. C. Reporter's ed. 494–496.)

Jury — infringement of right — non-unanimous verdict — action under Federal statute.

1. The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, *i. e.*, by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may, therefore, give effect, in actions under that statute, to a local practice permitting a less than unanimous verdict.

[For other cases, see Jury, I. d, 2, in Digest Sup. Ct. 1908.]

Damages — for death — future benefits — present cash value.

2. The present cash value of the future benefits of which the beneficiary was deprived by the death, making adequate allowance according to the circumstances for the earning power of money, is the proper measure of recovery in an action against an interstate railway carrier under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149), as amended by the act of April 5, 1910 (36 Stat. at L. 291, chap. 143, Comp. Stat. 1913, § 8662), for the benefit of the widow of an employee killed while engaged in interstate commerce.

[For other cases, see Damages, VI. j, in Digest Sup. Ct. 1908.]

[No. 453.]

Submitted April 19, 20, 1916. Decided June 5, 1916.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which, on a Second Appeal, affirmed a judgment of the Circuit Court of Boyd County, in that state, in favor of plaintiff in an action of death under the Federal employers' liability act. Reversed and remanded for further proceedings.[1]

See same case below, 162 Ky. 427, 172 S. W. 918.

The facts are stated in the opinion.

Messrs. **E. L. Worthington, W. D. Cochran, and Le Wright Browning** submitted the cause for plaintiff in error. Mr. P. K. Malin was on the brief:

The instruction on the measure of damages was erroneous.

Hackney v. Delaware & A. Teleg. & Teleph. Co. 69 N. J. L. 335, 55 Atl. 252; McCabe v. Narragansett Electric Lighting Co. 26 R. I. 427, 59 Atl. 112; Louisville & N. R. Co. v. Trammell, 93 Ala. 354, 9 So. 870; Benton v. North Carolina R. Co. 122 N. C. 1007, 30 S. E. 333; Rudiger v. Chicago, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 169; Southern R. Co. v. Hill, 139 Ga. 549, 77 S. E. 803; Irvin v. Southern R. Co. 164 N. C. 5, 80 S. E. 78; Thornton v. Seaboard Air Line R. Co. 98 S. C. 348, 82 S. E. 433; Kansas City Southern R. Co. v. Leslie, 233 U. S. 599, 59 L. ed. 1478, 35 Sup. Ct. Rep. 844; American R. Co. v. Didricksen, 227 U. S. 145, 57 L. ed. 456, 33 Sup Ct. Rep. 224; New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

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[1] Death of Sarah Dwyer suggested, and appearance of James R. Gainey, Jr., administrator *de bonis non* of Richard Dwyer, deceased, as party defendant in error herein, filed and entered January 31, 1916.

NOTE.—On number and agreement of jurors necessary to constitute a valid verdict—see notes to State v. Bates, 43 L.R.A. 33, and Silsby v. Foote, 14 L. ed. U. S. 394.

On the constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

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[1] Leave granted to present petition for rehearing herein within thirty days, on motion of Mr. George H. Lamar, in behalf of counsel for the defendant in error.

June 12, 1916.

Messrs. E. L. Worthington, LeWright Browning, and W. D. Cochran also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, ante, 1117.

Mr. R. S. Dinkle submitted the cause for defendant in error. Messrs. Watt M. Prichard and George B. Martin were on the brief:

The instruction of the lower court defining the measure of damages was not erroneous.

Chesapeake & O. R. Co. v. Kelly, 160 Ky. 296, 169 S. W. 736.

Messrs. R. S. Dinkle and George B. Martin also united in a joint brief raising the question of the application of the 7th Amendment to the Federal Constitution, an abstract of which will be found in connection with the report of Chesapeake & O. R. Co. v. Kelly, ante, 1117.

Mr. Justice Pitney delivered the opinion of the court:

This was an action under the employers' liability act of Congress of April 22, 1908, as amended April 5, 1910 [496] (chap. 149, 35 Stat. at L. 65, chap. 143, 36 Stat. at L. 291, Comp. Stat. 1916, § 8662). It was brought to recover damages for the death of Richard Dwyer, caused by the negligence of the railroad company, while he was in its employ in interstate commerce. The sole beneficiary was decedent's widow, who originally qualified as administratrix and brought the action, but has died since the allowance of the present writ of error.

Laying aside a contention based upon the 7th Amendment to the Federal Constitution, which has been disposed of in Minneapolis & St. P. R. Co. v. Bombolis, 241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595, the only question raised relates to the method adopted in ascertaining the damages. The jury returned a verdict for $16,000. On appeal to the Kentucky court of appeals it was insisted that this amount was grossly excessive, and was the result of erroneous instructions to the jury. It was contended that the verdict of $16,000 if placed at interest would yield an annual income greater than the amount the widow would have received had she lived, and would yet leave her the principal to dispose of at the time of her death. The court overruled this contention, on the authority of Chesapeake & O. R. Co. v. Kelly, 160 Ky. 296, 169 S. W. 736, where the same court held that in such a case the whole loss is sustained at the time of intestate's death, and is to be included in the verdict without rebate or discount. A reading of the opinion of the court of appeals in the present case (162 Ky. 427, 172 S. W. 918) makes it evident that it was only upon this theory that the court was able to reach a conclusion sustaining the verdict. Since we have held, in Chesapeake & O. R. Co. v. Kelly, this day decided [241 U. S. 485, ante, 1117, 36 Sup. Ct. Rep. 630], that the theory is erroneous, it results that the judgment here under review must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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[497] SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plff. in Err.,
v.
EDGAR E. CAMPBELL.

(See S. C. Reporter's ed. 497–510.)

Trial — general verdict — special findings — proximate cause.

1. A general verdict for plaintiff in an action by a railway employee to recover damages for injuries received by him in a head-on collision, in which the jury made special findings that the air brakes were insufficient to enable him to control the speed of his train, and that his violation of a train order was the proximate cause of the accident, must mean not only that the brake equipment was defective, but that it was a proximate cause of the collision, where the jury were instructed that before a verdict could be returned for the plaintiff, based on the allegation that the brakes

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NOTE.—On the applicability of the commerce clause or statutes thereunder to street railways or to interurban roads—see note to Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 46 L.R.A.(N.S.) 385.

On duty and liability under Federal and state railway safety appliance acts—see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49.

As to constitutionality, application, and effect of the Federal employers' liability act—see notes to Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 38, and Seaboard Air Line R. Co. v. Horton, L.R.A.1915C, 47.

As to duties of master and servant in regard to rules promulgated for the safe conduct of a business—see note to Nolan v. New York, N. H. & H. R. Co. 43 L.R.A. 305.

As to the relation of the proximate-cause doctrine to the rule of liability of a master for injuries to his servant caused by the combined negligence of himself and a fellow servant—see note to Lutz v. Atlantic & P. R. Co. 16 L.R.A. 819.

were defective and out of repair, they must be satisfied, from a preponderance of the testimony, not only that the brakes were in fact defective or out of repair, but that their defective condition was the direct or proximate cause of the collision.

[For other cases, see Trial, X., in Digest Sup. Ct. 1908.]

Evidence — sufficiency — proximate cause.

2. Evidence that a motorman, after discovering a train which was approaching from the opposite direction on the same track, would have had ample time to avoid a collision had the train-brake equipment been adequate, supports a finding that the defective brake equipment was the proximate cause of the ensuing collision.

[For other cases, see Evidence, XII. b, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — defective safety appliance.

3. The jury might reasonably infer that the train-brake equipment, which was wrecked in a collision, was defective or out of repair, where, notwithstanding testimony that the brakes were inspected and found in perfect order before the train started, there is evidence that when the motorman threw the air brake into emergency, the brakes took hold and then "leaked off" so as to release the brakes, and there was evidence which would have warranted the jury in finding that the motorman properly applied the air when 600 feet or more from the place where the collision occurred, and that the brakes refused to work, and there was expert evidence that the train could have been stopped inside of 300 feet if the brakes had been in proper order.

[For other cases, see Evidence, XII. d, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — interstate electric railway — power brakes.

4. Electric motors and trains drawn by them on an interstate interurban electric railway must be deemed to have been brought within the provisions of the safety appliance act of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), respecting power or train brakes on locomotives and trains, by the declaration of the amendatory act of March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), § 1, that the provisions relating to train brakes shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, and of § 2, that whenever any train is operated with power or train brakes, not less than 50 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing the train.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — employee disobeying orders.

5. The duty with respect to power and train brakes, under the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), was owed by an interstate interurban electric railway company to a motorman who had wrongfully exposed himself to danger by taking out his train in violation of orders.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Master and servant — safety appliances — servant acting outside employment.

6. The violation of a train order by the motorman of an interstate interurban electric railway does not suspend the relation of employer and employee so as to absolve the former from its duty toward him under the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), with respect to power or train brakes.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — safety appliances — exclusiveness of Federal regulation.

7. State statutes which, like 2 Ida. Rev. Code, §§ 6926, 6909, render a wilful violation or omission of duty on the part of a railway employee whereby human life or safety is endangered punishable as a misdemeanor, and make wilful or negligent conduct which causes a collision of trains and the resulting death of a human being a criminal offense, have no bearing on the right of the motorman of an interstate interurban electric railway to recover damages from his employer for injuries sustained in a collision because of defective power or train brakes, since his right to recover depends upon the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), to which all state legislation affecting the subject-matter must yield.

[For other cases, see Master and Servant, II. a, 2, d, in Digest Sup. Ct. 1908.]

Master and servant — employers' liability — safety appliances — contributory negligence — concurring proximate causes.

8. A recovery may be had under the Federal employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), where the employee's contributory negligence and the railway company's violation of the safety appliance acts of March 2, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605), and March 2, 1903 (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), are concurring proximate causes, in view of the provision of § 1 of the employers' liability act, imposing a liability for an injury to an employee resulting "in whole or in part" from the negligence of any of the officers,

agents, or employees of the carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, or other equipment, and of the proviso to § 3 of that act, that no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act "contributed" to the injury or death of such employee.

[For other cases, see Master and Servant, II. a; Proximate Cause, in Digest Sup. Ct. 1908.]

[No. 325.]

Argued April 26, 1916. Decided June 12, 1916.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Washington in favor of plaintiff in an action under the Federal employers' liability and safety appliance acts. Affirmed.

See same case below, 133 C. C. A. 370, 217 Fed. 518.

The facts are stated in the opinion.

Mr. Will G. Graves argued the cause, and, with Messrs. F. H. Graves and B. H. Kizer, filed a brief for plaintiff in error:

Judgment should have been entered for defendant upon the special findings

Sudden v. Morse, 55 Wash. 372, 104 Pac. 645; Cameron v. Stack-Gibbs Lumber Co. 68 Wash. 543, 123 Pac. 1001; Mercier v. Travelers' Ins. Co. 24 Wash. 154, 64 Pac. 158; Hobart v. Seattle, 32 Wash. 332, 73 Pac. 383; Abby v. Wood, 43 Wash. 379, 86 Pac. 558; Crowley v. Northern P. R. Co. 46 Wash. 85, 89 Pac. 471; Evans v. Oregon & W. R. Co. 58 Wash. 434, 28 L.R.A.(N.S.) 455, 108 Pac. 1095; Pepperall v. City Park Transit Co. 15 Wash. 176, 45 Pac. 743, 46 Pac. 407.

The jury's findings establish that Campbell was not in the course of his employment when he was injured, and consequently judgment could not be entered for him upon the cause of action pleaded and established by the general verdict.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 260, 58 L. ed. 591, 596, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109; St. Louis & S. F. R. Co. v. Conarty, 238 U. S. 243, 249, 59 L. ed. 1290, 1292, 35 Sup. Ct. Rep. 785; Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; Reese v. Philadelphia & R. R. Co. 239 U. S. 463, ante, 384, 36 Sup. Ct. Rep. 134; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, L.R.A.1915C, 1, 58 L. ed. 1062, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; 4 Thomp. Neg. 2d ed. § 3749; Williamson v. Berlin Mills Co. 111 C. C. A. 185, 190 Fed. 1; Baltimore & O. R. Co. v. Doty, 67 C. C. A. 38, 133 Fed. 866; Burnett v. Roanoke Mills Co. 152 N. C. 35, 67 S. E. 30; Chesapeake & O. R. Co. v. Barnes, 132 Ky. 728, 117 S. W. 261; Harris v. United S. S. Co. 75 N. J. L. 861, 70 Atl. 155; McGill v. Maine & N. H. Granite Co. 70 N. H. 125, 85 Am. St. Rep. 618, 46 Atl. 684; Lindquist v. King's Crown Plaster Co. 139 Iowa, 107, 117 N. W. 46; Martin v. Kansas City, M. & B. R. Co. 77 Miss. 720, 27 So. 646; Pioneer Min. & Mfg. Co. v. Talley, 152 Ala. 162, 12 L.R.A.(N.S.) 861, 43 So. 800; Duvall v. Armour Packing Co. 119 Mo. App. 150, 95 S. W. 978; Louisville & N. R. Co. v. Holland, 164 Ala. 73, 137 Am. St. Rep. 25, 51 So. 365; Buckley v. New York C. & H. R. R. Co. 142 App. Div. 8, 126 N. Y. Supp. 480; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Reimers v. Proctor Pub. Co. 85 N. J. L. 441, 89 Atl. 931, 4 N. C. C. A. 738; Anderson v. Missouri P. R. Co. 95 Neb. 358, L.R.A. —, —, 145 N. W. 842; Hobbs v. Great Northern R. Co. 80 Wash. 678, L.R.A.1915D, 503, 142 Pac. 20; Vanordstrand v. Northern P. R. Co. 86 Wash. 665, 151 Pac. 89; Pope v. Hill's Plymouth Co. 102 L. T. N. S. 632, 3 B. W. C. C. 339; Martin v. Fullerton [1908] S. C. 1030; Jenkinson v. Harrison, A. & Co. 4 B. W. C. C. 194; Losh v. Richard Evans & Co. 19 Times L. R. 142, 51 Week. Rep. 243; Marriott v. Brett & Beney, 5 B. W. C. C. 145; Whelan v. Moore, 43 Ir. L. T. 205, 2 B. W. C. C. 114; Smith v. Lancashire & Y. R. Co. [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64; Williams v. Wigan Coal & I. Co. 3 B. W. C. C. 65; Reed v. Great Western R. Co. [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31, 2 B. W. C. C. 109; Morrison v. Clyde Nav. Trustees [1909] S. C. 59, 49 Scot. L. R. 40; Revie v. Cumming [1911] S. C. 1032, 48 Scot. L. R. 831; Wemyss Coal Co. v. Symon [1912] S. C. 1239, 49 Scot. L. R. 921; Scalzo v. Columbia Maccaroni Factory, 17 B. C. 201.

Campbell's criminal act was both out of the ordinary, and inconsistent with his duty to his employer; and therefore in its commission he was beyond the scope of his employment.

Seaboard Air-Line R. Co. v. Chapman, 4 Ga. App. 706, 62 S. E. 488; Lloyd v. North Carolina R. Co. 151 N. C. 536, 45 L.R.A.(N.S.) 378, 66 S. E. 604.

In construing the British workmen's compensation act, the English courts frequently had occasion to remar

carefully define the distinction between improper acts done in the course of an employment, which do not debar recovery, and conduct so unrelated to the employment as to be without its pale, which does bar recovery.

Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 51 Scot. L. R. 861, 7 B. W. C. C. 1, Ann. Cas. 1914B, 495; Barnes v. Nunnery Colliery Co. [1912] A. C. 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195; Parker v. Hambrook [1912] W. N. 205, 107 L. T. N. S. 249, 56 Sol. Jo. 750, 5 B. W. C. C. 608.

The words "locomotive" and "locomotive engine" mean to the average man a steam locomotive.

Whitehouse v. Grand Trunk R. Co. 2 Haskell, 189, Fed. Cas. No. 17,565.

Common or popular words when used in a statute are to be understood in a popular sense.

Sutherland, Stat. Constr. § 247; Hartford v. Northern P. R. Co. 91 Wis. 374, 64 N. W. 1033.

The use in statutes relating to railroad operation of the words "locomotive," "locomotive engine," or "locomotive engineer," indicates the legislative intention to restrict the operation of the statute to the usual steam railroad.

Birmingham R. Light & P. Co. v. Ozburn, 4 Ala. App. 399, 56 So. 599; Galveston & W. R. Co. v. Galveston Electric R. Co. 58 Tex. Civ. App. 427, 123 S. W. 1140; Kammann v. St. Louis & N. E. R. Co. 173 Ill. App. 277; Conover v. Public Service R. Co. 80 N. J. L. 681, 78 Atl. 187; Indianapolis & G. Rapid Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145; Fallon v. West End Street R. Co. 171 Mass. 249, 50 N. E. 536, 4 Am. Neg. Rep. 288; Mudd v. Missouri, K. & T. R. Co. 146 Mo. App. 388, 124 S. W. 59; Norfolk & P. Traction Co. v. Ellington, 108 Va. 245, 17 L.R.A.(N.S.) 117, 61 S. E. 779; Cleveland & E. R. Co. v. Somers, 24 Ohio C. C. 67.

When Campbell admits that the failure might have been due to the breaking of any of a half dozen parts of the system, occasioned by his applying the brakes improperly, certainly there is no liability but that of an insurer under which the company can be held. The insurer idea is exploded by St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. Rep. 858; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Reese v. Philadelphia & R. R. Co. 239 U. S. 463, ante, 384, 36 Sup. Ct. Rep. 134.

The Federal acts made radical changes in the duty owed by a master to his servant, but the acts, in respect of all incidental matters not specifically dealt with, are to be construed in the light of Federal decisions made prior to their enactment.

Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265.

Such, too, is the effect of the McWhirter, Horton, and Reese Cases; Patton v. Texas & P. R. Co. 179 U. S. 361, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, merely states a rule of evidence; that in an action by a servant to recover damages for a breach of the master's duty to him, it is not sufficient that it appears that the master may have breached his duty, and in consequence the servant was injured; the evidence must point to the fact that he did breach it, and that the injury complained of resulted from the breach. It has been uniformly followed by the Federal courts as a rule of evidence under both Federal and state liability acts.

Chicago & N. W. R. Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593; Shandrew v. Chicago, St. P. M. & O. R. Co. 73 C. C. A. 430, 142 Fed. 320; Lyddy v. Louisville & N. R. Co. 117 C. C. A. 20, 197 Fed. 524; Smith v. Illinois C. R. Co. 119 C. C. A. 33, 200 Fed. 553; Norfolk & W. R. Co. v. Hauser, 128 C. C. A. 167, 211 Fed. 567; Midland Valley R. Co. v. Fulgham, L.R.A. —, —, 104 C. C. A. 151, 181 Fed. 91; Crucible Steel Forge Co. v. Moir, 135 C. C. A. 49, 219 Fed. 151, 8 N. C. C. A. 1006.

The state courts, too, hold that the liability acts, Federal or state, have not dispensed with the necessity for connecting by evidence, not surmise, the breach of the master's duty with the servant's injury.

Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742; Scroggins v. Atlantic & G. P. Cement Co. 179 Ala. 213, 60 So. 175; Wrightsville & T. R. Co. v. Tompkins, 9 Ga. App. 154, 70 S. E. 955; Johnson v. Nashville, C. & St. L. R. Co. 177 Ala. 284, 58 So. 447; Walton v. Tennessee Coal, Iron & R. Co. 166 Ala. 538, 52 So. 328.

In an action by a servant to recover damages from his master for injuries sustained, no presumption of negligence arose from the mere failure of appliances, but to sustain a recovery there must be evidence of defects in the appliances, due to the master's neglect. Like those cases is Looney v. Metropolitan R. Co. 200 U. S. 480, 50 L. ed. 564, 26 Sup. Ct. Rep. 303, 19 Am. Neg. Rep. 627, in which it was said:

"To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown."

Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707, 1 Am. Neg. Rep. 745; Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. See also Midland Valley R. Co. v. Fulgham, L.R.A. —, —, 104 C. C. A. 151, 181 Fed. 93.

A statute which simply imposes a new obligation upon an employer, or renders him liable for the negligence of an employee who would, apart from its provisions, have been regarded as a mere coservant of the injured person, leaves upon the plaintiff the burden of proving the existence of such culpability as will entitle him to maintain the action.

4 Labatt, Mast. & S. 2d ed. p. 4902.

The questions of negligence and of proximate cause are still to be determined according to the general existing rules on that subject.

Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677.

Under the Federal statute the plaintiff must show negligence under the rules ordinarily applicable to cases of that character.

South Covington & C. Street R. Co. v. Finan, 153 Ky. 340, 155 S. W. 742.

The rule *res ipsa loquitur* is merely one of evidence (Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905), and there being nothing in the Federal acts to indicate an intent to affect rules of evidence, it has been held, wherever the question has been presented, that they remain as before.

Smith v. Illinois C. R. Co. 119 C. C. A. 33, 200 Fed. 553; Weiss v. Belt R. Co. 186 Ill. App. 43; Chesapeake & O. R. Co. v. Walker, 159 Ky. 237, 167 S. W. 128; Ridge v. Norfolk Southern R. Co. 167 N. C. 510, L.R.A. —, —, 83 S. E. 762; Bjornsen v. Northern P. R. Co. 84 Wash. 220, 146 Pac. 575; Norfolk & W. R. Co. v. Hauser, 128 C. C. A. 167, 211 Fed. 567; Lyddy v. Louisville & N. R. Co. 117 C. C. A. 20, 197 Fed. 524; Courtney v. New York, N. H. & H. R. Co. 213 Fed. 388; Pennsylvania R. Co. v. Knox, 134 C. C. A. 426, 218 Fed. 748; Helm v. Cincinnati, N. O. & T. P. R. Co. 156 Ky. 240, 160 S. W. 945; Cincinnati, N. O. & T. P. R. Co. v. Goldston, 156 Ky. 410, 161 S. W. 246.

In any event, *res ipsa loquitur* is only applicable where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that, if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened.

Sweeney v. Erving, 228 U. S. 233, 238, 57 L. ed. 815, 818, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905.

It is only applicable when the nature of the accident points strongly to its cause being the defendant's negligence, and as well excludes an inference that it was otherwise occasioned.

Byers v. Carnegie Steel Co. 16 L.R.A. (N.S.) 214, 86 C. C. A. 347, 159 Fed. 347; Lucid v. E. I. Du Pont De Nemours Powder Co. L.R.A. —, —, 118 C. C. A. 61, 199 Fed. 377.

There was no evidence that the brakes were defective unless the case is based upon the safety appliance act. Campbell's contributory negligence, which at least is indisputable, was a complete defense under that act.

Reese v. Philadelphia & R. R. Co. 239 U. S. 463, ante, 384, 36 Sup. Ct. Rep. 134; Seaboard Air Line v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609.

The case is like that of a state in which the common-law rule of negligence prevails, but a statute has been passed affecting the rule. The fact that a plaintiff might have maintained a common-law action does not deprive him of the right to sue under the statute, but, if he counts on common-law negligence, he cannot claim the benefits of the statute.

5 Labatt, Mast. & S. 2d ed. § 1667; Welch v. Waterbury, 136 App. Div. 315, 120 N. Y. Supp. 1059; Flessher v. Carstens Packing Co. 81 Wash. 241, 142 Pac. 694; Wiser v. Northwestern Improv. Co. 86 Wash. 433, 150 Pac. 619.

Mr. H. Lawndes Maury argued the cause, and, with Messrs. E. H. Belden, W. C. Losey, and H. R. Newton, filed a brief for defendant in error:

The Federal Supreme Court, in considering the cause, will not go into the record further than to consider whether plain error has been committed in relation to the Federal employers' liability act.

Yazoo & M. Valley R. Co. v. Wright, 235 U. S. 376, 59 L. ed. 277, 35 Sup. Ct. Rep. 130; Chicago Junction R. Co. v. King, 222 U. S. 222, 56 L. ed. 173, 32 Sup. Ct. Rep. 79; Seaboard Air Line R. Co. v. Moore, 228

U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 57 L. ed. 1204, 33 Sup. Ct. Rep. 840, 3 N. C. C. A. 826; Southern R. Co. v. Gadd, 233 U. S. 577, 58 L. ed. 1100, 34 Sup. Ct. Rep. 696; Behn v. Campbell, 205 U. S. 403, 51 L. ed. 857, 27 Sup. Ct. Rep. 502.

We must look to the object and purpose of the act of Congress in the passage of the act in question, in order to arrive at a true conclusion as to the application of the act.

Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

The safety appliance act has been given a liberal construction by Federal courts, that the intent of Congress might be effectuated.

Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Chicago & N. W. R. Co. 157 Fed. 616; Winkler v. Philadelphia & R. R. Co. 4 Penn. (Del.) 80, 53 Atl. 90; Spokane & I. E. R. Co. v. United States, L.R.A. —, —, 127 C. C. A. 61, 210 Fed. 243.

Some state decisions are in point and may be of assistance to the court in determining the question.

Kent v. Jamestown Street R. Co. 205 N. Y. 361, 98 N. E. 664.

If it should be held that the finding actually made as to insufficiency of brakes to control the speed of the train immediately prior to the accident, and the findings presumed, are inconsistent with the finding that the leaving of Cœur d'Alene, in violation of his orders, by plaintiff, was the proximate cause of the accident (which inconsistency is assumed for the purpose of argument only), the findings would neutralize each other, and the general verdict must control.

Farmers' Sav. Bank v. Forbes, 151 Iowa, 627, 132 N. W. 59; Conwell v. Tri-City R. Co. 135 Iowa, 190, 112 N. W. 546; Indianapolis Southern R. Co. v. Tucker, 51 Ind. App. 480, 98 N. E. 431; Morrow v. Bonebrake, 84 Kan. 724, 34 L.R.A.(N.S.) 1147, 115 Pac. 585; Seigel, W. & C. Livestock Commission Co. v. Johnson, 4 Okla. 99, 44 Pac. 206; Daube v. Philadelphia & R. Coal & I. Co. 23 C. C. A. 420, 46 U. S. App. 591, 77 Fed. 713.

In order for motion for judgment upon special interrogatories to be granted, the inconsistency between special findings and the general verdict must be irreconcilable.

Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58; Drake v. Justice Gold Min. Co. 32 Colo. 259, 75 Pac. 913; Tarashonsky v. Illinois C. R. Co. 139 Iowa, 709, 117 N. W. 1074; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186.

Special findings must be findings of ultimate facts, and not mixed questions of law and fact, or conclusions, and the court should disregard any finding which is a conclusion.

Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58; Lake Shore & M. S. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476.

There is a wide distinction between a proximate cause and a cause which proximately contributed to an injury, and this distinction is recognized by Congress in the employers' liability act, and by the courts in interpreting similar statutes.

McFail v. Barnwell County, 57 S. C. 294, 35 S. E. 562; Wragge v. South Carolina & G. R. Co. 47 S. C. 105, 33 L.R.A. 191, 58 Am. St. Rep. 870, 25 S. E. 76.

There can be a proximate cause and a contributing cause to an injury, and two or more acts of negligence may proximately contribute to the same injury.

Chicago & N. W. R. Co. v. Prescott, 23 L.R.A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237; Andrews v. Mason City & Ft. D. R. Co. 77 Iowa, 669, 42 N. W. 513; Skjeggerud v. Minneapolis & St. L. R. Co. 38 Minn. 56, 35 N. W. 572; Corey v. Northern P. R. Co. 32 Minn. 457, 21 N. W. 479; Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102, 15 Am. Neg. Rep. 235.

The defenses of assumption of risk and contributory negligence are not available to the company under the act of Congress.

Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 844; Louisville & N. R. Co. v. Wene, 121 C. C. A. 245, 202 Fed. 887.

The finding that disobedience of orders was the proximate cause of the injury does not negative the implied finding that the failure of brakes to work immediately prior to the collision was a cause contributing to the injury.

Deming v. Merchants' Cotton-press & Storage Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89; Atchison, T. & S. F. R. Co. v. Calhoon, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Under the safety appliance act, an absolute duty rests on a carrier, not only to equip its trains with brakes, but also to maintain the equipment in accordance with the standard set by Congress.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612;

Donegan v. Baltimore & N. Y. R. Co. 91 C. C. A. 555, 165 Fed. 869; Atlantic Coast Line R. Co. v. United States, 94 C. C. A. 35, 168 Fed. 175; United States v. Atchison, T. & S. F. R. Co. 90 C. C. A. 327, 163 Fed. 517; United States v. Denver & R. G. R. Co. 90 C. C. A. 329, 163 Fed. 519; Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, 91 C. C. A. 373, 165 Fed. 423; United States v. Wheeling & L. E. R. Co. 167 Fed. 198; Indiana Union Traction Co. v. Abrams, 180 Ind. 54, 101 N. E. 1.

Failure to perform a statutory duty is negligence *per se*.

Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. Supp. 579; Grand Trunk Western R. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836; Indiana Union Traction Co. v. Abrams, 180 Ind. 54, 101 N. E. 1; Waverly Co. v. Beck, 180 Ind. 523, 103 N. E. 332; Gallenkamp v. Garvin Mach. Co. — N. Y. —, 99 N. E. 718; Pinnell v. Kelly, 54 Ind. App. 59, 99 N. E. 772.

The duty resting upon a common carrier by railroad, engaged in interstate commerce, to equip its trains with sufficient air brakes and with automatic couplers, is an absolute duty, and the requirement of the statute is not satisfied by using reasonable care to see that the equipment furnished is in perfect condition.

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; Delk v. St. Louis & S. F. R. Co. 220 U. S. 580, 55 L. ed. 590, 31 Sup. Ct. Rep. 617; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464. See also Indiana Union Traction Co. v. Abrams, 180 Ind. 54, 101 N. E. 1.

Can it be said that Congress, in passing these statutes, did not take into consideration the fact that men are human and are liable to misread and misinterpret orders, and that in just such unforeseen emergencies, safety appliances must be at hand, for the protection of the lives of these same employees and lives of passengers intrusted to their care? If the employee has been negligent, then his damages are to be decreased according to the degree of his negligence; but he is not entirely deprived of his right to have the jury compare his negligence with the negligence of the master in his failure to furnish proper appliances.

Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Louisville & N. R. Co. v. Wene, 121 C. C. A. 245, 202 Fed. 887.

Mr. Justice Pitney delivered the opinion of the court:

This action was brought by Campbell in the United States district court for the eastern district of Washington to recover damages for personal injuries, and was based upon the Federal employers' liability act of April 22, 1908 (chap. 149, 35 Stat. at L. 65, Comp. Stat. 1913, § 8657), and the safety appliance act of March 2, 1893, as amended March 2, 1903 (chap. 196, 27 Stat. at L. 531, Comp. Stat. 1913, § 8605; chap. 976, 32 Stat. at L. 943, Comp. Stat. 1913, § 8613). A judgment in plaintiff's favor was affirmed by the circuit court of appeals (133 C. C. A. 370, 217 Fed. 518), and the case comes here on writ of error.

At the time of Campbell's injury, July 31, 1909, the company was operating a single track electric railway between the city of Spokane, in the state of Washington, and the town of Cœur d'Alene, in the state of Idaho. It was operated under standard railroad rules. The running time of regular trains was fixed by a time-table, upon which they were designated by numbers. Special trains were run by telegraphic orders given by a train despatcher, whose office was in Spokane. Under the rules, regular trains were superior to special trains, and specials were required to look out for and keep out of the way of [499] the regulars. Unless a special train had orders from the train despatcher, fixing a meeting point with the regular train, or in some other way giving it a right to disregard the time when the latter was due according to the time-table, it was required to be clear of the main line at any point five minutes before the regular train was due at that point according to the time-table. Campbell was an experienced motorman, had been in the company's employ for several years, and was conversant with its rules and its methods of train operation. On the day he was injured he was the motorman in charge of a special train running between Spokane and Cœur d'Alene, made up of a combined motor and passenger car and two trailers, and referred to in the train orders as Motor 5, that being the number of the motor car. The train was equipped with Westinghouse air brakes. After several trips between the termini, it was at Cœur d'Alene about 4:30 o'clock in the afternoon, ready to start for Spokane when ordered to do so. Regular train No. 20 was about due to arrive. Under orders presently to be mentioned, the nature of which was in dispute, Campbell started his train west from Cœur d'Alene, and had proceeded some distance when he discovered a train approaching on the same track from the opposite direction. Upon seeing this, he applied the brakes, without success, and

there was a collision, in which he received serious personal injuries. The train with which he collided was regular No. 20.

His complaint in the action counted upon two grounds of recovery: (a) That the company, through its agents and employees, negligently instructed him to proceed with his train from Cœur d'Alene to Spokane, and to meet and pass No. 20 at the town of Alan, a station west of the point of collision; and (b) that the collision was directly due to the failure of the company to furnish him with a motor and train supplied with proper air brakes [500] in working condition. The action was tried before the district court and a jury, when evidence was introduced to the following effect:

Campbell testified that having arrived in Cœur d' Alene with his train about 4:20 P. M., and brought it into position to return to Spokane, he received through the conductor, Whittlesey, orders both written and oral for the running of the train; that the written order said that "motor 5 would run special Cœur d'Alene to Spokane and would meet Number 20 at Alan;" that when the written order was received Campbell was in his cab, ready to start, and that the conductor, on delivering the order to him, said: "All right, go ahead; get out of town." Campbell was unable to produce the written order. If its contents were as he testified, he was justified in at once leaving Cœur d'Alene and running to Alan, the order giving him a right of way over all trains to that point. But defendant's evidence was to the effect that the written order actually read: "Motor 5 will run spl. C. d'Alene to Spokane, meet spl. 4 east at Alan." Campbell admitted that if this was in fact the order, it did not authorize him to leave Cœur d'Alene before No. 20 came in, for it made no mention of that train, and did not supersede the right given to it by rules and time-table. Nor was it contended in his behalf that the conductor's verbal order could in any way modify the written order. It appeared that there was a land registration in progress at Cœur d'Alene, and because of the resulting rush of travel incoming trains stopped at the west end of the yard and went on a Y switch, where the train was turned and then backed down to the Cœur d'Alene station, while trains ready to leave Cœur d'Alene, upon the arrival of an incoming train, would run to the end of the yard, between the legs of the Y, wait there for the incoming train, and pull out as soon as it headed in on the Y. Whittlesey testified that he intended the train to go to the Y and [501] wait there for No. 20. Because, as Campbell testified, his orders were to go to Alan to meet No. 20, he did not stop at the Y. He testified that soon after passing this point, and while running at about 30 miles per hour (there was a slight descending grade), he saw an east-bound train (it was proved to be No. 20), coming on the same track at a distance which, from his testimony and that of others, might have been found to be upwards of 800 feet. He immediately shut off the power, and then "dynamited her," that is, threw his air brake into emergency so as to apply the air pressure upon the train brakes to the full capacity. He testified in effect that the brakes took hold properly, and held for approximately 35 or 40 feet, when the air released (another witness said it "leaked off"), and after that there was nothing he could do to stop the train except to reverse, which he endeavored to do but without success. There was no hand brake. He testified that if the air brakes had worked properly he could have stopped his train and avoided a collision; that when they took hold they reduced the speed to about 20 miles per hour; that when released the train shot forward at approximately 18 or 20 miles an hour; "then I stopped it a little bit with my reverse, so that at the moment of collision I think we were going about 15 miles an hour." No. 20 meanwhile had been brought almost, if not quite, to a stop.

Under instructions from the trial court the jury, besides reurning a general verdict, which was in favor of the plaintiff, with $7,500 damages, made three special findings in writing: (1) That Campbell, before leaving Cœur d'Alene, received a train order reading as follows: "Motor 5 will run Spl. C. d'Alene to Spokane, meet special 4 east at Alan;" (2) that the air brakes on Campbell's train immediately before the collision were insufficient to enable him to control the speed of the train; (3) that Campbell's leaving Cœur d'Alene in violation of [502] his orders was the proximate cause of the accident. There was a motion for judgment in favor of defendant on the special findings notwithstanding the general verdict, which was denied, and it is to this ruling as well as to certain instructions given and refused to be given that the assignments of error are addressed.

The general verdict and the special findings were taken pursuant to the state practice prescribed by certain sections of the Code, permitting the trial judge to instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and providing that "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." 1

Rem. & Bal. Anno. Code, §§ 364, 365. The rule established by decisions of the supreme court of the state is that where the general verdict and the special findings can be harmonized by taking into consideration the entire record of the cause, including the evidence and the instructions to the jury, and construing it liberally for that purpose, it is the duty of the court to harmonize them; and that where a special finding is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction shall be adopted which will support the general verdict. Pepperall v. City Park Transit Co. 15 Wash. 176, 180, 183, 45 Pac. 743, 46 Pac. 407; Mercier v. Travelers' Ins. Co. 24 Wash. 147, 153, 154, 64 Pac. 158; McCorkle v. Mallory, 30 Wash. 632, 637, 71 Pac. 186; Crowley v. Northern P. R. Co. 46 Wash. 85, 87, 88, 89 Pac. 471; Sudden & Christenson v. Morse, 55 Wash. 372, 375, 104 Pac. 645; Cameron v. Stack-Gibbs Lumber Co. 68 Wash. 539, 544, 123 Pac. 1001.

Whether, under the conformity act (Rev. Stat. § 914, Comp. Stat. 1913, § 1537), the trial court was required to adhere to the state practice governing the effect of the general verdict and the special findings may not be free from doubt. See Nudd v. Burrows, 91 [503] U. S. 426, 441, 23 L. ed. 286, 290; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 300, 23 L. ed. 898, 901, 7 Am. Neg. Cas. 331; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 119, 120, 33 L. ed. 60, 66, 9 Sup. Ct. Rep. 755; Lincoln v. Power, 151 U. S. 436, 442, 38 L. ed. 224, 227, 14 Sup. Ct. Rep. 387; Ex parte Chateaugay Ore & Iron Co. 128 U. S. 544, 554, 32 L. ed. 508, 511, 9 Sup. Ct. Rep. 150; United States v. United States Fidelity & G. Co. 236 U. S. 512, 529, 59 L. ed. 696, 704, 35 Sup. Ct. Rep. 298; Bond v. Dustin, 112 U. S. 604, 609, 28 L. ed. 835, 836, 5 Sup. Ct. Rep. 296; Glenn v. Sumner, 132 U. S. 152, 156, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 40, 35 L. ed. 55, 61, 11 Sup. Ct. Rep. 478; Knight v. Illinois C. R. Co. 103 C. C. A. 514, 180 Fed. 368, 372.

The court of appeals held (133 C. C. A. 370, 217 Fed. 523) that the Federal courts are not bound by local rules of practice with respect to submitting special findings along with a general verdict, or with respect to interpreting such verdicts; and that in this case it must be determined as matter of law, and without reference to the testimony, whether the special findings entitled defendant to judgment notwithstanding the general verdict.

We find it unnecessary to decide the question of practice, and laying aside all technicalities will assume, in favor of plaintiff in error, that the verdict is to be interpreted according to the local rule,—that is, by reading the special findings in the light of the issues and the evidence, but in the light also of the general verdict, so as to arrive at the true intent and meaning of the jury. So considered, the findings establish that there was no negligence on the part of the company in giving Campbell his running orders; that he received the order to meet Special 4 east at Alan, which, according to the admitted effect of the rules of the company, meant that he should not leave Cœur d'Alene until the arrival of regular No. 20; that he left Cœur d'Alene in disregard or violation of his orders, and that this was "the proximate cause" of the accident. At the same time, the special findings establish that the air brakes on his train immediately before the collision were insufficient to enable him to control the speed of the train. And the general verdict, so far as [504] it is supported by the evidence, must be taken as establishing every other fact in issue, not eliminated by the instructions of the trial court, that may be necessary to sustain the recovery. To quote from the brief of plaintiff in error: "The special findings establish that the general verdict was based solely upon the theory of negligence in the air-brake equipment of the train." But the general verdict, interpreted in the light of the instructions given by the trial court to the jury, means not merely that the braking equipment was defective, but that this was a proximate cause of the collision. The instruction upon this point was: "If . . . you find from a preponderance of the testimony that the air brakes on the car and train operated by the plaintiff were defective and out of repair at and immediately prior to the time of the collision, and that the defective condition of the air brakes was the direct and proximate cause of the collision, or contributed directly and proximately to the collision, and to the injury to the plaintiff, your verdict will be for the plaintiff. . . . And before you can return a verdict for the plaintiff based on the allegation that the brakes were defective and out of repair, you must be satisfied from a preponderance of the testimony not only that the brakes were in fact defective or out of repair, but that their defective condition was the direct or proximate cause of the collision, as I have defined that term to you." It is true that other parts of the charge indicate that the trial court entertained the view that the proximate cause must be either Campbell's disobedience of orders or the defective air-brake equipment, and that these two things could not concur as proximate causes. But he did not bind the jury by instructions

to that effect; and viewing the general verdict and the special findings together, in the light of the issues, the evidence, and the entire charge, it is evident, we repeat, that the jury must have found that the defective air brakes were a proximate cause of [505] the collision. In view of the testimony already mentioned, to the effect that Campbell, after discovering train No. 20, would have had ample time to avoid the collision had the train-brake equipment been adequate, the conclusion of the jury was in this respect not unreasonable.

It is insisted that there was no evidence that the provision of the safety appliance act respecting train brakes was violated. It is, of course, settled, that if the equipment was in fact defective or out of repair, the question whether this was attributable to the company's negligence is immaterial. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 294, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 575, 55 L. ed. 582, 588, 31 Sup. Ct. Rep. 612; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 43, ante, 874, 878, 36 Sup. Ct. Rep. 482. Hence the argument is that, according to all of the evidence, the equipment was not defective or out of repair. It appeared without dispute that it consisted of the Westinghouse standard automatic air brake, such as is in general use throughout the country upon passenger trains. A witness in defendant's employ testified that shortly before Campbell took the train out from Cœur d'Alene on the trip in question he inspected the air brakes and found them in perfect order. But there was much evidence besides that of Campbell himself, to the effect that when he applied the emergency, the brakes took hold and then leaked off, so as to release the brakes. The jury was warranted in finding from the testimony as a whole that Campbell properly applied the air when 600 feet or more from the place where the collision occurred, and that the brakes refused to work. Expert witnesses called by defendant testified in effect that the train could have been stopped inside of 300 feet if the brakes had been in proper order. The air-brake equipment was wrecked in the collision, so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing.

[506] Next, it is insisted that Campbell's train was not such as the safety appliance acts require to be equipped with air brakes. In Spokane & I. E. R. Co. v. United States, decided June 5, 1916, 241 U. S. 344, ante, 1037, 36 Sup. Ct. Rep. 668, we held that this same railroad, with respect to its interurban traffic, is subject to the provisions of those acts respecting automatic couplers, and hand holds or grab irons at the ends of the cars. In that case the particular reliance of the company was upon the concluding cause of the 1st section of the 1903 amendment (32 Stat. at L. 943, chap. 976, Comp. Stat. 1913, § 8613), which excepts trains, cars, etc., "which are used upon street railways." In the present case a distinction is sought to be drawn between steam and electric roads, the argument being that the provision requiring power brakes, when read in connection with the context, indicates that trains drawn by steam locomotives and operated by a locomotive engineer were alone within the contemplation of Congress. It is true that in the act of 1893 the provision was closely associated with the mention of a locomotive engine as the motive power; the words of § 1 being: "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic [after a specified date] that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." Section 6, prescribing penalties, also uses the words "locomotive engine" and "locomotives." But the 1903 amendment, which, as frequently pointed out, was enacted for the purpose of enlarging the scope of the act (Southern R. Co. v. United States, 222 U. S. 20, 26, 56 L. ed. 72, 74, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Southern R. Co. v. Crockett, 234 U. S. 725, 735, 58 L. ed. 1564, 1568, 34 Sup. Ct. Rep. 897), in its 1st section declares [507] that the provisions relating to train brakes (among others) shall be held to apply to "all trains, locomotives, tenders, cars, *and similar vehicles* used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, *and similar vehicles* used in connection therewith," subject to exceptions not now pertinent. The 2d section declares that whenever any train is operated with power or train brakes, "not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train." Of course, an important object of having a train equipped with a system of brakes under the single control of the engineer is to permit of a prompt and effective reduction

of speed when the man driving the train is notified of danger. The importance of this is precisely the same, whatever be the motive power; and, in view of the beneficial purpose of the act and the evident intent of Congress to enlarge its scope so far as necessary to guard against the dangers in view, the term "similar vehicles" must be held to have the effect of bringing electric motors and trains drawn by them within the provision respecting power or train brakes. The very exemption of trains, cars, and locomotives "used upon street railways" indicates that electric cars were in contemplation. And see Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 337, 57 L. ed. 1501, 1506, 46 L.R.A. (N.S.) 385, 33 Sup. Ct. Rep. 890; Kansas City Western R. Co. v. McAdow, 240 U. S. 51, 54, ante, 520, 522, 36 Sup. Ct. Rep. 252.

It is said that, conceding the power-brake provision applies to electric trains, the duty imposed was not owed to Campbell under the special circumstances established by the jury's findings. The argument is that the purpose of the brake requirements is to place control of the train in the hands of the engineer so that the safety of passengers and employees may be conserved, not that the engineer should be able to escape injury from peril to which he had wrongfully exposed himself; and that Campbell cannot [508] bring himself within the class intended to be protected by pointing out that the situation created by his disobedience of orders was one that Congress contemplated as possible and the consequences of which it desired to guard against. This gives altogether too narrow a meaning to the safety appliance act, and is inconsistent with the provisions of the employers' liability act, as we shall see.

It is most earnestly insisted that the findings established that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee, and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment, or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him, it, of course, does not necessarily follow that he did this wilfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment.

[509] To hold otherwise would have startling consequences. The running of trains on telegraphic orders is an everyday occurrence on every railroad in the country. Thousands of cases occur every day and every night where a failure by conductor or engineer to comprehend or to remember the message of the train despatcher may endanger the lives of employees and passengers. We are not aware that in any case it has been seriously contended that because an engineer violated the orders, he went outside of the scope of the employment. If he did so, in the sense of absolving the employer from the duty of exercising care for his safety, it is not easy to see upon what principle the employer's liability to passengers or to fellow employees for the consequences of his negligence could be maintained. The unsoundness of the contention is so apparent that further discussion is unnecessary.

Plaintiff in error refers to the fact that the wreck occurred in Idaho, and cites two sections of the Criminal Code of that state, one rendering a wilful violation or omission of duty on the part of one in Campbell's position, whereby human life or safety is endangered, punishable as a misdemeanor; the other making wilful or negligent conduct which causes a collision of trains, and the resulting death of a human being, a criminal offense. 2 Idaho Rev. Codes §§ 6926, 6909. Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield. Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 41, ante, 874, 878, 36 Sup. Ct. Rep. 482.

Upon the whole case, we have no difficulty in sustaining his right of action under the employers' liability act. That act (§ 1, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657) imposes a liabil

injury to an employee "resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due [510] to its negligence in its cars, engines, appliances, . . . or other equipment." As was held in San Antonio & A. Pass. R. Co. v. Wagner, decided June 5, 1916, 241 U. S. 476, ante, 1110, 36 Sup. Ct. Rep. 626, a violation of the safety appliance act is "negligence" within the meaning of the liability act. And by the proviso to § 3 of the latter act, no employee injured or killed shall be held to have been guilty of contributory negligence in any case where a violation of the safety appliance act "*contributed to* the injury or death of such employee." It is too plain for argument that under this legislation the violation of the safety appliance act need not be the sole efficient cause, in order that an action may lie. The circuit court of appeals (133 C. C. A. 370, 217 Fed. 524) held that the element of proximate cause is eliminated where concurring acts of the employer and employee contribute to the injury or death of the employee. We agree with this, except that we find it unnecessary to say the effect of the statute is wholly to eliminate the question of proximate cause. But where, as in this case, plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes, it is plain that the employers' liability act requires the former to be disregarded.

The assignments of error that are based upon the instructions given and refused to be given to the jury raise no question other than those which have been disposed of.

Judgment affirmed.

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[511] JOHN BINGHAM, Appt.,
v.
JOHN J. BRADLEY, United States Marshal for the Northern District of Illinois.

(See S. C. Reporter's ed. 511–518.)

Foreign extradition — sufficiency of complaint — presumption.

1. Extradition to Canada on a charge of receiving and retaining money, knowing it to have been stolen, will not be denied because the Canadian statute treats the receiving and retaining as distinct offenses, connecting them with the disjunctive "or," where, properly interpreted, the complaints charge the commission of both offenses, since, if only one offense, that of receiving the stolen property, is made extraditable by the treaties with Great Britain of August 9, 1842 (8 Stat. at L. 572), art. 10, and July 12, 1889 (26 Stat. at L. 1508), art. 1, this does not render the detention of the accused under the extradition warrant unlawful, as it is not to be presumed that the demanding government will, contrary to art. 3 of the latter treaty, suffer him to be tried or punished for any offense other than that for which he is surrendered.

[For other cases, see Extradition, IV. a; V., in Digest Sup. Ct. 1908.]

Extradition — sufficiency of complaint —place of crime.

2. The British Consul General's complaint in proceedings to extradite the accused to Canada sufficiently charges that the crime was committed in Canada, where it avers that the accused was a fugitive from justice from the district of Montreal, in that Dominion, and that the offense with which he is charged is an offense within the extradition treaties between the United States and Great Britain, and states that deponent's information is based upon authenticated copies of a warrant issued by the police magistrate of Montreal, and of the complaint upon which that warrant was issued, and upon certain depositions taken in Montreal, submitted and to be filed with the complaint in the extradition proceedings.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

Habeas corpus — extradition — evidence.

3. The finding of the United States Commissioner in foreign extradition proceedings, that the evidence sustained the charge, cannot be reversed on habeas corpus if he acted upon competent and adequate evidence, and had jurisdiction of the subject-matter and of the accused, and the offense is made extraditable by the treaty with the demanding government.

[For other cases, see Habeas Corpus, II. b, in Digest Sup. Ct. 1908.]

Foreign extradition — evidence — ex parte affidavits.

4. Properly authenticated affidavits are not rendered inadmissible in proceedings for the extradition to Canada of a fugitive from justice, because such affidavits were taken *ex parte* in the absence of the accused, and without opportunity for cross-examination, since the whole object of the extradition treaty with Great Britain of August 9, 1842 (8 Stat. at L. 572), would be defeated by construing as requiring the demanding government to send its citizens abroad to institute the proceedings the provision of art. 10 of the treaty, that extradition shall only be had "upon such evidence of criminality as, according to the laws of the place where

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NOTE.—On habeas corpus to review extradition proceedings—see notes to State v. Jackson, 1 L.R.A. 373; Ex parte Davis, 12 L.R.A.(N.S.) 225; Com. ex rel. Flower v. Superintendent of County Prison, 21 L.R.A. *(N.S.) 939;* Wisener v. Burrell, 34 L.R.A. (N.S.) 755, and Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464.

On practice and procedure in extradition cases—see notes to Cook v. Hart, 36 L. ed. U. S. 934, and Iasigi v. Van de Carr, 41 L. ed. U. S. 1046.

the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," and of U. S. Rev. Stat. § 5271, Comp. Stat. 1913, § 10,111, making depositions, warrants, or other papers, or copies thereof, admissible in evidence at the hearing if properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country, and declaring that the certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country, shall be proof of such authentication.

[For other cases, see Extradition, IV. a, in Digest Sup. Ct. 1908.]

[No. 592.]

Submitted April 4, 1916. Decided June 5, 1916.

APPEAL from the District Court of the United States for the Northern District of Illinois to inquire into a detention under a warrant of commitment issued in proceedings to extradite a fugitive from justice to a foreign country. Affirmed.

The facts are stated in the opinion.

Mr. William Dillon submitted the cause for appellant:

In order to make out a case for international extradition, under a treaty with a foreign state, it must appear: 1. That the party sought to be extradited is charged with having committed an act which is: (a) punishable as a crime under the law of the country seeking to extradite; (b) punishable as a crime under the law of the country from which extradition is sought; (c) extraditable as a crime under the terms of a treaty between the two countries. 2. That, from evidence, competent under the treaty and the provisions of the Federal statute, there is probable cause for believing that the party charged has in fact committed the crime he is so charged with, and has committed it in the jurisdiction to which it is sought to extradite him. 3 That the party charged with the commission of such crime is a fugitive from the justice of the state seeking extradition, in the sense, at least: (a) that he was in the state seeking extradition at the time the crime charged was committed there; (b) that he was in the state from which extradition is sought at the time of the application for such extradition.

Wright v. Henkel, 190 U. S. 40, 61, 47 L. ed. 948, 955, 23 Sup. Ct. Rep. 781, 12 Am. Crim. Rep. 386; Terlinden v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; Roberts v. Riley, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; Illinois ex rel. McNichols v. Pease, 207 U. S. 100, 52 L. ed. 121, 28 Sup. Ct. Rep. 58; McNamara v. Henkel, 226 U. S. 520, 523, 57 L. ed. 330, 332, 33 Sup. Ct. Rep. 146.

The doctrine in Illinois (which must rule here) is that proof of possession of stolen goods, shortly after the commission of the theft, may give rise to the presumption that the party having the goods is the thief; but cannot, by itself, give rise to the presumption that he received the goods knowing them to be stolen. But, if the party denies the theft, and fails to give any satisfactory explanation of how the goods came into his possession, such possession, considered in connection with these other facts, may give rise to the presumption that he received the goods, knowing them to be stolen; and the Federal rule seems to be substantially the same.

Gunther v. People, 139 Ill. 526, 28 N. E. 1101; McNamara v. Henkel, 226 U. S. 520, 524, 525, 57 L. ed. 330, 332, 333, 33 Sup. Ct. Rep. 146.

In order to give rise to any such presumption the possession must be shown to have been shortly after the theft.

Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002; Gunther v. People, supra; Watts v. People, 204 Ill. 233, 68 N. E. 563.

Where the charge is for receiving (the only extraditable offense suggested by this charge and evidence), as distinguished from retaining or aiding in concealing, the evidence must also tend to show a guilty knowledge at the time of the act of receiving.

Huggins v. People, supra.

Messrs. Benjamin S. Minor, Almon W. Bulkley, Clair E. More, Hugh B. Rowland, and Colley W. Bell submitted the cause for appellee:

If the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purposes of extradition, his decision cannot be reviewed on habeas corpus.

McNamara v. Henkel, 226 U. S. 520, 57 L. ed. 330, 33 Sup. Ct. Rep. 146.

The objection to the introduction of the *ex parte* affidavits appearing in the record is not well taken. This method of proving the probable guilt of the accused is well established, and in many cases is the only practicable method.

Rice v. Ames, 180 U. S. 371, 375, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 12 Am.

Crim. Rep. 356; Yordi v. Nolte, 215 U. S. 227, 231, 54 L. ed. 170, 172, 30 Sup. Ct. Rep. 90; Ex parte Schorer, 197 Fed. 67; Powell v. United States, 124 C. C. A. 282, 206 Fed. 400.

Possession and disposition in Canada being otherwise shown, possession and disposition in Chicago is evidence of knowledge that the money disposed of in Montreal was stolen.

Com. v. Phelps, 192 Mass. 591, 78 N. E. 741.

In all prosecutions for receiving stolen goods, the proof of guilty knowledge must, in the very nature of things, be in the form of presumptions drawn from all the attendant circumstances.

Huggins v. People, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002; McNamara v. Henkel, 226 U. S. 520, 524, 57 L. ed. 330, 332, 33 Sup. Ct. Rep. 146; Ex parte Glucksman, 189 Fed. 1016; Fulton v. State, 8 Ala. App. 257, 62 So. 959; James v. State, 8 Ala. App. 255, 62 So. 897.

An extradition proceeding is not a trial, and all that is necessary to show to warrant extradition is probable cause that the person accused committed the offense.

Glucksman v. Henkel, 221 U. S. 508, 512, 55 L. ed. 830, 833, 31 Sup. Ct. Rep. 704.

Like guilty knowledge, the courts hold that a jury may find the venue from the presumptions to be drawn from all the evidence.

Heard v. State, 121 Ga. 138, 48 S. E. 905; Com. v. Phelps, 192 Mass. 591, 78 N. E. 741; Wills v. People, 3 Park. Crim. Rep. 496; Brown v. State, — Tex. Crim. Rep. —, 59 S. W. 1118; Baker v. State, 58 Ark. 513, 25 S. W. 603, 9 Am. Crim. Rep. 455; People v. Cooper, 58 App. Div. 532, 69 N. Y. Supp. 257; United States v. Britton, 2 Mason, 464, Fed. Cas. No. 14,650.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a final order of the district court, denying an application for a writ of habeas corpus in an extradition case. The facts are to be gathered from the petition for the writ and the exhibits therein referred to and made a part of it, which include a sworn complaint by the British Consul General at Chicago, applying on behalf of the government of the Dominion of Canada for the extradition of appellant to Montreal, certain *ex parte* affidavits taken in Montreal, and a complaint made and warrant issued against appellant in that city, and abstract of the oral testimony taken before the United States Commissioner at Chicago, and the warrant of commitment issued by the Commissioner, under which appellant is held in custody.

The complaint of the Consul General sets forth on information and belief that appellant, in the month of February, 1915, was guilty of the crime of receiving and retaining in his possession money to the amount of $1,500 in bills of the Bank of Montreal, the property of that bank, knowing the same to have been stolen; that a warrant has been issued by the police magistrate of the city of Montreal for the apprehension of appellant for the crime mentioned; that appellant is guilty of the indictable offense of receiving money knowing it to have been stolen, and is a fugitive from justice from the district of Montreal, province of Quebec, and Dominion of Canada, and is now within the territory of the United States; that the offense of which he is charged is an offense within the treaties between the United States and Great Britain; and that deponent's information is based upon duly authenticated [513] copies of a warrant issued by the police magistrate of Montreal and of the complaint or information upon which that warrant was issued, and upon certain depositions of witnesses submitted to be filed with the present complaint. The reference is to the Montreal affidavits, which set forth in substance that in the month of September, 1911, a branch of the Bank of Montreal at New Westminister, British Columbia, was broken into and a large sum of money ($271,721) stolen from the bank, including a considerable number of $5 bills of the Bank of Montreal, seventy-eight of these being identified by their numbers; that on February 10, 1915, in the city of Montreal, appellant purchased a diamond ring from one Eaves, a jeweler, and paid for it $250, of which $245 was composed of new Bank of Montreal $5 bills, more than thirty of these being identified by the numbers as among those stolen; that on February 9, 1915, one Wakefield purchased in Montreal some travelers' checks, paying for them in part with fifty new $5 bills of the Bank of Montreal, of which twenty or more were identified as being a part of the stolen money; and that on February 10, 1915, Wakefield procured from a firm of bankers in Montreal an exchange of Canadian bills for American currency, the exchange including fifty new $5 bills of the Bank of Montreal, of which fifteen or more were identified as being a part of those stolen.

Appellant having been apprehended, a hearing was had before the United States Commissioner, at which the above-mentioned documents were introduced and testimony was given tending to show that appellant and Wakefield were together in Montreal on the 9th and 10th of February, 1915, cooperating in the exchange of the stolen bills

for travelers' checks and United States currency; and that on the evening of February 10th they left Montreal together in a manner indicating an intent to evade detection, and went to Chicago, where almost [514] immediately they began systematic efforts to procure the exchange of Bank of Montreal bills for United States currency.

The Commissioner deeming the evidence sufficient to sustain the charge, the warrant of commitment was issued, the proceedings and evidence being certified in due course to the Secretary of State, pursuant to § 5270, Rev. Stat. (Comp. Stat. 1913, § 10,110).

Under the applicable provisions of our treaties with Great Britain (treaty of 1842, art. 10, 8 Stat. at L. 572, 576; treaty of 1889, art 1, 26 Stat. at L. 1508, 1509), there is included among the extraditable offenses that of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained."

In behalf of appellant it is objected that while the Criminal Code of Canada defines as indictable offenses (a) the receiving *or* retaining in possession anything obtained by any offense punishable on indictment, knowing it to have been so obtained, and (b) the receiving *or* retaining in possession any money or valuable security or other thing, the stealing whereof is declared to be an indictable offense, knowing the same to have been stolen, the offense charged in the complaint filed and in the warrant issued in Montreal and in the Consul General's complaint is that of receiving *and* retaining in his possession money, etc., knowing it had been stolen. The argument is that the Canadian statute treats receiving and retaining as distinct offenses, connecting them with the disjunctive "or," while the complaints treat the two acts as together constituting one offense. Properly interpreted, however, they charge the commission of both offenses; and if only one, that of receiving, etc., is extraditable by the treaty, this does not render appellant's detention unlawful, since it is not to be presumed that the demanding government will suffer him to be tried or punished for any offense other than that for which he is surrendered, in violation [515] of article 3 of the treaty of 1889. Kelly v. Griffin, 241 U. S. 6, 15, ante, 861, 864, 36 Sup. Ct. Rep. 487.

It is insisted that the Consul General's complaint does not allege that the offense was committed in Canada, that the evidence relied upon raises no presumption that appellant committed anywhere the offense of *receiving* stolen property knowing it to be stolen (the offense specified in the treaty), and that it raises no presumption that appellant committed the offense in Montreal or anywhere in the Dominion of Canada.

The criticism upon the complaint is unsubstantial. It is fairly to be inferred from what is stated that the crime was committed in Canada, and it is distinctly averred that appellant is a fugitive from justice from the district of Montreal, in that Dominion, and that the offense with which he is charged is an offense within the treaties between the United States and Great Britain. Besides this, it is stated that deponent's information is based upon authenticated copies of a warrant issued by the police magistrate of Montreal, and of the complaint upon which that warrant was issued, and upon certain depositions submitted and to be filed with the present complaint; the depositions being those taken in Montreal. It is clear that the intent was to charge that the offense was committed in Canada.

As to the effect of the evidence: The Commissioner doubtless held that the fact of possession, taken in connection with the other facts of the case, raised a presumption either that appellant was a party to the burglary or that he afterwards obtained possession of the bills with guilty knowledge. Appellant disputes the inference, and, assuming it to be well founded, insists that there is nothing in the law of probabilities to sustain an inference that "possession by a man during a visit of a few days to Montreal of goods that were stolen more than three years previously in British Columbia makes it more probable [516] that he received the goods in Canada than that he received them in the United States." There is nothing in the evidence to require the inference that appellant was paying a brief visit to Montreal. It appears that he has a brother who is in business in Chicago, and that he himself was in that city in the summer of 1914, and, on three occasions, with intervals of several weeks, exchanged Canadian money there for United States currency. This is consistent with the inference that he was then exchanging part of the stolen money, but does not require the inference that he had a fixed place of abode in Chicago. The stolen bills that were in appellant's possession in Montreal in February, 1915, are not shown to have been removed from the Dominion after the time they were stolen from the bank in September, 1911. As it was a reasonable inference —they being "new bills"—that they had never before been used in exchange, and because so many of them were found together in the hands of appellant and his confederate three and a half years after the burglary, it was further inferable that they had been retained during the intervening

period with the purpose of awaiting such opportunity for passing them as might come from relaxed vigilance on the part of the authorities; and since the Dominion of Canada is the natural and convenient market for bills of the Bank of Montreal, it was inferable that the bills had not been taken out of the Dominion since the time they were stolen; and, if not, it followed that appellant must have been within the Dominion when he received them. That they were received with knowledge that they had been stolen, might be inferred from the fact of the burglary, coupled with the suspicious circumstances (only a part of which we have referred to) attending the efforts to exchange them for other forms of property.

The Commissioner deemed the evidence sufficient to sustain the charge (Rev. Stat. § 5270, Comp. Stat. 1913, § 10,110), and since he had jurisdiction of the subject-matter and of the accused, and [**517**] the offense is within the treaty, his finding cannot be reversed on habeas corpus if he acted upon competent and adequate evidence. McNamara v. Henkel, 226 U. S. 520, 523, 57 L. ed. 330, 332, 33 Sup. Ct. Rep. 146.

It is insisted that the Montreal affidavits, essential to show that the alleged offense was committed within the Dominion, were incompetent because taken *ex parte*, in the absence of appellant, and without opportunity for cross-examination. The treaty of 1842 provides in article 10 that extradition shall only be had "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed." Sec. 5271, Rev. Stat. (Comp. Stat. 1913, § 10,111), as amended by act of August 3, 1882, §§ 5 and 6 (chap. 378, 22 Stat. at L. 216, Comp. Stat. 1913, § 10,116), provides that any depositions, warrants, or other papers or copies thereof shall be admissible in evidence at the hearing if properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country, and that the certificate of the principal diplomatic or consular officer of the United States resident in the foreign country shall be proof of such authentication. The Montreal affidavits, complaints, warrant, etc., are properly authenticated in accordance with this provision. It is one of the objects of § 5271 to obviate the necessity of confronting the accused with the witnesses against him; and a construction of this section, or of the treaty, that would require the demanding government to send its citizens to another country to institute legal proceedings, would defeat the whole object of the treaty. Rice v. Ames, 180 U. S. 371, 375, 45 L. ed. 577, 581, 21 Sup. Ct. Rep. 406, 12 Am. Crim. Rep. 356; Yordi v. Nolte, 215 U. S. 227, 231, 54 L. ed. 170, 172, 30 Sup. Ct. Rep. 90.

All of the objections savor of technicality. And since the jurisdiction of the Commissioner is clear, and the evidence abundantly sufficient to furnish reasonable ground for the belief that appellant has committed within [**518**] the Dominion of Canada a crime that is an offense under the laws of the Dominion, as well as under those of Illinois (Jones & A. Anno. Stat. [Ill.] § 3892), and is covered by the terms of the treaty, and that he is a fugitive from justice, a fair observance of the obligations of the treaty requires that he be surrendered. Glucksman v. Henkel, 221 U. S. 508, 512, 55 L. ed. 830, 833, 31 Sup. Ct. Rep. 704.

Final order affirmed.

NEW YORK LIFE INSURANCE COMPANY, Petitioner,
v.
EFFIE J. GOULD DUNLEVY.

(See S. C. Reporter's ed. 518–523.)

Judgment — jurisdiction — personal judgment against nonresident — necessity of service.

A court in which a valid personal judgment has been obtained on domiciliary service, though empowered through garnishment proceedings instituted after the judgment debtor had become a nonresident to inquire whether she held a valid claim against a life insurance company, summoned as garnishee, for the surrender value of a policy which she claimed had been assigned to her, and, if found to exist, to condemn and appropriate it so far as necessary to discharge the original judgment, could not, without further personal service, bind her by the rendition, under an interpleader initiated by the insurance company, which paid into court the sum due on the policy, of a judgment that there was no valid assignment, followed by an order for

NOTE.—On the protection of a nonresident creditor against garnishment—see notes to Illinois C. R. Co. v. Smith, 19 L.R.A. 577; Goodwin v. Claytor, 67 L.R.A. 209; Starkey v. Cleveland, C. C. & St. L. R. Co. L.R.A.1915F, 880, and King v. Cross, 44 L. ed. U. S. 211.

On validity of personal judgments rendered upon constructive service of process—see note to Moyer v. Bucks, 16 L.R.A. 231.

As to what service of process is sufficient to constitute due process of law—see note to Pinney v. Providence Loan & Invest. Co. 50 L.R.A. 577.

the payment of the fund in court over to the insured.

[For other cases, see Judgment, III. c, 1; Constitutional Law, IV. b, 8, in Digest Sup. Ct. 1908.]

[No. 290.]

Argued March 14 and 15, 1916. Decided June 5, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of California in favor of plaintiff in an action to recover the surrender value of a life insurance policy. Affirmed.

See same case below, 130 C. C. A. 473, 214 Fed. 1.

The facts are stated in the opinion.

Mr. **James H. McIntosh** argued the cause, and, with Messrs. Edward J. McCutchen, Warren Olney, Jr., Charles W. Willard, and J. M. Mannon, Jr., filed a brief for petitioner:

The trial court should have given the proceedings in the Pennsylvania court the same faith and credit accorded them by law or usage in the courts of Pennsylvania.

Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Converse v. Hamilton, 224 U. S. 243, 56 L. ed. 749, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292; Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550.

The proceedings in the Pennsylvania court were regular in every way, and conformed to the law and usage of the courts of Pennsylvania.

Wright v. Southern R. Co. 141 N. C. 164, 53 S. E. 831; Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550; Brownfield v. Canon, 25 Pa. 299; Fish v. Keeney, 91 Pa. 138; McMunn v. Carothers, 4 Clark (Pa.) 354; Wasserman v. Bank, 3 W. N. C. 475; Wilbraham v. Horrocks, 14 Phila. 191; 1 Troubat & H. Practice, p. 270; Good v. Grant, 76 Pa. 52; Wilson v. Mayhew, 6 Phila. 273; Hiller v. Good, 9 Lanc. Bar. 129; Wright v. McGarry, 2 Chester Co. Rep. 467; Dever v. Rice, 19 W. N. C. 156; Rothchild v. Morrison, 9 Lanc. L. Rev. 74; Rodgers v. Santa Claus Co. 27 W. N. C. 574; Stockham v. Pancoast, 1 Pa. Dist. R. 135; Stern v. Jones, 7 Kulp, 19; Kistler v. Thompson, 3 Lack. Jur. 341; Re Gwinner, 33 Pittsb. L. J. N. S. 421; Conshohocken Tube Co. v. Iron Car Equipment Co. 167 Pa. 589, 31 Atl. 934.

By the law and usage of the Pennsylvania courts and every other court, the company discharged its obligation to Mrs. Dunlevy when, pursuant to the writ served upon it and the order of the court, it paid what it owed her into court, to the credit of the cause to which she was a party and in court.

Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550; Roig v. Tim, 103 Pa. 115; Reed v. Penrose, 2 Grant, Cas. 472; Malvin v. Sweitzer, 1 Kulp, 5; Stover v. Stover, 3 Del. Co. Rep. 290; Wells v. Tuck, 1 Kulp, 154; Ficken's Estate, 16 Phila. 269.

Mr. **Nat Schmulowitz** argued the cause, and, with Messrs. Frank W. Taft and Clarence Coonan, filed a brief for respondent:

The exemplified record of the Pennsylvania proceedings is not *res judicata* of any fact, as no judgment has been rendered or entered therein.

Dougherty v. Lehigh Coal & Nav. Co. 202 Pa. 635, 90 Am. St. Rep. 660, 52 Atl. 18; Bennett Water Co. v. Millvale, 200 Pa. 613, 50 Atl. 155; Middleton Mfg. Co. v. Philadelphia & R. R. Co. 145 Pa. 187, 22 Atl. 747, 748.

If judgment had been rendered in the Pennsylvania proceedings, the proceedings would not have been *res judicata* of any fact as regards the respondent.

20 Cyc. 1149; Finch v. Alexander County Nat. Bank, 65 Ill. App. 337; Hukill v. Yoder, 29 Pittsb. L. J. N. S. 94; Hilliard v. Burlington Shoe Co. 76 Vt. 57, 56 Atl. 283; Laport v. Bacon, 48 Vt. 176; Hamilton Nat. Bank v. Horton, 68 N. H. 234, 44 Atl. 296; Lewis v. Tams, 4 Phila. 276; Cummings v. Edwards-Wood & Co. 95 Minn. 118, 103 N. W. 709, 106 N. W. 304; Shinn, Attachment & Garnishment, § 725; Webster v. Adams, 58 Me. 317; Puffer v. Graves, 26 N. H. 256; Ruff v. Ruff, 85 Pa. 333.

A determination of personal rights without jurisdiction *in personam* is ineffectual.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Dull v. Blackman, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333.

Only two matters could possibly have been adjudicated by the Pennsylvania proceedings, and neither of these matters constitute *res judicata* to the claim of respondent. Any other matters not necessary to the judgment—matters without which the judgment could have been pronounced—are not *res judicata* for any purpose.

Thormann v. Frame, 176 U. S. 350, 44 L. ed. 500, 20 Sup. Ct. Rep. 446.

The full faith and credit clause of the

Constitution does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject-matter, the parties affected by it, nor the facts necessary to give jurisdiction.

Ibid.

The garnishment issue as to the ownership of the debt owed by the insurance company was not a part of the original action of Boggs & Buhl v. Dunlevy to the extent that the jurisdiction acquired in that cause extended to the garnishment issue.

Ruff v. Ruff, 85 Pa. 333.

Jurisdiction in a garnishment matter depended upon an effective process served upon the garnishee, wherever found; not upon a continued jurisdiction over the principal defendant.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207.

The payment into court was an *ex parte* proceeding. No service of the petition to that end upon, nor any consent thereto by, respondent, is claimed or set forth. The matter, therefore, under no condition, could be a matter demanding credit in a sister state.

Thormann v. Frame, supra.

Mr. Justice McReynolds delivered the opinion of the court:

Respondent, Effie J. Gould Dunlevy, instituted this suit in the superior court, Marin county, California, January 14, 1910, against petitioner and Joseph W. Gould, her father, to recover $2,479.70, the surrender value of a policy on his life which she claimed had been assigned to her in 1893, and both were duly served with process while in that state. It was removed to the United States district court, February 16, 1910, and there tried by the judge in May, 1912, a jury having been expressly waived. Judgment for amount claimed was affirmed by the circuit court of appeals. 204 Fed. 670, 130 C. C. A. 473, 214 Fed. 1.

The insurance company by an amended answer filed December 7, 1911, set up in defense (1) that no valid assignment had been made, and (2) that Mrs. Dunlevy was concluded by certain judicial proceedings in Pennsylvania wherein it had been garnished and the policy had been adjudged to be the property of Gould. Invalidity of the assignment is not now urged; but it is earnestly insisted that the Pennsylvania proceedings constituted a bar.

In 1907 Boggs & Buhl recovered a valid personal judgment by default, after domiciliary service, against Mrs. Dunlevy, in the common pleas court at Pittsburgh, where she then resided. During 1909, "the tontine dividend period" of the life policy having expired, the insurance [520] company became liable for $2,479.70, and this sum was claimed both by Gould, a citizen of Pennsylvania, and his daughter, who had removed to California. In November, 1909, Boggs & Buhl caused issue of an execution attachment on their judgment, and both the insurance company and Gould were summoned as garnishees. He appeared, denied assignment of the policy, and claimed the full amount due thereon. On February 5, 1910,—after this suit was begun in California,—the company answered, admitted its indebtedness, set up the conflicting claims to the fund, and prayed to be advised as to its rights. At the same time it filed a petition asking for a rule upon the claimants to show cause why they should not interplead and thereby ascertain who was lawfully entitled to the proceeds, and, further, that it might be allowed to pay amount due into court for benefit of proper party. An order granted the requested rule, and directed that notice be given to Mrs. Dunlevy in California. This was done, but she made no answer and did not appear. Later the insurance company filed a second petition, and, upon leave obtained thereunder, paid $2,479.70 into court, March 21, 1910. All parties except Mrs. Dunlevy having appeared, a feigned issue was framed and tried to determine validity of alleged transfer of the policy. The jury found, October 1, 1910, there was no valid assignment, and thereupon, under an order of court, the fund was paid over to Gould.

Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy, the court of common pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company, and, if found to exist, then to condemn and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. Chicago, [521] R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; Harris v. Balk, 198 U. S. 215, 226, 227, 49 L. ed. 1023, 1028, 25 Sup. Ct. Rep. 625, 3 Ann. Cas. 1084; Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 L. ed. 426, 26 Sup. Ct. Rep. 207; Baltimore & O. R. Co. v. Hostetter, 240 U. S. 620, ante, 829, 36 Sup. Ct. Rep. 475; Shinn, Attachment & Garnishment, § 707. See Brigham v. Fayerweather, 140 Mass. 411, 413, 5 N. E. 265. But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and con-

clusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Shinn, Attachment & Garnishment, § 674. See Cross v. Armstrong, 44 Ohio St. 613, 623, 625, 10 N. E. 160.

Counsel maintain that having been duly summoned in the original suit instituted by Boggs & Buhl in 1907, and notwithstanding entry of final judgment therein, "Mrs. Dunlevy was in the Pennsylvania court and was bound by every order that court made, whether she remained within the jurisdiction of that court after it got jurisdiction over her person or not;" and hence, the argument is, "When the company paid the money into court where she was, it was just the same in legal effect as if it had paid it to her." This position is supposed to be supported by our opinion in Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550, where it is said (p. 353): "If a judicial proceeding is begun with jurisdiction over the person of the party concerned, it is within the power of a state to bind him by every subsequent order in the cause. Nations v. Johnson, 24 How. 195, 203, 204, 16 L. ed. 628, 631, 632. This is true not only of ordinary actions, but of proceedings like the present. It is within the power of a state to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration [522] is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the probate court."

Of course the language quoted had reference to the existing circumstances, and must be construed accordingly. The judgment under consideration was fairly within the reasonable anticipation of the executor when he submitted himself to the probate court. But a wholly different and intolerable condition would result from acceptance of the theory that, after final judgment, a defendant remains in court and subject to whatsoever orders may be entered under title of the cause. See Wetmore v. Karrick, 205 U. S. 141, 151, 51 L. ed. 745, 748, 27 Sup. Ct. Rep. 434; Freeman, Judgm. 4th ed. § 103. The interpleader proceedings were not essential concomitants of the original action by Boggs & Buhl against Dunlevy, but plainly collateral; and, when summoned to respond in that action, she was not required to anticipate them. Smith v. Woolfolk, 115 U. S. 143, 148, 149, 29 L. ed. 357, 359, 360, 5 Sup. Ct. Rep. 1177; Reynolds v. Stockton, 140 U. S. 254, 269, 35 L. ed. 464, 469, 11 Sup. Ct. Rep. 773; Owens v. Henry (Owens v. McCloskey) 161 U. S. 642, 646, 40 L. ed. 837, 838, 16 Sup. Ct. Rep. 693; Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; Freeman, Judgm. 4th ed. § 143.

It has been affirmatively held in Pennsylvania that a judgment debtor is not a party to a garnishment proceeding to condemn a claim due him from a third person, and is not bound by a judgment discharging the garnishee (Ruff v. Ruff, 85 Pa. 333); and this is the generally accepted doctrine. Shinn, Attachment & Garnishment, § 725. Former opinions of this court uphold validity of such proceedings upon the theory that jurisdiction to condemn is acquired by service of effective process upon the garnishee.

The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its [523] borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person. Pennoyer v. Neff, supra; Freeman, Judgm. 4th ed. § 120a; Black, Judgm. 2d ed. §§ 904 and 905.

We are of opinion that the proceedings in the Pennsylvania court constituted no bar to the action in California, and the judgment below is accordingly affirmed.

ARTHUR B. DUEL, Appt.,
v.
HARRY B. HOLLINS et al., Individually and as Members of the Firm of H. B. Hollins & Company, Alleged Bankrupts, and A. Leo Everett, Receiver. (No. 352.)

WIENER, LEVY, & COMPANY, Appts.,
v.
HARRY B. HOLLINS et al., Individually and as Members of the Firm of H. B. Hollins & Company, Alleged Bankrupts, and A. Leo Everett, Receiver. (No. 353.)

(See S. C. Reporter's ed. 523-531.)

Bankruptcy — assets — shares of stock in possession of bankrupt broker.

The shares represented by a certificate of stock in a corporation, found in the possession of a bankrupt firm of stock brokers, though insufficient fully to satisfy those of its customers for whom it had bought shares in such corporation, should be allotted to such customers *pro rata*, al-

though such shares are not the identical ones purchased for any of such customers. [For other cases, see Bankruptcy, VI. a, in Digest Sup. Ct. 1908.]

[Nos. 352 and 353.]

Argued May 4 and 5, 1916. Decided June 5, 1916.

TWO APPEALS from the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the Southern District of New York for the allotment *pro rata* to customers of shares of stock found in the possession of a bankrupt firm of stock brokers. Reversed, and decree of District Court affirmed.

See same case below, 135 C. C. A. 312, 219 Fed. 544.

The facts are stated in the opinion.

Mr. **Frederick W. Longfellow** argued the cause, and, with Mr. Lewis L. Delafield, filed a brief for Arthur B. Duel:

The petitioner, Duel, is entitled to at least $5/14$ of the 100 shares of Copper stock which was represented by certificate No. 29,373 in the box of Hollins & Company at the time of the filing of the petition in bankruptcy.

Richardson v. Shaw, 209 U. S. 365, 52 L. ed 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Sexton v. Kessler, 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690.

Mr. **Stuart McNamara** argued the cause, and, with Mr. Carl A. de Gersdorff, filed a brief for Wiener, Levy, & Company:

Appellants Wiener, Levy, & Company are entitled to at least an undivided $5/28$ interest in the 100 shares of Amalgamated Copper stock represented by certificate No. 29,373, found in the box of Hollins & Company at the time of the filing of the bankruptcy petition.

Ibid.; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104.

Mr. **William C. Armstrong** argued the cause, and, with Mr. Charles K. Beekman, filed a brief for Harry B. Hollins et al.:

A marginal customer of a stockbroker who seeks to reclaim stock after bankruptcy must identify affirmatively the certificates allotted to him, or prove that no certificates were specifically set aside for him, and all doubt must be resolved in favor of the receiver. The decision in Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690, is not applicable to the facts in the case at bar.

Re S. H. P. Pell & Co. dated May 27, 1915, unreported; Re T. A. McIntyre & Co. 104 C. C. A. 424, 181 Fed. 960; Re Ennis, 109 C. C. A. 476, 187 Fed. 728; City Bank v. Blackmore, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 771; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; Re Berry, 79 C. C. A. 124, 149 Fed. 176; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519; Re Berry, 77 C. C. A. 434, 147 Fed. 208; Re A. O. Brown & Co. 189 Fed. 432, 113 C. C. A. 348, 193 Fed. 24, 99 C. C. A. 345, 175 Fed. 769, 113 C. C. A. 354, 193 Fed. 30; First Nat. Bank v. Littlefield, 226 U. S. 110, 57 L. ed. 145, 33 Sup. Ct. Rep. 78; Schuyler v. Littlefield, 232 U. S. 707, 58 L. ed. 806, 34 Sup. Ct. Rep. 466; Knauth v. Lovell, 212 Fed. 337; National City Bank v. Hotchkiss, 231 U. S. 50, 58, 58 L. ed. 115, 120, 34 Sup. Ct. Rep. 20; Scotten v. Littlefield, 235 U. S. 407, 59 L. ed. 289, 35 Sup. Ct. Rep. 125; Macy v. Roedenbeck, L.R.A.1916E, 12, — C. C. A. —, 227 Fed. 346.

It is wrongful for a broker to mingle certificates for shares of a certain kind of stock belonging to two or more marginal customers with varying debit balances, and to rehypothecate them without regard to the varying amounts he is advancing on them to each customer, and the court will not presume such wrongdoing on the broker's part.

Douglas v. Carpenter, 17 App. Div. 333, 45 N. Y. Supp. 219; Markham v. Jaudon, 41 N. Y. 235; Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104; Lawrence v. Maxwell, 53 N. Y. 19.

A stockbroker, in the absence of special agreement, is bound to allot specific certificates to each customer upon disposing of those acquired for, or received from, him, and will be presumed to have done so, in the absence of substantive evidence to the contrary.

Douglas v. Carpenter, 17 App. Div. 333, 45 N. Y. Supp. 219; Lawrence v. Maxwell, 53 N. Y. 23; Markham v. Jaudon, 41 N. Y. 235; Schuyler v. Littlefield, 232 U. S. 707, 58 L. ed. 806, 34 Sup. Ct. Rep. 466; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519; Re T. A. McIntyre & Co. 104 C. C. A. 410, 181 Fed. 955; Re T. A. McIntyre & Co. 24 Am. Bankr. Rep. 1; Re T. A. McIntyre & Co. 24 Am. Bankr. Rep. 13; Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 56 L.R.A. 796, 58 N. E. 896; Crawford County v. Strawn, 15 L.R.A.(N.S.) 1100, 84 C. C. A. 553, 157 Fed. 49; City Bank v. Blackmore, 21 C. C. A. 514, 43 U. S. App. 617, 75 Fed. 773.

The stock sought to be reclaimed in this proceeding has been shown to be the prop-

erty of Landau to the extent of 50 shares, by positive identification, and any general identification must yield thereto.

Skiff v. Stoddard, 63 Conn. 198, 21 L.R.A. 102, 26 Atl. 874, 28 Atl. 104.

The rights of appellants were fixed at petition filed, and they can only recover the proportion of the value of the securities identified, which their total credit balance at that time bore to the market value of all their securities.

Re T. A. McIntyre & Co. 24 Am. Bankr. Rep. 4; Re Jamison Bros. & Co. 126 C. C. A. 363, 209 Fed. 541.

Mr. Justice McReynolds delivered the opinion of the court:

Hollins & Company, brokers and members of the New York Stock Exchange, went into bankruptcy November 13, 1913.

On October 13, 1912, they purchased for appellant Duel 100 shares of Amalgamated Copper Company stock—"Copper"—and received certificates therefor which they subsequently disposed of by deliveries on account of sales for customers.

October 25, 1912, they purchased for one Bamberger 30 shares of "Copper," received a certificate therefor, and pledged this for their own benefit with the National Bank of Commerce.

[525] February 25, 1913, they purchased for appellants Wiener, Levy, & Company 50 shares of "Copper" and received a certificate. About June 13, 1913, this passed out of their control "for and in behalf of another customer."

Prior to November 1, 1913, they were directed to purchase for one Landau 100 shares of "Copper," and their books charge them as carrying this number for his account.

At the close of business November 7, 1913, they were responsible to customers for 280 shares of "Copper"—Bamberger 30, Duel 100, Wiener, Levy, & Company 50, Landau 100; and they held in actual possession—"in the box"—only two certificates for 50 shares each. November 10, 1913, they used these in making delivery on a short sale. On the same day that sale was "covered," and on the 11th they received and placed in their box a certificate (No. 29,373) for 100 shares.

When bankruptcy occurred (November 13th) their entire liability to "long" customers on account of "Copper" arose from purchases of 280 shares as above narrated; and they actually held only certificate No. 29,373, received two days before. To secure their own loans they had on pledge with Kings County Trust Company and National Bank of Commerce, respectively, certificates for 50 and 30 shares; and they also had an outstanding short sale of 100 shares.

In the deposition of Allaire, bankrupts' cashier, it is said:

"The said certificate No. 29,373 was never marked or otherwise identified by Hollins & Company as the property of any particular person or customer, or placed in any envelop bearing any indication that the said stock was held for the special account of any particular customer or [526] person, and no memorandum appears upon the books or records of Hollins & Company to the effect that said stock was purchased or held for the special or particular account of any one customer or person.

. . .

"It was the practice of Hollins & Company to use certificates of stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers.

"Certificate No. 29,373, representing 100 shares of Amalgamated Copper stock, was not purchased or received for the account of any member of the firm of Hollins & Company, or for the personal account of said firm as a whole, but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date."

The record indicates that all transactions in question were made in pursuance of the usual contracts for speculative purchases and sales of stock upon margins.

By timely petitions appellants claimed that, in adjusting their accounts for final settlement with bankrupts' estate, they were entitled to have allotted to them respectively 100/280 and 50/280 of the 100 shares of "Copper" represented by certificate No. 29,373. The district court, southern district of New York (212 Fed. 317), sustained their position and ordered accordingly, but the circuit court of appeals reached a different conclusion and reversed the order. 135 C. C. A. 312, 219 Fed. 544.

[527] The facts of the present case differ in some respects from those presented in Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690; but we think a logical application of principles there approved requires disagreement with

the circuit court of appeals and approval of order in the district court.

In view of our former opinions it must be taken as settled: That bankrupts and their customer stood in the relation of pledgee and pledgeor. That in their dealings stock certificates issued by same corporation lacked individuality, and, like facsimile storage receipts for gold coin, could properly be treated as indistinguishable tokens of identical values. That, as between themselves, after paying amount due brokers, the customer had a right to demand delivery of stocks purchased for his account; and such delivery might have been made during insolvency without creating a preference. Richardson v. Shaw, 209 U. S. 365, 52 L. ed. 835, 28 Sup. Ct. Rep. 512, 14 Ann. Cas. 981; Thomas v. Taggart, 209 U. S. 385, 52 L. ed. 845, 28 Sup. Ct. Rep. 519; Sexton v. Kessler & Co. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657; Gorman v. Littlefield, supra.

Summing up the doctrine of Richardson v. Shaw concerning legal relationship between customer and broker in buying and holding shares, we said in Gorman v. Littlefield (pp. 23, 24): "It was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon, or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. It was therefore [528] concluded that the turning over of the certificates for the shares of stock belonging to the customer, and held by the broker for him, did not amount to a preferential transfer of the bankrupt's property."

And we there further declared (pp. 24, 25): "It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of a certain kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. Richardson v. Shaw, supra. It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind, and to keep on hand, subject to the order of the customer, certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the bankrupt."

[529] When the bankruptcy which occasioned Gorman v. Littlefield took place, the broker's box contained certificates, not specifically allotted, for 350 shares of the designate stock, and the appellant's claim for 250 was the only one presented by a customer. We held that, under the circumstances, no more definite identification was essential, and approved his contention. If, in the instant cause, a certificate for 280 shares of "Copper" instead of 100 had been on hand, the four customers for whom that number were purchased might successfully claim them under rule approved in Gorman's Case. And merely because the one actually in the box represented insufficient shares fully to satisfy all is not enough to prevent application of that rule so far as the circumstances will permit. The District Court properly awarded to appellants their *pro rata* parts of the 100 shares.

Decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

Mr. Justice **Pitney**, with whom concurred Mr. Justice **Hughes**, dissenting:

In Gorman v. Littlefield, 229 U. S. 19, 57 L. ed. 1047, 33 Sup. Ct. Rep. 690, the reasoning embodied in the following extract from the opinion (p. 24) was, as I take it, essential to vindicate the conclusion reached by the court: "It is said, however, that the shares in this particular case are not so identified as to come within the rule. But

it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased [530] for the appellant, to buy others of like kind, and to keep on hand, subject to the order of the customer, certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant."

In the present case, it does not appear that at the time of the inception of the bankruptcy proceedings certificates were found in the brokers' possession equal in amount to those which should have been on hand; several customers are laying claim to the shares that were on hand; and it affirmatively appears that the brokers, having sold the shares specifically purchased for these customers, had not bought others of like kind, nor kept on hand certificates sufficient for the claims of the customers upon them. Not only was no stock kept on hand to answer the claims aggregating 280 shares, but it affirmatively appears that the 100 shares that were on hand were not acquired with intent to make restitution. The deposition of Allaire, the only man having knowledge upon the subject, was that certificate No. 29,373, representing 100 shares of Amalgamated Copper stock, "was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date,"—the date being one unconnected with any transaction for account of the appellants or either of them.

It is one thing to infer an intent to make restitution to a customer when the acts have been done that are necessary to effect restitution; it is an entirely different matter to infer an intent to make restitution when no restitution has in fact been made. The presumption of an intent to restore fractional interests in this case must rest on the merest fiction; and such a fiction ought not to be indulged in cases of this character, where it will inevitably result in creating a series of arbitrary [531] preferences, contrary to the equity of the bankruptcy act.

I think the decree of the Circuit Court of Appeals (135 C. C. A. 312, 219 Fed. 544) ought to be affirmed, and am authorized to say that Mr. Justice Hughes concurs in this dissent.

60 L. ed.

COMMONWEALTH OF VIRGINIA, Complainant,
v.
STATE OF WEST VIRGINIA.

(See S. C. Reporter's ed. 531–532.)

Execution — against state.

Execution will not issue on a money judgment against a state, where the state legislature has not met since the rendition of the judgment, and will not again meet in regular session until the assembling of a new legislature, the members of which have not been chosen.

[Matters as to execution, see Execution, in Digest Sup. Ct. 1908.]

[No. 2, Original.]

Submitted June 5, 1916. Decided June 12, 1916.

PETITION for a Writ of Execution against the state of West Virginia upon a money judgment in favor of the commonwealth of Virginia. Denied without prejudice.

The facts are stated in the opinion.

Mr. **John Garland Pollard**, Attorney General of Virginia, for the petition.

Mr. **A. A. Lilly**, Attorney General of West Virginia, and Mr. **John H. Holt**, opposed.

Mr. Chief Justice **White** delivered the opinion of the court:

In the original cause of Virginia v. West Virginia, on the 14th day of June, 1915 [238 U. S. 202, 59 L. ed. 1272, 35 Sup. Ct. Rep. 795], a decree was rendered in favor of Virginia and against West Virginia for the sum of $12,393,929.50, with interest thereon at the rate [532] of 5 per centum from July 1st, 1915, until paid. Virginia now petitions for a writ of execution against West Virginia, on the ground that such relief is necessary, as the latter has taken no steps whatever to provide for the payment of the decree. West Virginia resists the granting of the execution on three grounds: (1) "Because the state of West Virginia, within herself, has no power to pay the judgment in question, except through the legislative department of her government, and she should be given an opportunity to accept and abide by the decision of this court, and, in the due and ordinary course, to make provision for its satisfaction, before any steps looking to her compulsion be taken; and to issue an execution at this time would deprive her of such opportunity, because her legislature has not met since the rendition of said judgment, and will not again meet in regular session until the second Wednesday in

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January, 1917, and the members of that body have not yet been chosen;" (2) because presumptively the state of West Virginia has no property subject to execution; and (3) because, although the Constitution imposes upon this court the duty, and grants it full power, to consider controversies between states, and therefore authority to render the decree in question, yet with the grant of jurisdiction there was conferred no authority whatever to enforce a money judgment against a state if, in the exercise of jurisdiction, such a judgment was entered.

Without going further, we are of the opinion that the first ground furnishes adequate reason for not granting the motion at this time.

The prayer for the issue of a writ of execution is therefore denied, without prejudice to the renewal of the same after the next session of the legislature of the state of West Virginia has met and had a reasonable opportunity to provide for the payment of the judgment.

And it is so ordered.

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[533] STATE OF MISSOURI, Complainant,
v.
CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY.

(See S. C. Reporter's ed. 533–543.)

Judgment — estoppel by — decree in rate case — dismissing without prejudice.

1. The final dismissal of a suit by a railway company to enjoin the enforcement by state officers of a rate-fixing law in its entirety, on the ground that to enforce the rates as fixed by the state would result in confiscation, although "without prejudice," estops the railway company, when sued by the state to recover back passenger fares in excess of the rates established by law, collected during the period covered by an injunction granted in the prior suit, from state officers when traveling within the state, on state business, to assert that the rates as fixed by the state were so low as to be confiscatory, since the reservation "without prejudice" did not leave the controversy open as to the period with which the decree dealt, but merely permitted a renewal of the application for relief if justified by future operation and changed conditions.

[For other cases, see Judgment, III. f, in Digest Sup. Ct. 1908.]

Estoppel — inconsistent positions in judicial proceedings.

2. A railway company which secured an injunction restraining the enforcement in its entirety of a state rate-making law as confiscatory cannot avoid the effect of a final decree of dismissal as an estoppel in a subsequent suit by the state to recover excess passenger fares collected from state officers during the period covered by the injunction by asserting that, because the state was not and could not have been a party to the prior suit, the restraint of the injunction did not operate against the rate-making power so far as the interest of the state is concerned.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

[No. 16, Original.]

Argued May 3 and 4, 1916. Decided June 12, 1916.

MOTION to strike the defense of confiscation from the answer of a railway company in an original action by which a state seeks to recover from the railway company passenger fares in excess of the rates established by the state, paid by state officers when traveling within the state, on state business. Motion granted.

The facts are stated in the opinion.

Mr. John T. Barker, Attorney General of Missouri, argued the cause, and, with Messrs. Lee B. Ewing, W. T. Rutherford, and Kenneth C. Sears, filed a brief for complainant:

The injunction suit brought by defendant railroad in the district court at Kansas City has been finally determined and the bill dismissed and injunction dissolved. Whatever money or property defendant received under or by virtue of such injunction or decree must be restored to complainant, and defendant will not be heard to deny such right, and cannot plead that such rates were confiscatory. Therefore such plea should be stricken out.

Love v. North American Co. — C. C. A. —, 229 Fed. 103; Missouri Rate Cases; (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Bellamy v. St. Louis, I. M. & S. R. Co. 136 C. C. A. 442, 220 Fed. 876; 3 Cyc. 462–469; 18 Enc. Pl. & Pr. 871; 2 Freeman, Judgm. 4th ed. § 481, pp. 832–834; 1 Beach, Inj. p. 348, § 343; Spelling, Inj. & Extr. Rem. § 1096; 1 Joyce, Inj. p. 525, § 343; Ming v. Suggett, 34 Mo. 364, 86 Am. Dec. 112; Turner v. Edmonston, 210 Mo. 411, 124 Am.

Note.—On conclusiveness of judgments, generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Musical Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429, and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

St. Rep. 739, 109 S. W. 33; St. Louis v. St. Louis Gaslight Co. 70 Mo. 69; St. Louis v. St. Louis Gaslight Co. 82 Mo. 349; Haebler v. Myers, 132 N. Y. 363, 15 L.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963; Lake Shore & M. S. R. Co. v. Taylor, 134 Ill. 603, 25 N. E. 588; Starke v. Lewis, 23 Miss. 151; Savannah Shoe Factory v. Kaiser, 108 Ga. 767, 33 S. E. 404; New York v. Brown, 179 N. Y. 303, 72 N. E. 114; Chicot Lumber Co. v. Dardell, 84 Ark. 140, 104 S. W. 1100; Pulteney v. Warren, 6 Ves. Jr. 73, 5 Revised Rep. 226; Cummings v. Mugge, 94 Ill. 186; Van Zandt v. Argentine Min. Co. 2 McCrary, 642, 48 Fed. 770, 7 Mor. Min. Rep. 634; St. Louis & S. F. R. Co. v. Barker, 210 Fed. 902; Hawkes v. Champion, Cary, 51; Dowche v. Perrot, Cary, 63; Hill v. Portman, Cary, 140; Bank of United States v. Bank of Washington, 6 Pet. 8, 8 L. ed. 299; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; Ex parte Walter Bros. 89 Ala. 237, 18 Am. St. Rep. 103, 7 So. 400; Zimmerman v. National Bank, 56 Iowa, 133, 8 N. W. 807; Lytle v. Lytle, 94 N. C. 522; Flemings v. Riddick, 5 Gratt. (Va.) 272, 50 Am. Dec. 119; Hier v. Anheuser-Busch Brewing Co. 60 Neb. 320, 83 N. W. 77; Thompson v. Reasoner, 122 Ind. 454, 7 L.R.A. 495, 24 N. E. 223; United States v. Rothstein, 109 C. C. A. 521, 187 Fed. 268; Brown v. Detroit Trust Co. 113 C. C. A. 490, 193 Fed. 622; Simmons v. Price, 18 Ala. 405; Ward v. Sherman, 155 Cal. 287, 100 Pac. 864; Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 15 Ann. Cas. 670; Bryant v. Fairfield, 51 Me. 149; Delano v. Wilde, 11 Gray, 17, 71 Am. Dec. 687; Peck v. Mclean, 36 Minn. 228, 1 Am. St. Rep. 665, 30 N. W. 759; Thompson v. Carroll, 36 N. H. 21; Scott v. Conover, 10 N. J. L. 61; Murray v. Berdell, 98 N. Y. 480; Britton v. Phillips, 24 How. Pr. 111; Bickett v. Garner, 31 Ohio St. 28; McFadden v. Swinerton, 36 Or. 336, 59 Pac. 816, 62 Pac. 12; Whitesell v. Peck, 176 Pa. 170, 35 Atl. 48; Gates v. Brinkley, 4 Lea, 710; Peticolas v. Carpenter, 53 Tex. 23; Stanard v. Brownlow, 3 Munf. (Va.) 229; Keck v. Allender, 42 W. Va. 420, 26 S. E. 437; Singly v. Warren, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066; Knoxville v. Knoxville Water Co. 212 U. S. 151, 53 L. ed. 380, 29 Sup. Ct. Rep. 148; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P. U. R. 1915D, 577, 35 Sup. Ct. Rep. 811; St. Louis & S. F. R. Co. v. Barker, 210 Fed. 912; State ex rel. Barker v. Chicago & A. R. Co. 216 Fed. 564.

Where a carrier alleges a rate to be confiscatory, it may litigate the question by enjoining the representatives of the state. It cannot litigate the question against individuals. This would be a collateral attack, and as a direct method is provided, that method is exclusive.

Re Engelhard & Sons Co. 231 U. S. 645, 58 L. ed. 416, 34 Sup. Ct. Rep. 258; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Messrs. F. W. Paschal and Clifford B. Allen filed a brief as *amici curiæ*.

Mr. Clifford B. Allen also filed a separate brief as *amicus curiæ:*

This court has decided in the Missouri Rates Cases that the statutes of 1905 and 1907 were constitutionally applied to the Burlington Railroad Company during the years from 1905 to 1914, inclusive; hence this question has become *res judicata*.

St. Louis & S. F. R. Co. v. Barker, 210 Fed. 912; State ex rel. Barker v. Chicago & A. R. Co. 216 Fed. 564; Merchants Exch. v. Baltimore & O. R. Co. 34 Inters. Com. Rep. 341; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214; State ex rel. Barker v. Chicago & A. R. Co. 265 Mo. 682, L.R.A.1916C, 309, 178 S. W. 129.

The confiscatory character of a statutory rate cannot be adjudicated in a suit by a shipper against a carrier.

Re Engelhard & Sons Co. 231 U. S. 646, 58 L. ed. 416, 34 Sup. Ct. Rep. 258; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 346, 36 L. ed. 180, 12 Sup. Ct. Rep. 400; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 973; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, 168 S. W. 1156; State ex rel. Public Service Commission v. Baltimore & O. R. Co. — W. Va. —, P. U. R. 1915D, 568, 85 S. E. 714.

It is too late to again contest the alleged confiscatory character of the act of 1905.

Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 973; Southern R. Co. v. Railroad Commission, 196 Fed. 560.

The railroads should not be permitted to plead that the rates which they had superseded were confiscatory, in an action by the shippers to recover the money exacted during the rate-contesting case.

Love v. North American Co. — C. C. A. —, 229 Fed. 107.

Mr. W. T. Alden also filed a brief as *amicus curiæ:*

It is the duty of the defendant to restore the excessive charges collected during the pendency of the injunction in the Missouri Rate Cases.

Love v. North American Co. — C. C. A. —, 229 Fed. 103; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; Bank of United States v. Bank of Washington, 6 Pet. 8, 17, 8 L. ed. 299–304; Bellamy v. St. Louis, I. M. & S. R. Co. 136 C. C. A. 442, 220 Fed. 876; Brown v. Detroit Trust Co. 113 C. C. A. 490, 193 Fed. 622–626; Lanyon v. Chesney, 209 Mo. 1, 106 S. W. 522; St. Louis v. St. Louis Gaslight Co. 70 Mo. 69; Haebler v. Myers, 132 N. Y. 363, 15 L.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963; Zimmerman v. National Bank, 56 Iowa, 133, 8 N. W. 807.

The proper remedy against a schedule of rates alleged to be unremunerative and confiscatory is by a bill in equity against the officers and authorities of the state charged with the duty of establishing or enforcing such rates. The convenience to the court and the protection of litigants alike demand that such questions be tested out in a direct proceeding for that purpose, and carriers will not be permitted to make such a defense to a suit for overcharges filed by individual shippers.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418–460, 33 L. ed. 970–982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 164, 52 L. ed. 714–731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Re Engelhard & Sons Co. 231 U. S. 646–649, 58 L. ed. 416–418, 34 Sup. Ct. Rep. 258; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649–659, 39 L. ed. 566–571, 15 Sup. Ct. Rep. 484; Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 972; St. Louis & S. F. R. Co. v. Barker, 210 Fed. 916; Allen v. St. Louis, I. M. & S. R. Co. 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Chicago & O. R. Co. v. Conley, 230 U. S. 513, 57 L. ed. 1597, 33 Sup. Ct. Rep. 985; Oregon R. & Nav. Co. v. Campbell, 230 U. S. 525, 57 L. ed. 1605, 33 Sup. Ct. Rep. 1026.

It is true this is a rule of procedure which is founded on convenience, and it may be deviated from where it would work hardship or perpetuate injustice, but the case at bar does not fall within any of the exceptions established or recognized by the previous decisions of this court.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649–664, 39 L. ed. 567–573, 15 Sup. Ct. Rep. 484; Ex parte Young, 209 U. S. 123–164, 52 L. ed. 714–731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764.

On the contrary, the case at bar presents those very elements and considerations which this court has frequently pointed to and relied upon in holding that the proper mode of relief against a body of rates on the ground that they are unreasonably low and confiscatory is by a direct proceeding in equity against the governmental authorities charged with the duty of enforcing such rates.

(a) To leave such issues to be determined in suits by private parties, which would be prosecuted in different localities in great numbers, and in different courts at the same time, in which variant decisions would frequently be reached, even on the same state of facts, would result in business paralysis and legal pandemonium.

Central of Georgia R. Co. v. Railroad Commission, 161 Fed. 972.

(b) The expense of combating the defense of confiscation would be so burdensome, and the delays attendant upon the proper presentation of evidence so onerous, that individual shippers would not have the means to carry on litigation, and a practical denial of justice would result in many, if not most, cases.

Ex parte Young, 209 U. S. 123–164, 52 L. ed. 714–731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418–460, 33 L. ed. 970–982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

(c) This defendant elected in the beginning to contest the validity of the Missouri rate acts by a direct proceeding, and after having carried on litigation of that character for eight years, it ought not to be permitted now to adopt another mode of relief.

(d) When, in obedience to the mandate of this court, the bill of this defendant—a complainant in the Missouri Rate Cases—was dismissed without prejudice, it was incumbent upon the defendant to proceed without delay to file a new bill attacking the constitutionality of the Missouri rate laws. Its failure so to do constituted laches, which should bar it from now urging that defense.

(e) It is an established rule that a carrier must charge the published tariff rates in the transportation of freight and passengers, and cannot depart therefrom to any extent or in any respect.

Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 477, 55 L. ed. 297, 301, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; American

Sugar Ref. Co. v. Delaware, L. & W. R. Co. 125 C. C. A. 251, 207 Fed. 742.

When the bills enjoining the enforcement of the Missouri maximum freight and passenger laws of 1905 and 1907 were dismissed without prejudice, those laws became valid and effective from the date of their enactment; hence, it was and is unlawful for the defendant to charge, collect, demand, or retain any greater or less compensation for the transportation of property or passengers than is specified in such acts.

Pierce v. Pierce, 46 Ind. 86; McCollum v. McConaughy, 141 Iowa, 172, 119 N. W. 539.

Messrs. Ernest E. Watson and Herbert A. Abernethy also filed a brief as *amici curiæ*:

The question of confiscation as to the past is *res judicata*.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Ex parte Young, 209 U. S. 123, 162–167, 52 L. ed. 714, 730–732, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 659, 666, 39 L. ed. 567, 570, 573, 15 Sup. Ct. Rep. 484; Southern P. Co. v. Railroad Comrs. 78 Fed. 249; Haverhill Gaslight Co. v. Barker, 109 Fed. 696; St. Louis & S. F. R. Co. v. Hadley, 161 Fed. 419; St. Louis, I. M. & S. R. Co. v. Bellamy, 211 Fed. 178.

Messrs. O. M. Spencer and Frank Hagerman argued the cause, and, with Mr. Chester M. Dawes, filed a brief for defendant:

A dismissal without prejudice means that the issues can be again litigated "as if no previous suit had been commenced."

Northern P. R. Co. v. St. Paul, M. & M. R. Co. 47 Fed. 536; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; A. H. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082; Whitehouse, Eq. Pr. § 395.

If, as the answer alleges, the 2-cent statutory fare requirement was confiscatory, then complainant cannot recover, and any defense which so shows is, of course, proper.

(a) The matter stricken at is the plea that the 2-cent statutory rate was confiscatory for the two separate and distinct reasons that it, first, prevented defendant from earning a fair return upon the value of the entire property devoted to the use, and second, actually required the defendant to carry passengers at a less rate than the transportation actually cost. The two ideas are distinct and separate. If the statute did not permit the defendant to earn a fair return upon the value of its property in the state, devoted to its use, then it was confiscatory and not binding upon defendant.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 437.

Moreover, if that return was so meager that it was insufficient to pay for the cost of that particular service, the statute was, for that reason, void.

Southern R. Co. v. St. Louis Hay & Grain Co. 214 U. S. 297, 302, 53 L. ed. 1004, 1006, 29 Sup. Ct. Rep. 678; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. —, –, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1.

(b) Had the bill been filed in the district court in the proceedings out of which the claim arises, instead of here (Krippendorf v. Hyde, 110 U. S. 276, 280–282, 28 L. ed. 145, 147, 148, 4 Sup. Ct. Rep. 27; Root v. Woolworth, 150 U. S. 401, 411, 413, 37 L. ed. 1123, 1125, 1126, 14 Sup. Ct. Rep. 136), it would have borne every earmark of the familiar ancillary and dependent bill in equity. If the bill is correctly framed in equity and a consideration of the question of confiscation is limited to that forum, then the defense is proper because equity rule 30 expressly permits a defendant to "state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense."

(c) If, however, regardless of the aim of the pleader, the alleged bill be construed as a simple petition at law, the same result follows.

(d) A railroad company can, by its own original bill in equity, have injunctive relief against the enforcement of statutory state rates because confiscatory (Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764), though the state could not be made a party to such an action.

But even if the state could have been so sued, that remedy would not be now available, because past, not future, acts, are here involved, and injunctive relief is, ordinarily, to prevent future, not past, wrongdoing. But even if the proceedings in equity might have been better suited for the purpose, that fact would not prevent a defendant from asserting the defense at law or to a suit of the state by mandamus or injunction compelling obedience to the statute, or any kind of a case in which the carrier might be called to account because of a rate charged in excess of that fixed by statute. The question of convenience is for the party calling for the constitutional protection.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 666, 39 L. ed. 567, 573, 15 Sup.

Ct. Rep. 484; Ex parte Young, 209 U. S. 123, 165, 166, 52 L. ed. 714, 731, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Wadley Southern R. Co. v. State, 137 Ga. 497, 73 S. E. 741, 235 U. S. 651, 59 L. ed. 405, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, affirming 83 Mich. 592, 47 N. W. 489; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, reversing 114 Mich. 460, 72 N. W. 328; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A. —, —, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, 26 N. D. 438, 145 N. W. 135; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; State v. Pacific Exp. Co. 80 Neb. 823, 18 L.R.A. (N.S.) 664, 115 N. W. 619; State v. Adams Exp. Co. 80 Neb. 840, 115 N. W. 625; State v. Adams Exp. Co. 85 Neb. 25, 42 L.R.A. (N.S.) 396, 122 N. W. 691; State v. Wells-Fargo & Co. 85 Neb. 42, 122 N. W. 697; Atty. Gen. v. Chicago & N. W. R. Co. 35 Wis. 425.

Wherever, as here, the state, which is not subject to suit by the carrier, in its sovereign capacity, itself seeks to enforce a statute by a recovery of refunds thereunder, there surely can be no objection to permitting a defense to be made upon the ground of reasonableness of the rate. In such a proceeding the state is a party just as it is in a mandamus or an injunctive proceeding, and a judgment in such an action would be as binding and as conclusive as though the proceeding had been instituted against some officer of the state, as defendant, by the railway company as plaintiff.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 346, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961.

Complainant cannot recover because of any common-law right based upon an exorbitant charge coercively exacted, but, if it could, defendant would be entitled to a hearing upon its defense of confiscation.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 436, 51 L. ed. 553, 557, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Young v. Kansas City, St. J. & C. B. R. Co. 33 Mo. App. 514; State ex rel. Crow v. Atchison, T. & S. F. R. Co. 176 Mo. 716, 63 L.R.A. 761, 75 S. W. 776; McCormick v. Kaye, 41 Mo. App. 268; Boone County Home Mut. Ins. Co. v. Anthony, 68 Mo. App. 428; State v. Dalton, 134 Mo. App. 526, 114 S. W. 1132; Davidson v. Schmidt, 146 Mo. App. 368, 124 S. W. 552; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A.(N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Coal & Coke R. Co. v. Conley, 67 W. Va. 177, 67 S. E. 613; Chesapeake & O. R. Co. v. Conley, 230 U. S. 513, 522, 57 L. ed. 1597, 1603, 33 Sup. Ct. Rep. 985; Winsor Coal Co. v. Chicago & A. R. Co. 52 Fed. 716.

Complainant cannot recover on the ground that it is entitled to the excess fares paid by its officers, and is entitled to restitution, but, if it could, confiscation would be a defense upon which the carrier would be entitled to be heard.

Since, legally, neither damage nor wrong was done by the injunction, the doctrine of restitution is not involved.

Russell v. Farley, 105 U. S. 433, 435–446, 26 L. ed. 1060, 1061–1064; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 229, 21 L. ed. 43, 45; Meyers v. Block, 120 U. S. 206, 209, 30 L. ed. 642, 643, 7 Sup. Ct. Rep. 525; Cimiotti Unhairing Co. v. American Fur Ref. Co. 158 Fed. 172; St. Louis v. St. Louis Gaslight Co. 82 Mo. 353; Scheck v. Kelly, 95 Fed. 941.

The right to claim restitution belongs not to the state as a passenger, but exclusively to the party to the record.

McLagan v. Brown, 11 Ill. 519; Major v. Collins, 17 Ill. App. 239; Edwards v. Phillips, 91 N. C. 355; 18 Enc. Pl. & Pr. 879, 880.

The state never was and could not have been a party defendant to the original cause (Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764), and its right to make claim on behalf of its several officers is not made apparent. This suggestion completely answers any claim for restoration, because, if it exists, it arose in favor of and is held by the state in its proprietary capacity. On such account alone it can sue here in this, an original, proceeding.

While it is the general rule that property received under a judgment subsequently reversed must be restored, yet the right of restitution is not absolute, and the party in possession of the property may deny such right by showing that he is equitably and justly entitled thereto.

3 Cyc. 463; 18 Enc. Pl. & Pr. pp. 875, 876, 877; Teasdale v. Stoller, 133 Mo. 652, 54

Am. St. Rep. 703, 34 S. W. 873; Gould v. McFall, 118 Pa. 455, 4 Am. St. Rep. 606, 12 Atl. 336; Andrews v. Thum, 18 C. C. A. 308, 33 U. S. App. 393, 71 Fed. 763; Carlson v. Winterson, 7 Misc. 15, 27 N. Y. Supp. 368; State ex rel. Hayden v. Horton, 70 Neb. 334, 97 N. W. 437, 99 N. W. 501; Dupuy v. Roebuck, 7 Ala. 484; Crocker v. Clements, 23 Ala. 296; Freeman, Judgm. 3d ed. p 509, § 481.

Mr. O. M. Spencer also filed a separate brief for defendant:

The defendant herein stands in relation to this suit and any defense it has, just as if no former litigation over the rates in Missouri had ever occurred.

Northern P. R. Co. v. St. Paul, M. & M. R. Co. 47 Fed. 536; Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; Whitehouse, Eq. Pr. § 395, p. 638; 2 Street, Fed. Eq. Pr. p. 817, § 1348; A. H. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082; Durant v. Essex Co. 7 Wall. 109, 19 L. ed. 156; Shepherd v. Pepper, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438; Thurston v. Thurston, 99 Mass. 39; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046; Reynolds v. Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639; English v. English, 27 N. J. Eq. 579; Ballentine v. Ballentine, 2 Monaghan (Pa.) 333, 15 Atl. 859; O'Keefe v. Irvington Real Estate Co. 87 Md. 196, 39 Atl. 428; Lang v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609; Tucker v. Wilson, 68 Miss. 693, 9 So. 898; Epstein v. Ferst, 35 Fla. 498, 17 So. 414.

The mere fact that the railroad company is now a defendant, and not a complainant, cannot bar its right to make the same defense again; for while the usual method of testing the reasonableness of rates is by suit in equity, yet the same defense can be made in any action at law.

Ex parte Young, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; 1 Michie, Carr. p. 119, § 139.

Mr. Chief Justice White delivered the opinion of the court:

A preliminary outline is essential to clear the way for an understanding of the case. By original action here brought, the state sues to recover a sum of money for passenger fares in excess of the rate established by law, paid by its officers when traveling within the state, on state business. Answering, the railroad alleges among other defenses that the rates fixed by law were so low as to be confiscatory, and hence repugnant to the Constitution of the United States. The matter for decision arises on a motion on behalf of the state to strike out this defense on the ground that the right to assert it is barred by a decree of this court, establishing that the rates fixed by the state law were lawful, and not confiscatory,—a decree the conclusive effect of which, it is asserted, the railroad company is estopped from denying.

The case as made by the pleadings and by the record in which the decree relied on was rendered, of which we take judicial notice, is this: In April, 1905, by law, Missouri established certain freight rates. Almost at once the defendant company and others filed their bills in [537] the circuit court of the United States for the western district of Missouri against the State Board of Warehouse Commissioners, the attorney general of the state, and certain shippers, alleged to be representative, to enjoin the carrying out of the rate-fixing law on the ground that to enforce the rates which it fixed would result in confiscation and a taking of the property of the railroads in violation of the Constitution. An injunction was granted prohibiting the carrying into effect of the rate law. While these suits were pending, the state by law fixed a passenger rate, and, repealing the freight law which had been enjoined, enacted another, and by supplemental bills both these laws were assailed on the grounds upon which the other law had been attacked, and injunctions were awarded restraining their enforcement. After much testimony offered on the issue of confiscation, the court permanently enjoined the enforcement of the state statutes. On review in this court, as to the railroad now before us and others, this conclusion was held to be erroneous, and the decree which was entered here reversed and remanded the case, with directions to dismiss the bill, without prejudice. Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 509, 57 L. ed. 1571, 1595, 33 Sup. Ct. Rep. 975.

Although the contentions respectively pressed in argument are numerous, their solution depends upon the application of a few well-settled principles which we proceed to state in order to test all the propositions by applying them, and thus avoid redundancy.

1. In Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462,

702, considering a law fixing railroad rates in the light of two settled rules, (a) that, in exerting the public rate-making power, the rates cannot be made so low as to be confiscatory, without violating the Constitution, and (b) that although a state is not subject to suit without its consent, there is always the right to enjoin an individual, whether he is a state officer or not, from doing an act violating the Constitution, that is, from taking property [538] unlawfully, it was held that both these propositions controlled in the fullest degree in the legislative fixing of railroad rates. In fact it was in that case decided that from the act of fixing railroad rates by law there resulted the duty to provide an opportunity for testing their repugnancy as a unit to the Constitution in case there was a charge that they were confiscatory. It was accordingly held that, in virtue of the due process of law provision of the 14th Amendment, the state could not by mandamus compel a railroad to comply with rates fixed by a state law unless an opportunity was afforded to test the question of confiscation.

Developing and applying this doctrine in many cases, it came to pass that on the complaint of a railroad as to the confiscatory character of rates fixed by state law, the right was recognized to test the rates as a unit, and therefore to obtain an injunction restraining the enforcement of the state law in its entirety; and that for such purpose any officers of the state having any power to directly enforce the law, or, by indirection, to give effect to the same in any manner whatever, were qualified as defendants to stand in judgment for the relief asked. Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A. (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437.

2. While it is true that the comprehensive right thus recognized was broader and more efficacious than would be the right of a railroad merely to resist in each particular case an individual effort to enforce a single rate fixed by law (see Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764), it is true also that the recognized broader right was not, unless it was availed of, exclusive of the latter and narrower one, that is, the right to resist separate attempts to enforce a rate. St Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484. This [539] principle was but a recognition of the fact that the broader right to invoke a complete remedy to enjoin the law, and thus prevent the enforcement of the rates, did not take away the narrower right of a railroad to stand upon the defensive, and merely resist the attempt to enforce the rate in each particular case, because of their confiscatory character. One right was not destructive of the other, because there was freedom to elect which of the two would be pursued.

3. Resulting from the principles just stated, recognizing that the operation of a decree enjoining the giving effect to a rate law, because of its alleged confiscatory character, differed materially, both as to the public interest and that of the railroad, from the consequences which would arise from a mere decree rejecting the complaint of a person as to an individual and consummated grievance, based on the claim that an illegal rate had been charged, it came to pass that a form of decree came to be applied in rate cases to meet and provide for this difference. In other words, in a rate case where an assertion of confiscation was not upheld, because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as "without prejudice," not to leave open the controversy as to the period with which the decree dealt, and which it concluded, but in order not to prejudice rights of property in the future, if, from future operation and changed conditions arising in such future, it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute in the future if a change in [540] conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in Knoxville v. Knoxville Water Co. 212 U. S. 1, 53 L. ed. 371, 29 Sup.

Ct. Rep. 148. It has since been repeatedly applied in language which, in the completest way, makes the meaning of the limitation "without prejudice" in such a case clear, and leaves no ground for any dispute whatever on the subject. Willcox v. Consolidated Gas Co. 212 U. S. 19, 53 L. ed. 382, 48 L.R.A (N.S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Northern P. R. Co. v. North Dakota, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423; Louisville v. Cumberland Teleph. & Teleg. Co. 225 U. S. 430, 56 L. ed. 1151, 32 Sup. Ct. Rep. 741; Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 57 L. ed. 1571, 33 Sup. Ct. Rep. 975; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 59 L. ed. 1244, P.U.R.1915D, 577, 35 Sup. Ct. Rep. 811. A complete illustration of the operation of the qualification is afforded by the North Dakota Case, just cited, since in that case, as a result of the qualification "without prejudice," the case was subsequently reopened, and upon a consideration of new conditions arising in such future period, a different result followed from that which had been previously reached. 236 U. S. 585, 59 L. ed. 735, L.R.A.—, —, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1. As to the second aspect, that is, the significance of the limitation "without prejudice" as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms, through an abundance of precaution, defined and stated in the opinion in the Missouri Rate Cases (Knott v. Chicago, B. & Q. R. Co.) 230 U. S. 474, 508, 57 L. ed. 1571, 1594, 33 Sup. Ct. Rep. 975.

Let us test the merit of the respective contentions by these propositions.

(a) It is insisted that the right obtains to assert, as against the individual suit of the state, the existence of the confiscation for the very period covered by the previous finding that there was a failure to establish the confiscation, because the reservation "without prejudice," which was made in that decree, leaves the whole subject open for a renewed attack as to individuals, and, indeed, by general complaint as to the unconstitutionality of the law as a whole. But this proposition simply disregards the foundation [541] upon which such a reservation came to be applied, as we have just pointed out, in cases involving an assault upon the present and future operation of a law fixing rates. In other words, the contention but accepts the doctrine previously announced, and yet repudiates the cases by which that doctrine was established, by affixing a meaning to the reservation "without prejudice," as used in the cases, wholly destructive of the sole object and purpose for which, in those cases, the reservation came to be applied. Again, it is said, conceding that the limitation "without prejudice," when applied to a rate case, under the authorities, has the significance which we have affixed to it, that meaning should only prevent the reopening of the inquiry as to the period embraced by the testimony in the case, and therefore should not be extended so as to prevent the reopening from the time, at least, of the close of the testimony. This, it is said, must be the case, since there might well be a change in conditions between the time when the proof in a case was taken and the entry of the final decree. But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation "without prejudice" as looking backward, and overthrowing that which was concluded by the decree, instead of considering it in its true light, that is, as looking forward to the future, and providing for conditions which might then arise.

(b) Conceding, for the argument's sake, the controlling influence of what we have said, nevertheless the contention is that the previous decree is here inapplicable, since the state was not a party to the litigation in which the decree was entered; indeed, could not have been made a party without its consent. But once more the argument proceeds upon a disregard of the previous cases, upon the authority of which the right was exercised to obtain, on the charge of confiscation, the exertion of judicial authority [542] to stay or suspend every vestige of power asserted by the state statute fixing rates until the controversy was determined. In other words, the proposition ignores the doctrine settled by the previous cases that there inhered in, and went along with, the rate-making power, a duty on the part of the state to afford means for judicially deciding a question of confiscation when asserted. It is true, as we have previously pointed out, that because there was a right on the part of a railroad to sue to prevent the execution of the state power manifested in the rate-making law, it did not follow that the railroad was deprived of its right to resist the enforcement of the law by way of defense when an attempt was made to enforce the law against it. But it is true also, as we have seen, that the right to elect between the two was undoubted,—an election the potency of which was pointed out in the Gill Case, supra, and was, moreover, in the clearest way, fully expounded in the Young Case, 209 U. S. p. 166,

52 L. ed. 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764. This being true, it is obvious that the question here is not how far the decree relied upon was binding upon parties who were not technical defendants, but how far is it binding upon the railroad? In other words, it is whether, when there has been an election to obtain a remedy by proceedings against particular defendants, comprehensive enough to restrain the giving effect of every vestige of state power which was embraced in the authority exerted by the state in passing the rate-making law, it can now be said by the railroad, in order to frustrate or limit the decree rendered in the case, that the restraint did not operate as against the rate-making power so far as the interest of the state is concerned, because the state was not a party. The right to restrain the whole power having been enjoyed for the purpose of the complaint as to confiscation which was made, the contrary cannot be asserted in order to escape the effect of the decree, holding that such complaint was erroneously made. In last analysis, [543] the contention comes simply to asserting that the settled rule of Ex parte Young and the cases, which preceded it was wrong, and there was no right to restrain the complete enforcement of the rate law without the presence of the state as a technical party. And the cogency of this consideration is made quite clear by bearing in mind, as expressly pointed out in the Young Case, supra, that the power which the court possessed by virtue of the bringing of the suit at the instance of the railroad to enjoin and suspend the whole rate-making law comprehensively included the right to stay proceedings brought in other courts, which would have tended to set aside or frustrate the authority to completely exercise the jurisdiction acquired.

As it results from what we have said that, in our opinion, by the application of the most elementary principles of estoppel, the railroad may not be heard to disavow what it asserted in order to secure the suspension of the rate law during the suit, it follows that it was without right in this case to assert the defense of confiscation, and the motion to strike out the same must therefore prevail.

As the view which we have taken of the controversy has not rendered it necessary to consider whether, in any event, the suit was not a class suit binding upon all, into that subject we have not entered. Additionally, we have not considered, and express no opinion upon, the arguments dealing with questions of the ultimate right to recover in the absence of a condition to that effect imposed when the injunction was issued, in view of the terms of the injunction bond, etc., etc.

The motion to strike out the defense of confiscation from the answer is granted.

Mr. Justice McKenna dissents.

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[544] OGDEN M. REID, Petitioner,
v.
JAMES C. FARGO, as President of the American Express Company, et al.

(See S. C. Reporter's ed. 544-551.)

Appeal — in admiralty — trial de novo.

1. An appeal to a Federal circuit court of appeals from a final decree of a district court in a suit in admiralty brings the case before it for a trial *de novo* so that the court may review an interlocutory decree therein which was not appealed from, and allow a recovery against a party who was dismissed by that decree, and may review both interlocutory and final decrees so far as essential to grant relief to a party who had not appealed from either decree.

[For other cases, see Appeal and Error, VIII. c. 3, in Digest Sup. Ct. 1908.]

Evidence — sufficiency — negligence.

2. The presumption that a rope, used as a sling by stevedores in attempting to transfer a boxed automobile from a ship's hold to a pier, was strong and efficient, arising from the fact that it held the weight of the box until it was lifted above the hatch, and until, by a swinging motion, the danger of the straining or cutting of the rope upon the unprotected edges of the box was more likely to result, gives adequate ground for the inference, there being no evidence of any defect in the rope, that it was such cutting and straining which led to the severance of the rope, and the precipitation of the car into the water.

[For other cases, see Evidence, XII. d, in Digest Sup. Ct. 1908.]

Carriers — express companies — liability as forwarder.

3. An express company which accepted in London an automobile to be shipped to New York, and, having boxed the same, shipped it by an ocean carrier without declaring its value, taking from the steamship company a bill of lading limiting liability to $100 unless a greater value is declared and extra freight paid, was secondarily liable to the owner, where the car was seriously damaged through the negligence of stevedores employed by the steamship company to discharge the cargo, even though the express company be regarded as a mere forwarding agent.

[For other cases, see Carriers, II. b, 1, in Digest Sup. Ct. 1908.]

Shipping — vessel as carrier — limiting liability — agreed value.

4. A steamship company may, by a

stipulation in its bill of lading, limit its liability to $100, unless a greater value is declared and such extra freight as may be agreed upon is paid.

[For other cases, see Shipping, IV. c, 4, in Digest Sup. Ct. 1908.]

[No. 279.]

Argued March 13, 1916. Decided June 12, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which, reversing a decree of the District Court for the Southern District of New York in an admiralty suit, exonerated stevedores and an express company from liability for damage to a shipment, and held the steamship company liable to an amount not exceeding the limitation stated in the bill of lading. Reversed and remanded to the trial court, with directions to enter a decree holding the stevedores primarily liable, and the steamship company and express company secondarily liable, with a limitation of the steamship company's liability to that stated in the bill of lading.

See same case below, 130 C. C. A. 285, 213 Fed. 771.

The facts are stated in the opinion.

Mr. Oscar R. Houston argued the cause and filed a brief for petitioner:

One who has not appealed cannot be heard except in support of the decree below.

Canter v. American Ins. Co. 3 Pet. 307, 7 L. ed. 688; Stratton v. Jarvis, 8 Pet. 4, 9, 10, 8 L. ed. 846, 848, 849; The William Bagaley, 5 Wall. 377, 412, 18 L. ed. 583, 591; The Quickstep, 9 Wall. 665, 672, 19 L. ed. 767, 769; The Maria Martin, 12 Wall. 31, 20 L. ed. 251; The Mabey, 13 Wall. 738, 741, 20 L. ed. 473, 474; The Merrimac, 14 Wall. 199, 201, 20 L. ed. 873, 874; The D. R. Martin, 91 U. S. 365, 366, 23 L. ed. 439, 440; The Stephen Morgan, 94 U. S. 599, 24 L. ed. 266.

Even if the rule of Munson S. S. Line v. Miramar S. S. Co. 93 C. C. A. 360, 167 Fed. 960, is sound, the present case is distinguishable.

The Dove, 91 U. S. 381, 384, 385, 23 L. ed. 354, 355; Bowker v. United States, 186 U. S. 135, 140, 46 L. ed. 1090, 1092, 22 Sup. Ct. Rep. 802; The Hudson, 15 Fed. 172; Re New York & P. R. S. S. Co. 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; Benedict, Admiralty, § 410; Henderson v. Kanawha Dock Co. 107 C. C. A. 651, 185 Fed. 781; The John & Winthrop, 106 C. C. A. 1, 182 Fed. 380.

The obligation of the Express Company to declare the value of the car is quite analogous to the duty of every forwarding agent to pass on to the carrier the full instructions for delivery received by it from the shipper; and it is well settled that the forwarder is liable for failure to perform this duty.

Little Miami R. Co. v. Washburn, 22 Ohio St. 324; Chartrand v. Southern R. Co. 85 S. C. 479, 67 S. E. 741; Forsythe v. Walker, 9 Pa. 148; North v. Merchants' & M. Transp. Co. 146 Mass. 315, 15 N. E. 779; Colfax Mountain Fruit Co. v. Southern P. Co. 118 Cal. 648, 40 L.R.A. 78, 50 Pac. 775.

The obligation of the Express Company is also analogous to the duty of the seller of personal property under a contract by which title is to pass to the buyer upon shipment by a common carrier. The duty of such a seller to ship in the usual and customary manner with reasonable care is believed to be substantially the same as that of the forwarding agent in the present case. It has been held to be negligence on the part of the seller to ship goods at a valuation substantially lower than the true value.

Clarke v. Hutchins, 14 East, 475; Miller v. Harvey, 83 Misc. 59, 144 N. Y. Supp. 624.

Mr. Walter F. Taylor argued the cause and filed a brief for James C. Fargo:

The appeal by T. Hogan & Sons, Inc., opened the whole case so that the circuit court of appeals had power to reverse the portion of the decree holding the Express Company liable.

Irvine v. The Hesper, 122 U. S. 256, 30 L. ed. 1175, 7 Sup. Ct. Rep. 1177; Yeaton v. United States, 5 Cranch, 281, 3 L. ed. 101; The Lucille, 19 Wall. 73, 22 L. ed. 64; The Charles Morgan, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172; The Connemara, 108 U. S. 352, 360, 27 L. ed. 751, 754, 2 Sup. Ct. Rep. 754; Munson S. S. Line v. Miramar S. S. Co. 93 C. C. A. 360, 167 Fed. 960; The Galileo, 29 Fed. 538; The Umbria, 8 C. C. A. 194, 11 U. S. App. 612, 59 Fed. 489.

The limitation clause contained in the bill of lading was not intended to apply and does not apply to shipments on which the rates are fixed on a basis other than value. When it is manifest that the rate on a shipment would not be in any way affected by disclosure of its value, an agreement fixing the limit of liability at anything less than the true value of the goods would be purposeless from the shippers' point of view, and there would be no consideration to support it.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151;

Missouri P. R. Co. v. Harper Bros. 121 C. C. A. 570, 201 Fed. 671; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 284, 59 L. ed. 576, 582, 35 Sup. Ct. Rep. 351.

The admission of T. Hogan & Sons, Inc., that the automobile, while in their custody, fell into the water, is enough to sustain the charge of negligence against them, in the absence of a satisfactory explanation that the fall of the car was attributable to some cause for which they were not responsible.

Inland & S. Coasting Co. v. Tolson, 139 U. S. 551, 555, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653; Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; Marceau v. Rutland R. Co. 211 N. Y. 203, 51 L.R.A.(N.S.) 1221, 105 N. E. 206, Ann. Cas. 1915C, 511.

Mr. Roscoe H. Hupper argued the cause, and, with Mr. Norman B. Beecher, filed a brief for the International Mercantile Marine Company:

The circuit court of appeals had no power to direct a decree against the steamship company.

Hill v. Chicago & E. R. Co. 140 U. S. 52, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; Jackson v. Jackson, 99 C. C. A. 286, 175 Fed. 715.

The only fair inference from the evidence is that the accident was due to the cutting of the rope on the unprotected edges of the case, or to undue strain put upon the sling in pulling the case sideways across the deck. If the rope parted because it was cut by the unprotected edges of the case, the condition of the break would be fully explained. Although Hogan's gangway man testified that there were no jerks, Hogan's winchman was not produced. No sufficient explanation having been given, it would seem that Hogan must be held.

San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 98, 99, 56 L. ed. 680, 684, 32 Sup. Ct. Rep. 399.

If, notwithstanding the pleadings, Reid be regarded as claiming against the steamship company, it cannot be doubted that the steamship company can avail itself against him of this contract, made for its benefit (Hendrick v. Lindsay, 93 U. S. 143, 23 L. ed. 855, and particularly by way of release from liability, Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1; Baltimore & O. S. W. R. Co. v. Voight, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385).

No more can it be doubted that by these provisions of the Express Company's conditions of carriage the steamship company was devested of its insurer's liability both as to Reid and the Express Company, and remained responsible only for such negligence as should be proved against it. So long as the stipulation does not purport to avoid liability for negligence, it is no objection that the burden of proof is placed on the shipper.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 384, 12 L. ed. 465, 483; Clark v. Barnwell, 12 How. 272, 13 L. ed. 985; York Mfg. Co. v. Illinois C. R. Co. 3 Wall. 107, 18 L. ed. 170; The Folmina, 212 U. S. 354, 362, 53 L. ed. 546, 550, 29 Sup. Ct. Rep. 363, 15 Ann. Cas. 748.

The steamship company's liability, if any existed, was limited to $100 by the terms of its bill of lading.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Wells, F. & Co. v. Neiman-Marcus Co. 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D, 593; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Hohl v. Norddeutscher Lloyd, 99 C. C. A. 166, 175 Fed. 544.

The stipulation for limited liability is not affected by the fact that the steamship company's printed schedule names only one rate.

Cau v. Texas & P. R. Co. 194 U. S. 427, 431, 432, 48 L. ed. 1053, 1056, 1057, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659.

In a peculiar sense the Express Company, itself a common carrier,—and as such not under the disability mentioned by Mr. Justice Gray in Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 441, 32 L. ed. 788, 792, 9 Sup. Ct. Rep. 469,—was a competent contractor and could deal at arm's length with the steamship company, agreeing that the value of the motor car was not over $100, for the sake of avoiding the payment of extra freight.

George N. Pierce Co. v. Wells, F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351.

Mr. Livingston Platt argued the cause, and, with Mr. Frank H. Platt, filed a brief for T. Hogan & Sons:

Where the ship furnishes the rope used

by the stevedore, the responsibility for the condition of the rope rests with the ship, and the stevedore is justified in assuming it is safe.

Foster v. Bucknall S. S. Lines, 124 C. C. A. 297, 206 Fed. 415; The Phœnix, 34 Fed. 760; The Rheola, 19 Fed. 926.

The uncontradicted evidence is that the stevedores used due care. The stevedores were not insurers of the safety of the automobile. There was no presumption of negligence. The burden remained upon the petitioner to prove negligence.

Sweeney v. Erving, 228 U. S. 233, 240, 57 L. ed. 815, 818, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905. See also The King Gruffydd, 65 C. C. A. 495, 131 Fed. 189; Connors v. King Line, 98 App. Div. 261, 90 N. Y. Supp. 652.

Mr. Chief Justice White delivered the opinion of the court:

This controversy thus arose: In December, 1910, Reid, the petitioner, delivered in London to the American Express Company an automobile, to be carried to New York. The Express Company, in a communication concerning the shipment, was informed that the car was worth about $3,900. The car was boxed by the Express Company and by it delivered to the Minnewaska, a steamship belonging to the International Mercantile Marine Company, bound for New York. The Express Company shipped the car in its own name as consignor, to itself in New York as consignee, and no express notice was given to the ship of the real value of the package and its contents. The bill of lading issued by the steamship company expressly limited the liability to $100, and contained the following clause: "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value [546] in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." On the arrival of the ship at New York, T. Hogan & Sons, Incorporated, stevedores, were employed to discharge the cargo. A sling was placed around the box containing the car, and a fall, with a hook attached to it, was affixed to the sling, and by a winch the car was lifted up from the hold, through the hatchway. When it had passed above the hatchway, a hook attached to another tackle was fastened to the sling, this second tackle being used to swing the package toward and over the side of the ship, to land it on the pier. This was not accomplished, however, because, as the package swung over the side of the ship, toward the pier, the sling broke, and the car fell into the water, and was seriously damaged.

In November, 1911, Reid filed his libel in the district court of the United States for the southern district of New York, against the Express Company, to recover from it the amount of damage caused to the automobile. Before answering, the Express Company, in conformity to admiralty rule 59, of this court, and with rule 15 in admiralty for the southern district of New York, filed two petitions, one against the steamship company, and the other against Hogan & Sons, to make them parties defendant on the ground that, if there was any liability on the part of the Express Company [547] on the libel of Reid, both the steamship company and Hogan & Sons were responsible therefor, and asking a decree over against each of them separately in case there was any decree against the Express Company. Thereupon the Express Company answered the original libel, denying responsibility on the ground, among others, that it was a mere forwarder. Subsequently both Hogan & Sons and the steamship company answered not only the petitions of the Express Company, making them parties defendant, but also the original libel, traversing the alleged liability on various grounds. The latter company, however, referring to the limitation of liability to $100 in the bill of lading which it had issued, admitted its responsibility to that extent, and alleged that the sum thereof had been offered and declined.

In March, 1913, an interlocutory decree was entered, holding that Hogan & Sons were primarily responsible, and that the Express Company was secondarily so, and that when the amount of the loss was ascertained, Reid would therefore have the right to recover the amount from Hogan & Sons, and in addition to recover from the Express Company any part of the sum which he was unable to collect under execution from Hogan & Sons. The final decree, which thereafter fixed the amount at $2,724.40, carried out the interlocutory decree. Nobody appealed from the interlocutory decree, and the Express Company did not appeal from the final decree, fixing its secondary liability. Hogan & Sons, however, did appeal. The court below, considering that, on the appeal, the case was before it for a trial *de novo*, and therefore that the rights and liabilities of all the parties must be considered from that point of view, reversed the decree below, and held that error had been committed in the decree rendered against Hogan & Sons, because the proof did not establish that they had been negligent. As to the Express Company, it was also

held that error had been [548] committed in decreeing it to be liable secondarily, because, in receiving the automobile, it had acted in the capacity of a mere forwarder, and had discharged its obligations in that respect. As to the decree which dismissed the steamship company, it was held that error had been committed, because that company, as an insurer, was liable, not, however, exceeding the amount of $100, the limitation stated in the bill of lading. As the result of the allowance of a petition for certiorari, the correctness of these conclusions is now before us for decision.

At the threshold it is insisted that the court below had no authority to consider the case as before it for a new trial, that is, *de novo*, and to award relief upon that theory, and that consequently it erred in reviewing the interlocutory decree, which was not appealed from, by which the steamship company was dismissed, and allowing a recovery against that company, and also in reviewing both the interlocutory and final decrees so far as it was essential to grant relief to the Express Company, because that company had not appealed. It is not denied that in the second circuit the right to a *de novo* trial was considered as settled by Munson S. S. Line v. Miramar S. S. Co. 93 C. C. A. 360, 167 Fed. 960, and that a well-established practice to that effect obtained, but it is insisted that a general review of the adjudged cases on the subject will show the want of foundation for the rule and practice. But we think this contention is plainly without merit, and that the right to a *de novo* trial in the court below authoritatively resulted from the ruling in Irvine v. The Hesper, 122 U. S. 256, 30 L. ed. 1175, 7 Sup. Ct. Rep. 1177,—a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited, and the long-continued practice which has obtained since that case was decided, and the full and convincing review of the authorities on the subject, contained in the opinion in the Miramar Case. Entertaining this view, we do not stop to consider the various arguments [549] which are here pressed upon our attention, tending at least indirectly to establish the nonexistence of the right to the trial *de novo* in the court below, or that this case, for reasons which are wholly unsubstantial, may be distinguished and made an exception to the general rule, because to do so would serve no useful purpose, and would be at least impliedly to admit that there was room to discuss a question concerning which there was no room for discussion whatever.

It is conceded that if the grounds relied upon to fix liability as against the Express Company, the steamship company, and Hogan & Sons are established, there is a right to an independent recovery as to each, whatever may be the recourse of these parties to recover over as against each other. Which of the defendants, if any, was liable primarily for the loss, is, then, to be considered. We first approach this question from the point of view of Hogan & Sons, because undoubtedly that company was in possession and control of the car at the time it dropped into the river and was damaged. While there is some confusion and various slight contradictions in the testimony, we are of the opinion that the trial court was right in holding that the loss occurred through the fault of Hogan & Sons, and therefore that the court below erred in reversing the decree against that company. And without undertaking to review the testimony, to all of which we have given a careful consideration, we content ourselves with briefly pointing out the general points of view which have led us to the conclusion stated. Without saying that the mere fact of the dropping of the automobile into the water in the course of delivery from the ship's hold to the pier serves to speak for itself on the issue of responsibility, that is, to bring the case within the principle of *res ipsa loquitur*, we are of the opinion that, by analogy, the case well illustrates that rule for this reason: Some cause must be found for the dropping of the car into the river, and only [550] two theories on this subject may be deduced from the proof: either that the acident to the car occurred without fault, as the result of the breaking of the rope composing the sling because of some unseen and hidden defect in such rope, or that it was occasioned by some act of negligence or want of care in handling the car. The first, we are of opinion, is without any substantial support in the proof; in fact, to accept it would conflict with direct and positive proof to the contrary. That view, therefore, could only be sustained by substituting imagination for proof. The second, on the contrary, we are of opinion, finds cogent support from the proof which could only be escaped by overthrowing it by the process of imagination to which we have just referred. It is unquestioned that when the sling was put around the box containing the car, preparatory to attaching the hook in order to hoist it, no blocks or other means were used to prevent the rope from being worn or cut by the edges of the box. The presumption that the rope was strong and efficient, arising from the fact that it held the weight of the box until it was lifted above the hatch, and until, by the swinging motion, the danger of straining or cutting of the ropes upon the edges was more likely to result, gives adequate ground for the inference that such

cutting and straining occurred and led to the severance of the rope, and the precipitation of the car into the water. And this inference is supported by various other circumstances which we do not stop to recapitulate.

Were the steamship company and the Express Company, in the order stated, liable to Reid, the libellant, dependent upon his inability to make under execution the amount of the decree from Hogan & Sons, is, then, the only remaining question. In substance this question, however, is negligible since, in the argument at bar, it was conceded that T. Hogan & Sons, Incorporated, were amply solvent, and that there was no question of their ability [551] to respond to any decree which might be rendered against them. To avoid, however, all miscarriage of right from any possible, though improbable, change of conditions, without going into detail or stating the considerations which control our conclusion on the subject, we content ourselves with saying, first, that as to the steamship company we are of the opinion that, on the failure to make the amount of the decree against Hogan & Sons, the libellant will be entitled to recover over against that company to the amount of $100, to which its liability was limited, as stated in the bill of lading under which the shipment was made; second, that even looking upon the Express Company as a forwarder, under the circumstances of the case and the terms of the bill of lading under which the car was shipped by that company, the trial court rightly held it liable, and that recovery against it on failure to enforce the decree against Hogan & Sons will also obtain.

It follows that the decree below must be reversed and the cause remanded to the trial court, with directions to set aside its decree in so far as it dismissed the steamship company from the case, and to enter a decree in conformity with this opinion.

Reversed and remanded.

OSCAR M. LANCASTER and Patrick M. Kerr, Appts.,
v.
KATHLEEN OIL COMPANY, Josiah Brown, et al.

(See S. C. Reporter's ed. 551–556.)

Pleading — jurisdictional averments — Federal question.

1. Allegations in a bill filed by the lessees of an oil and gas mining lease from the heirs of an Indian homestead allottee for the recovery of possession from a subsequent lessee of the same premises, and for an injunction restraining the assertion of any rights under such lease, and any interference with plaintiffs' rights under their lease, that plaintiffs' lease, though not approved by the Secretary of the Interior, was valid, and that the subsequent lease to defendant, which had such approval, was void because, by the act of May 27, 1908 (35 Stat. at L. 312, chap. 199), the land descended to the heirs of the Indian allottee free from any restrictions against leasing the same for oil and mining purposes, and because, if that act did impose restrictions as to such a lease, it was repugnant to the Federal Constitution,—were material to the cause of action stated in the bill, and therefore present a cause of action within the jurisdiction of a Federal district court as a Federal court.

[For other cases, see Pleading 337–349, in Digest Sup. Ct. 1908.]

Cloud on title — when maintainable — remedy at law — possession.

2. The rule that a suit to quiet title can only be brought by one in possession has no application where the legal remedy by an action in ejectment is not available.

[For other cases, see Cloud on Title, II. d, in Digest Sup. Ct. 1908.]

[No. 336.]

Submitted April 26, 1916. Decided June 12, 1916.

APPEAL from the District Court of the United States for the Eastern District of Oklahoma to review a decree dismissing a suit on the ground that the bill alleged no cause of action within the jurisdiction of the court as a Federal court. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Mr. **William F. Tucker** submitted the cause for appellants. Mr. Hulette F. Aby was on the brief:

The character of the interest of the lessee in an Oklahoma oil and gas mining lease is an incorporeal hereditament, a chattel real, and passes only the privilege to explore; and this rule of property will be recognized and given effect by the Federal courts.

Duff v. Keaton, 33 Okla. 92, 42 L.R.A. (N.S.) 472, 124 Pac. 291; Frank Oil Co. v. Belleview Gas & Oil Co. 29 Okla. 719, 43 L.R.A.(N.S.) 487, 119 Pac. 260; Guffey v. Smith, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526.

The owner of an oil and gas mining lease, under which no development has been made, cannot maintain ejectment thereon in the courts of Oklahoma.

Frank Oil Co. v. Belleview Gas & Oil Co. supra; Kolachny v. Galbreath

NOTE.—On effect of remedy at law upon equitable jurisdiction to remove cloud on title—see note to Whitehouse v. Jones, 12 L.R.A.(N.S.) 49.

Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac 902.

Courts of equity will protect exclusive rights and licenses, privileges, and easements, where claimed for a valuable consideration, by injunction.

Alpers v. San Francisco, 32 Fed. 503; Brush-Swan Electric Light Co. v. Brush Electric Co. 41 Fed. 163; Duff v. Russell, 133 N. Y. 678, 31 N. E. 622; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; Goddard v. Wilde, 17 Fed. 845; Joy v. St. Louis, 138 U. S. 1, 46, 34 L. ed. 843, 857, 11 Sup. Ct. Rep. 243; Lumley v. Wagner, 1 DeG. M. & G. 604, 21 L. J. Ch. N. S. 898, 16 Jur. 871, 6 Eng. Rul. Cas. 652; Manhattan Mfg. & Fertilizing Co. v. New Jersey Stock Yard & Market Co. 23 N. J. Eq. 161; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 58 L.R.A. 227, 90 Am. St. Rep. 627, 51 Atl. 973; 6 Pom. Eq. Jur. § 773; Singer Sewing Mach. Co. v. Union Buttonhole & Embroidery Co. Holmes, 253, Fed. Cas. No. 12,904; Steinau v. Cincinnati Gaslight & Coke Co. 48 Ohio St. 324, 27 N. E. 545; Western U. Teleg. Co. v. Union P. R. Co. 1 McCrary, 558, 3 Fed. 423.

Where, under the laws and decisions of the state, no remedy at law exists in the state courts, the United States courts, following in actions at law the local laws and modes of procedure, can grant no such remedy, and the owner of a valid oil and gas mining lease on lands in such state may maintain an action to enjoin those claiming the right and about to operate for and produce and sell the oil and gas therefrom under a later and similar lease from the same lessors, and in such action the court will determine the rights of the two lease claimants; and if the title of the plaintiff be found valid, plaintiff will be entitled to injunction, discovery, and accounting.

Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Bettman v. Harness, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; Brown v. Spilman, 155 U. S. 665, 39 L. ed. 304, 15 Sup. Ct. Rep. 245; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Erhardt v. Boaro, 113 U. S. 527, 28 L. ed. 1113, 5 Sup. Ct. Rep. 560, 15 Mor. Min. Rep. 472; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 900; Friend v. Mallory, 52 W. Va. 53, 43 S. E. 114; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219; Guffey v. Smith, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902.

In an action for injunction and accounting, brought by the owners of an oil and gas mining lease while out of possession of the leased premises, and against the lessors and lessees of a subsequent lease, where the lessees of the second lease have entered thereunder and are about to mine and remove the oil and gas underlying the lands, under the second lease, the allegations of the bill as to the character and derivation of the title of the plaintiff, and the character and derivation of the claim and title asserted by the defendant, in connection with the nature of the acts done thereunder, are usual, proper, and essential in such a bill.

Blakeslee v. Missouri P. R. Co. 43 Neb. 61, 61 N. W. 118; Chicago City R. Co. v. General Electric Co. 74 Ill. App. 465; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 173, 40 Pac. 326; Cooke v. Central Dist. & Printing Teleg. Co. 21 Pa. Super. Ct. 43; Douglass v. Nuzum, 16 Kan. 515; Franklin Teleg. Co. v. Harrison, 145 U. S. 459, 36 L. ed. 776, 12 Sup. Ct. Rep. 100; Guffey v. Smith, 237 U. S. 101, 59 L. ed. 856, 35 Sup. Ct. Rep. 526; Hungerford v. Cushing, 8 Wis. 332; Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; McClanahan v. Davis, 8 How. 170, 182, 12 L. ed. 1033, 1039; McKinzie v. Mathews, 59 Mo. 99; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep 79, 77 Pac. 915; Miller v. Burket, 132 Ind. 469, 32 N. E. 309; Ringo v. Binns, 10 Pet. 269, 9 L. ed. 420; Ryan v. Fulghum, 96 Ga. 234, 22 S. E. 940; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Stillwell v. Adams, 29 Ark. 346; Story, Eq. Pl. 505; Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635, 59 L. ed. 758, 35 Sup. Ct. Rep. 446.

In an action by the lessee under an oil and gas lease covering Oklahoma lands, for injunction, discovery, and accounting, brought against a second lessee of the same lands, the plaintiff, by pleading the character and derivation of his title under an act of Congress, and the character and derivation of the claim and title asserted by the defendant, and the facts in relation thereto, and it being alleged that a decision of the controversy between the parties depends upon the construction of certain specified acts of Congress of the United States, or parts thereof applicable to the case, and that certain provisions of the acts of Congress upon which the adverse claim and title rest are violative of provisions of the Constitution of the United States, specified in the bill, there is presented by

appropriate allegations a controversy arising under the Constitution and laws of the United States, of which the district court of the United States has jurisdiction.

Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 371, 381, 48 L. ed. 484, 488, 24 Sup. Ct. Rep. 325; Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. ed. 257, 285; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Osborn v. Bank of United States, 9 Wheat. 739, 824, 825, 6 L. ed. 204, 224, 225; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635, 59 L. ed. 758, 35 Sup. Ct. Rep. 446.

Messrs. **George S. Ramsey, Edgar A. De Meules, and Malcolm E. Rosser** submitted the cause for appellees. Messrs. Edward H. Chandler and Sol H. Kauffman were on the brief;

This case is governed by the case of Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724.

In its essence, this is a bill to recover possession of land. It alleges that the plaintiffs are the holders of an oil and gas mining lease from the fee-simple owners of the land, giving the plaintiffs the exclusive right of possession for oil and gas mining purposes; that they are deprived of such possession by the Kathleen Oil Company, which is in possession and is itself boring for and producing oil and gas on the land. This suit is, therefore, in its nature, simply an equitable action of ejectment; a substitute for ejectment, brought in equity because, for technical reasons, ejectment will not lie at the suit of the lessee to recover possession under an oil and gas lease, on the ground (whether sound or not) that the right of a lessee under such lease is an incorporeal hereditament and such a right cannot be enforced by ejectment. In other words, an officer charged with a writ of possession is supposed to be unable to put the lessee in possession on account of the incorporeal nature of the right or estate.

Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902.

This suit, therefore, differs from the legal action of ejectment only in the nature of the relief required. The relief required is to enjoin the alleged trespasser, and prevent it from interfering with the lessees in the prosecution of their rights under the lease. Nothing more is required, therefore, than the mere statement of plaintiffs' right and title, the facts constituting the invasion of such right, and the nature and extent of the injury suffered, so as to indicate the nature of the relief required. It is not necessary to state that the right was acquired in view of a certain interpretation or construction of some statute (which might or might not govern), and say in effect that if such construction be sustained the right is enforceable, and, if it be rejected, it is unenforceable; because such statements are mere argument and have no proper place in the bill.

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Fletcher, Eq. Pl. 136.

The mere fact that the plaintiffs question their own title will not confer jurisdiction in equity, much less raise a Federal question. The plaintiff, in equity cases as in other cases, if he seeks to recover possession, upon a legal right, must rely upon the strength of his own title.

Hough v. Martin, 22 N. C. (2 Dev. & B. Eq.) 379, 34 Am. Dec. 403.

There is no jurisdiction in equity merely on account of the doubtful state of a legal title; other grounds of equitable jurisdiction must be shown.

Jones v. Jones, 3 Meriv. 161; Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Bacon v. Jones, 4 Myl. & C. 433, 3 Jur. 994; Laughlin v. Lamasco City, 6 Ind. 223; Dan. Ch. 6th Am. ed. 361; 21 Enc. Pl. & Pr. 713; Van Zile, Eq. Pl. 29.

In actions to recover possession of real property it has long been the rule that the only ultimate facts required to be stated are: (1) the description of the lands; (2) the extent or nature of the interest asserted; and (3) that the defendant is withholding possession.

Payne v. Treadwell, 16 Cal. 242; Christy v. Scott, 14 How. 282, 14 L. ed. 422; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Austin v. Schluyter, 7 Hun, 275; Hihn v. Mangenberg, 89 Cal. 268, 26 Pac. 968; Walter v. Lockwood, 23 Barb. 228, 4 Abb. Pr. 309; People v. New York, 28 Barb. 240; Sanders v. Leavy, 16 How. Pr. 308; Ensign v. Sherman, 14 How. Pr. 439; Coryell v. Cain, 16 Cal. 567, 5 Mor. Min. Rep. 226; Garrison v. Sampson, 15 Cal. 93.

An allegation that the plaintiff is the owner of certain real or personal property is a statement of an ultimate fact, and sufficient to aver title.

Payne v. Treadwell, 16 Cal. 242; Garwood v. Hastings, 38 Cal. 216; Gage v. Kaufman, 133 U. S. 471, 33 L. ed. 725, 10 Sup Ct. Rep. 406; Ely v. New Mexico & A. R. Co. 129 U. S. 291, 32 L. ed. 688, 9 Sup.

Ct. Rep. 293; Johnson v. Vance, 86 Cal. 129, 24 Pac. 863.

The rule in equity is the same.

Wiggin v. New York, 9 Paige, 16; Laughlin v. Lamasco City, 6 Ind. 223; Dan. Ch. 6th Am. ed. 1896, 362.

In a suit for injunction to restrain an injury to land it is not necessary that the petition should aver from whom or how the title was obtained. This is a matter of evidence.

Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co. 115 Mo. 613, 22 S. W. 616.

If plaintiffs claim the exclusive right to dig for oil and gas, they need only recite that they are the lessees of a certain oil and gas lease, executed to them by the owners of the fee, and then set forth the lease or its legal effect. They need not recite any presumed defect in their title and negative it, but that is properly for the defendants, if the latter so desire.

Payne v. Treadwell, 16 Cal. 242; Gage v. Kauffman, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406; Christy v. Scott, 14 How. 282, 14 L. ed. 422.

The reason, according to Serjeant Stephens, is that if it were requisite to show from whom the party derived his title, it might be required on the same principle to show from whom that person derived his, and so *ad infinitum*.

Stephens, Pl. § 175.

But the better reason is that a simple allegation of ownership is the statement of an ultimate fact, and the derivation of the title, if material, is a matter of evidence.

Payne v. Treadwell, supra.

Suits to remove clouds are brought by persons in possession.

Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; Orton v. Smith, 18 How. 263, 15 L. ed. 393; Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720.

Allegations in actions of ejectment that the defendant is unlawfully withholding possession from the plaintiff are universally treated in modern practice as sufficient, and why not so in this case? The principles are the same.

Payne v. Treadwell, supra.

Appellants' counsel seem to argue that the continuing nature of the trespass must be shown by a lease or by some definite claim of right on the part of the defendants. But why? Could not the trespass be of a continuing nature without any claim of right whatever by the defendants? Such an invasion of right would be all the more enjoinable.

Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427; Slater v. Gunn, 170 Mass. 509, 41 L.R.A. 268, 49 N. E. 1017; 9 Enc. Forms, 868; Indianapolis Natural Gas Co. v. Kibbey, 135 Ind. 357, 35 N. E. 392, 17 Mor. Min. Rep. 677.

No admission of parties can change the law or give jurisdiction to a court in a cause of which it hath no jurisdiction.

Hipp v. Babin, 19 How. 271, 15 L. ed. 633; Welby v. Rutland, 2 Bro. P. C. 39.

Assuming that it is proper for plaintiffs to set up defendant's claim, it would only be necessary in this case to allege that, subsequent to the execution of plaintiff's lease, the fee owners executed another lease on the same land to the Kathleen Oil Company. That certainly would give rise to no Federal question.

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704.

The rule that plaintiffs cannot anticipate defendant's defense applies to equity as well as law cases.

Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; Third Street & Suburban R. Co. v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; Louisville & N. R. Co. v. Mottley, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Denver v. New York Trust Co. 229 U. S. 123, 133–135, 57 L. ed. 1101, 1120, 1121, 33 Sup. Ct. Rep. 657.

Mr. Chief Justice White delivered the opinion of the court:

This direct appeal is prosecuted to reverse the decree of the court below, dismissing the suit on the ground that the bill alleged no cause of action within the jurisdiction of the court as a Federal court.

Briefly summarized, the bill alleged that in 1903 Lizzie Brown received from the United States a patent to certain [553] described land in Oklahoma as her homestead allotment as a member of the Creek Tribe of Indians; that she died in March, 1912, leaving surviving as her sole heirs her husband, Josiah Brown, and four minor children, all of whom were made defendants. It was alleged that Brown, the father, was appointed guardian of the children, and that in April, 1912, he and the children, as owners in fee of the land in question, made an oil and gas mining lease to the plaintiffs, which was re-

corded April 18th, 1912; that, notwithstanding this lease, about two months later, that is, June 2d, 1912, Brown, on his own behalf and as guardian, made an oil and gas mining lease covering the identical land, to the Kathleen Oil Company, also made a defendant, which lease was approved by the Secretary of the Interior and was duly recorded. It was alleged that plaintiffs entered upon the land under their lease, prepared to drill for oil, but, learning of the subsequent lease to the Kathleen Oil Company, withdrew and made an application to the Secretary of the Interior to cancel his approval of that lease, which was denied. It was averred that the Kathleen Oil Company had entered into its lease with full knowledge of the prior lease to the plaintiffs, but that it had nevertheless gone into possession and was operating under its lease, and was producing and selling oil and gas. The bill then alleged that the plaintiffs' lease, although not approved by the Secretary, was valid, and that the subsequent lease to the defendant company, which was approved by the Secretary of the Interior, was void because, by the act of Congress of May 27, 1908 (35 Stat. at L. 312, chap. 199), the land of Lizzie Brown descended to her heirs free from any restriction against leasing the same for oil and gas mining purposes, and because, if that act did impose restrictions as to such a lease, it was void for repugnancy to the Constitution of the United States. The prayer was that the defendant company be enjoined from entering on the land and from [554] continuing to operate under its lease, that all the defendants be restrained from interfering in any manner with the plaintiffs in conducting operations under their lease, and from asserting or claiming any right to the oil and gas deposits under the land, or the right to mine and remove the same, and that the defendant company account to the plaintiffs for the gas and oil which it had removed.

The defendants moved to dismiss on the ground that the court was without jurisdiction as a Federal court to entertain the cause. The motion was granted, and a decree of dismissal entered, and, for the purpose of this direct appeal, the court certified under the statute that the dismissal had been ordered because "the essential and appropriate allegations of the cause of action asserted in said bill of complaint did not disclose a case arising under the Constitution or a law or treaty of the United States."

As it is apparent that the court below erred if the allegations concerning the validity of the lease of the plaintiffs, and the invalidity of that of the defendant company, were material to the cause of action stated in the bill, we come at once to that question. In support of the proposition that such allegations were not material, it is argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises, but was brought in equity because, under the law of Oklahoma, a lessee of an oil and gas mining lease under circumstances here disclosed had no right to sue in ejectment. Kolachny v. Galbreath, 26 Okla. 772, 38 L.R.A.(N.S.) 451, 110 Pac. 902. Further, it is said that as, in a suit in ejectment, it is only necessary to allege a right of possession by the plaintiff, and a wrongful possession by the defendant, averments by anticipation of assumed defects in the plaintiffs' title, to be alleged by the defendant, and of the causes which would be relied upon to establish want of title in the defendant, are not relevant or essential, and are to be disregarded in determining [555] the question of the jurisdiction of the court as a Federal court. This, it is said was expressly decided in Taylor v. Anderson, 234 U. S. 74, 58 L. ed. 1218, 34 Sup. Ct. Rep. 724, and that case is relied upon as conclusive of this controversy.

But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the Taylor Case, we think it can here have no application, since we are of the opinion that the assumption that the cause of action alleged in the bill under consideration is the equivalent of a suit in ejectment is wholly without foundation. We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any rights under its lease, and from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval.

It is said, however, if the bill be thus construed, the suit is in substance one to quiet title, and, under the well-settled rule, such a suit can be brought only by one in possession. Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434. But this contention overlooks the reason upon which the rule is based, as pointed out

in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application, and that the court had equitable jurisdiction to determine all the issues presented by the bill.

[556] That the bill, as thus construed, states a cause of action within the jurisdiction of the court below as a Federal court, is, in substance, conceded, and is demonstrated by the ruling in Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635, 643, 644, 59 L. ed. 758, 766, 767, 35 Sup. Ct. Rep. 446.

It follows from what we have said that the court below erred in dismissing the cause for want of jurisdiction as a Federal court, and its decree must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

And it is so ordered.

PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF WALTER S. KENNEDY, as Next Friend of Fayette Kennedy, Warren Kennedy, and Willis White, Jr., Plffs. in Err.,

v.

FREDERICK W. BECKER, as Sheriff of Erie County, New York.

(See S. C. Reporter's ed. 556–564.)

Indians — reservation of fishing rights in treaty — right to violate state game laws.

The reservation to the Indians of the right to fish on the ceded lands, which is contained in the treaty of September 15, 1797 (7 Stat. at L. 601), by which the Seneca Indians ceded to Robert Morris certain lands in the state of New York, does not give tribal Seneca Indians, residing on an Indian reservation in charge of an Indian agent, the right to take fish from the waters on the ceded lands outside the reservation in a manner and at a time prohibited by the game laws of the state.

[For other cases, see Fisheries, III., in Digest Sup. Ct. 1908.]

[No. 666.]

Argued April 7, 1916. Decided June 12, 1916.

IN ERROR to the Supreme Court of the State of New York in and for the County of Erie, in that state, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Department, which had reversed an order of a Special Term of the Supreme Court, discharging, on habeas corpus, certain Indians charged with violating the game laws of the state. Affirmed.[1]

See same case below in appellate division, 165 App. Div. 881, 151 N. Y. Supp. 138; in court of appeals, 215 N. Y. 42, 109 N. E. 116.

The facts are stated in the opinion.

Mr. George P. Decker argued the cause and filed a brief for plaintiffs in error:

Defendant in error here fails, unless he convinces this court that by the treaty of Big Tree it was the intent and understanding of the parties that a tribal Seneca, in leaving his residence reserves to fish at the *locus in quo*, would be leaving the frontiers of his tribe, and be subjecting himself in fishing to the jurisdiction of New York. If that were the understanding, then his right there would be one falling, like that of a white man, under the legislative power of New York to regulate according to the will of the state legislature. If the state had that right, it is immaterial here to know whether the right fell under the head of police powers, as publicists classify governmental powers, or fell under some other heading. The Seneca in any case, then, would have no advantage over the unnaturalized Russian who possessed private lands in New York, with the right to fish upon them, but who discovered, *e. g.*, that New York had prohibited the taking of trout for a term of fifty years. Such would be an impotent outcome of the Big Tree treaty.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662.

Changed conditions afford no foundation for extension of state power cutting down tribal rights and invading Federal jurisdiction.

The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667.

The *locus in quo*, in consequence of the treaty of Big Tree, remained after 1797 an Indian reservation for the special and limited purposes intended, and no less, in legal contemplation, to the extent of those purposes, than a residence reserve upon which no white man might lawfully set foot for any purpose under warrant of mere state authority. Hunting grounds of Indians are to be regarded as in possession of the tribe.

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[1] Leave granted to present a petition for rehearing herein within sixty days if counsel are so advised, on motion of Solicitor General Davis for the United States.

June 12, 1916.

Mitchel v. United tSates, 9 Pet. 745, 9 L. ed. 295.

Treaties between a white man's government and an Indian tribe are to be read by white men's courts favorably to the Indians, or as the Indians had the right to understand them.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; Northern P. R. Co. v. United States, 227 U. S. 355, 57 L. ed. 544, 33 Sup. Ct. Rep. 368.

Federal treaties (and the treaty of Big Tree was one) are, as compared with state jurisdiction and legislation, the supreme law of the land.

The New York Indians (Fellows v. Denniston) 5 Wall. 768, 18 L. ed. 711.

It was the intent of the treaty of Big Tree that these rights, then possessed, should not pass away from the Senecas under the ceding clause.

United States v. Winans, 198 U. S. 371, 381, 49 L. ed. 1089, 1092, 25 Sup. Ct. Rep. 662.

If the Senecas were not to be immune from state control in the enjoyment of fishery and chase on these lands, it must be assumed that they would have refused to cede to Morris.

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

Treaty engagements with Indians saying that they may have certain rights, either exclusive or in common with white men, are to be protected.

Holden v. Joy, 17 Wall. 244, 21 L. ed. 534; Re Blackbird, 109 Fed. 139; United States v. Winans, 73 Fed. 72; Seneca Nation v. Appelby, 196 N. Y. 323, 89 N. E. 835.

The fact that Indians, in selling tribal lands, reserve possessory rights only temporarily, does not operate to subject them to state jurisdiction in the enjoyment of those rights before Congress shall take appropriate action putting an end to its protectorship.

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399.

The treaty of Big Tree, having been negotiated with the United States, operated as to the reservation of the rights retained, with all the force of an act of Congress, for it was expressly ratified by the Senate and proclaimed by the President.

United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396.

This treaty did not operate to reserve to the Senecas only a *jus privatum* in the land, but to retain a tribal right in order to secure the private enjoyment of it by members of the tribe.

Re Mattson, 69 Fed. 535; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

The only control by white men to which tribal Indians may be subjected is that which may be exercised by Congress.

United States v. Kagama, 118 U. S. 384, 30 L. ed. 231, 6 Sup. Ct. Rep. 1109; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107, 34 Sup. Ct. Rep. 1.

It was the intent of the Federal Constitution that all shackles previously existing on Federal departments in right to exclusive control over Indian affairs should be removed.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483.

No state may tax the lands of Indian reservations, and this rule was laid down by this court in the absence of any affirmative act of Congress denying such power to states.

The New York Indians (Fellows v. Denniston) 5 Wall. 761, 18 L. ed. 708; The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 18 L. ed. 667.

As to crimes, Congress has the power to retain exclusive jurisdiction over Indian lands as against a state, even after those lands have been allotted to individual Indians, and the Indians themselves have become citizens of the United States.

United States v. Pelican, 232 U. S. 451, 58 L. ed. 680, 34 Sup. Ct. Rep. 396.

It follows that if Congress may, in case of allotted lands and the dissolution of tribes by affirmative legislation, retain exclusive control over persons of Indian blood, so, in the absence of affirmative legislation putting Indians still tribal under state jurisdiction, they retain their status as tribal Indians, and their tribal rights, as against state control.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662.

The better authorities in the New York courts uphold our contention.

Bishop v. Barton, 2 Hun, 436, affirmed in 64 N. Y. 637; People ex rel. Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, Ann. Cas. 1915D, 367; Hastings v. Farmer, 4 N. Y. 293; Jackson ex dem. Klock v. Hudson, 3 Johns. 375, 3 Am. Dec. 500; Buffalo, R. & P. R. Co. v. Lavery, 75 Hun, 396, 27 N. Y. Supp. 443.

The better authorities of other states concur with the above cases.

State v. Campbell, 53 Minn. 354, 21 L.R.A. 169, 55 N. W. 553; Re Blackbird, 109 Fed. 139; United States ex rel. Davis v. Shanks, 15 Minn. 369, Gil. 302; Earl v. Godley (Earl v. Wilson) 42 Minn. 361, 7 L.R.A. 125, 18 Am. St. Rep. 517, 44 N. W. 254; Kobogum v. Jackson Iron Co. 76 Mich.

498, 43 N. W. 602; La Riviere v. La Riviere, 97 Mo. 80, 10 S. W. 840.

The Federal authorities have recently brought suit to reinstate the Indians who were ousted by the state courts, in the case of Boylan v. George, 133 App. Div. 514, 117 N. Y. Supp. 573. It would seem on its face inexplicable that the invasion of tribal rights involved in the above cases could have accumulated. The explanation may be found. In many instances these Indians have asked the state courts to pass upon the question submitted. Almost always in such cases the Indians, defeated in the first instance, have had no means of their own adequate to appeal. They have commonly neglected to ask the Department of Justice to sue or defend for them. The right, power, and duty of the Federal departments to protect Indian rights is thoroughly established in the following decisions of this court:

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; Heckman v. United States, 224 U. S. 413, 56 L. ed. 820, 32 Sup. Ct. Rep. 424; United States v. Boyd, 68 Fed. 577; United States v. Winans, 73 Fed. 72; United States v. Gray, 119 C. C. A. 529, 201 Fed. 291; United States v. Mackey, — C. C. A. —, 216 Fed. 126.

The rule as to the field open to state jurisdiction in matters of interstate commerce does not apply as to commerce with Indian tribes.

Cherokee Nation v. Georgia, 5 Pet. 1, 18, 8 L. ed. 25, 31; Worcester v. Georgia, 6 Pet. 515, 561, 8 L. ed. 483, 501; United States v. Kagama, 118 U. S. 384, 30 L. ed. 231, 6 Sup. Ct. Rep. 1109; The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 755, 18 L. ed. 672; Re Heff, 197 U. S. 506, 49 L. ed. 856, 25 Sup. Ct. Rep. 506.

If a decision is made to-day on this subject which our courts would not have made one hundred years ago, when these Indians were powerful, our courts would not, in the language of this court, be administering "that superior justice in respect to Indians which becomes our judiciary."

United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478. See also Dick v. United States, 208 U. S. 356, 52 L. ed. 526, 28 Sup. Ct. Rep. 399.

The Hartford convention should not be honored in this cause by this court for any purpose prejudicial to the Senecas.

Ogden v. Lee, 6 Hill, 546; The New York Indians (Fellows v. Denniston) 5 Wall. 769, 18 L. ed. 712, reversing 23 N. Y. 420; Fellows v. Blacksmith, 19 How. 366, 15 L. ed. 684, affirming 7 N. Y. 401; Holden v. Joy, 17 Wall. 244, 21 L. ed. 534; New York ex rel. Cutler v. Dibble, 21 How. 366, 16 L. ed. 149, affirming 16 N. Y. 203; Seneca Nation v. Appleby, 196 N. Y. 323, 89 N. E. 835; Ryan v. Knorr, 19 Hun, 540.

Assistant Attorney General Warren also argued the cause, and, with Mr. W. W. Dyar, filed a brief for plaintiffs in error:

The language used in treaties with the Indians should never be construed to their prejudice. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. Georgia, 6 Pet. 515, 581, 8 L. ed. 483, 508; The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 757, 18 L. ed. 667, 673; Choctaw Nation v. United States, 119 U. S. 1, 27, 28, 30 L. ed. 306, 314, 315, 7 Sup. Ct. Rep. 75; Jones v. Meehan, 175 U. S. 1, 11, 44 L. ed. 49, 54, 20 Sup. Ct. Rep. 1; United States v. Winans, 198 U. S. 371, 380, 49 L. ed. 1089, 1092, 25 Sup. Ct. Rep. 662; Northern P. R. Co. v. United States, 227 U. S. 355, 362, 367, 57 L. ed. 544, 548, 550, 33 Sup. Ct. Rep. 368; Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207.

The Seneca and other New York tribal Indians are wards, not of the state, but of the United States.

Worcester v. Georgia, 6 Pet. 515, 8 L. ed. 483; The New York Indians (Fellows v. Denniston) 5 Wall. 761, 18 L. ed. 711; Fellows v. Blacksmith, 19 How. 366, 15 L. ed. 684; People ex rel. Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, Ann. Cas. 1915D, 367.

The hunting and fishing rights involved are a part of the original Indian rights of occupancy, reserved in the very instrument of cession, never relinquished, and continuously held under the ancient Indian title. The *locus in quo*, therefore, always remained an Indian reservation *pro tanto*.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662.

There is nothing peculiarly sacred in state control over fish and game; and in the West the courts have expressly held that state fish and game laws cannot be enforced against Indians on their own reservations.

Re Blackbird, 109 Fed. 139; Re Lincoln, 129 Fed. 247; State v. Campbell, 53 Minn. 354, 21 L.R.A. 169, 55 N. W. 553.

The reserved rights of hunting and fishing are secured to the Seneca Indians by the word of the United States, given at a public treaty, which is the supreme law of the land.

Fellows v. Blacksmith, 19 How. 366, 372, 15 L. ed. 684, 686.

State police laws must yield when clear-

ly in conflict with the prohibitions of the Constitution (Eubank v. Richmond, 226 U. S. 137, 57 L. ed. 156, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 76, Ann. Cas. 1914B, 192), or with Federal laws or treaties passed or made in the exercise of powers clearly granted.

Sligh v. Kirkwood, 237 U. S. 52, 58, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501; Geofroy v. Riggs, 133 U. S. 258, 266, 267, 33 L. ed. 642, 644, 645, 10 Sup. Ct. Rep. 295.

The United States may, by treaty, continue in force its legislation forbidding the sale of intoxicating liquors to Indians, even upon lands which have been ceded and patented to whites under the town-site laws.

Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794.

And Federal legislation may continue in force after the Indian lands have been allotted in severalty and are held under trust patents, although the Indians have become citizens of the states.

United States v. Pelican, 232 U. S. 442, 447, 58 L. ed. 676, 678, 34 Sup. Ct. Rep. 396; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387.

It cannot be denied that these exertions of Federal power abridged the free exercise of their ordinary police power to control the sale of intoxicating liquors by the states concerned.

Those authorities are applicable here, for the power of the United States over Indian relations does not depend upon Federal ownership of the lands they occupy, but upon the subject-matter.

Perrin v. United States, 232 U. S. 478, 484, 485, 58 L. ed. 691, 694, 695, 34 Sup. Ct. Rep. 387; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 110, 34 Sup. Ct. Rep. 1; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846.

The agreement here involved was within the scope of the treaty-making power vested in the government.

Holden v. Joy, 17 Wall. 211, 243, 21 L. ed. 523, 534; Geofroy v. Riggs, 133 U. S. 258, 267, 33 L. ed. 642, 645, 10 Sup. Ct. Rep. 295.

The operation of the state fish and game laws was excluded by the exercise of Federal power.

The Kansas Indians (Blue Jacket v. Johnson County) 5 Wall. 737, 755, 18 L. ed. 667, 672.

Mr. Blaine F. Sturgis argued the cause, and, with Mr. A. Frank Jenks and Mr. E. E. Woodbury, Attorney General of New York, filed a brief for defendant in error:

When Indians leave their reservations and cross into territory over which the state has governmental jurisdiction, they forfeit the protection accorded them as wards of the Federal government, and subject themselves to the laws of the state, the same as other individuals.

Clairmont v. United States, 225 U. S. 551, 56 L. ed. 1201, 32 Sup. Ct. Rep. 787; Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Ex parte Tilden, 218 Fed. 920.

The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437.

Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient.

Com. v. Alger, 7 Cush. 84.

The ultimate fee of all lands occupied by Indians is in the sovereign, subject to the right of occupation until the same is extinguished under sanction of the government. Fletcher v. Peck, 6 Cranch, 87, 3 L. ed. 162; Johnson v. M'Intosh, 8 Wheat. 543, 5 L. ed. 681; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The treaty making power was never intended to abridge the right of a state to regulate its strictly internal affairs.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Tucker, Limita-

tions on Treaty Making Power 1915, pp. 381, 382.

In construing provisions of a treaty, this court has always upheld the police power of the states, where possible.

Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; Patsone v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 394, 395, 46 L. ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811.

Mr. Herbert B. Lee also argued the cause and filed a brief for defendant in error:

The state of New York, except in so far as it has delegated its inherent powers to the United States, has the jurisdiction described, including jurisdiction over Indians, for the Federal government is a government of delegated powers.

People ex rel. Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, Ann. Cas. 1915D, 367; Cherokee Nation v. Georgia, 5 Pet. 1, 22, 8 L. ed. 25, 32; Mitchel v. United States, 9 Pet. 712, 745, 9 L. ed. 283, 295; New York ex rel. Cutler v. Dibble, 21 How. 366, 16 L. ed. 149; Dick v. United States, 208 U. S. 340, 353, 52 L. ed. 520, 525, 28 Sup. Ct. Rep. 399.

The character of the contracting parties, the subject-matter of the transaction, and the language employed by them, indicate that this grant, far from being a treaty in the proper sense of that term, was in fact the familiar conveyance of an interest in land by one individual or group of common owners to another individual.

Cherokee Nation v. Georgia, 5 Pet. 1, 17, 22, 8 L. ed. 25, 31, 32; United States v. Rogers, 4 How. 567, 572, 11 L. ed. 1105, 1107; New York ex rel. Cutler v. Dibble, 21 How. 366, 370, 16 L. ed. 149, 151; United States v. Kagama, 118 U. S. 375, 381, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; Mitchel v. United States, 9 Pet. 712, 745, 9 L. ed. 283, 295; United States v. 43 Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846.

In Ward v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076, similar to the case at bar, this court held that a treaty in which the Indians reserved the right to hunt upon the land ceded had left them amenable to the game laws of Wyoming.

United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662, did not overrule Ward v. Race Horse, but is distinguishable therefrom, and consistent with the contentions of defendant in error.

Mr. Chief Justice White delivered the opinion of the court, after reading the following memorandum:

This opinion, by direction of the court, had been prepared by Mr. Justice Hughes, and was approved before his resignation. After that event, it was again considered, and was re-adopted.

Fayette Kennedy, Warren Kennedy, and Willis White, Jr., three Seneca Indians, residing on the Cattaraugus Reservation, under the charge of an Indian agent of the United States, were arrested for spearing fish in Eighteen Mile creek, in Erie county, state of New York, at a place outside the Reservation, and there having certain fish in their possession, in violation of § 176 of the conservation law of that state. A justice of the peace committed them to the custody of the sheriff, and a writ of habeas corpus was sued out upon the ground that the commitment was invalid. It was alleged that the persons arrested were tribal Indians, as above stated, and that the place where the offense was committed was within the territory included in "certain grants . . . under sanction of the United States of America, whereby . . . the right was reserved to the said Indians to fish in the waters on and in said lands." The supreme court, at special term, discharged the petitioners, holding that the ancient grants, agreements, and the treaties mentioned, and [560] particularly the treaty made between the Seneca Nation of Indians and Robert Morris, in the year 1797, permitted these Indians to fish in the waters in question "at will, and at all seasons of the year, regardless of the provisions of the game laws of the state of New York." The appellate division of the supreme court, fourth department, reversed the order, and remanded the three Indians to custody (165 App. Div. 881, 151 N. Y. Supp. 138); and the order of the appellate division was affirmed by the court of appeals. The court entertained the Federal question presented, and decided that the state law, notwithstanding the treaty, was applicable. 215 N. Y. 42, 109 N. E. 116.

Section 176 of the conservation law of New York prohibits the taking of fish, or having the same in possession, except as permitted by the article of which it is a part. The validity of these provisions with respect to those subject to the jurisdiction of the state is not questioned. The controversy relates solely to the state power over these Indians.

The argument for the plaintiffs in error has taken a wide range, and embraces an extended history of the dealings with the Six Nations. We do not find it to be necessary to review this interesting history, as

the question to be determined is a narrow one. The *locus in quo* is within the state of New York, being within 1 mile from the point where Eighteen Mile creek empties into Lake Erie. It is not within the territorial limits of the Indian Reservation on which the Senecas reside. It is within the territory which was ceded by the Seneca Nation to Robert Morris by the treaty of the "Big Tree," of September 15, 1797 (7 Stat. at L. 601), and the question turns upon the construction of this treaty; that is, on the consequences which attached to the reservation therein of fishing and hunting rights upon the lands then granted. These lands were a part of the tract covered by the compact made in 1786 between the state of New York and the [561] commonwealth of Massachusetts, known as the Hartford convention. (Journals of Congress, vol. 4, p. 787.) By the terms of this compact for the settlement of existing controversies, Massachusetts ceded, granted, and released to New York all its "claim, right, and title" to the "government, sovereignty, and jurisdiction" of the lands, while New York ceded, granted, and released to Massachusetts "the right of pre-emption of the soil from the native Indians, and all other the estate, right, title, and property" which the state of New York had. Subsequently Massachusetts sold to Robert Morris its "pre-emptive right." By § 12 of the Federal Indian intercourse act of May 19, 1796 (1 Stat. at L. 469, 472, chap. 30), it was provided that no conveyance of lands "from any Indian, or nation or tribe of Indians," should be valid unless "the same be made by treaty or convention, entered into pursuant to the Constitution;" and this was subject to a proviso as to the proposal and adjustment of compensation by state agents in the presence and with the approval of commissioners of the United States. The lands in question were accordingly conveyed to Robert Morris by the treaty above mentioned. From the preamble (as shown by the original on file in the State Department, a copy of which has been produced by the government) it appears that the conveyance was made under the authority of the United States, and in the presence of the United States commissioner, and the treaty was proclaimed by the President after ratification by the Senate on April 11, 1798. The convention is in the form of an indenture by which (identifying the tract as being part of that embraced in the Hartford convention) these lands were granted by the sachems, chiefs, and warriors of the Seneca Nation to Robert Morris, "his heirs and assigns forever." The lands —which were soon resold—thus passed by the conveyance into private ownership, and were subject to the jurisdiction and sovereignty of the [562] state of New York. The grant contained the following reservation, which is in question here:—"Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *á prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the state of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, of all state power of control or reasonable regulation as to lands and waters otherwise admittedly within the jurisdiction of the state.

It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state (Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; Ward v. Race Horse, 163 U. S. 504, 507, 41 L. ed. 244, 245, 16 Sup. Ct. Rep. 1076), subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, [563] go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the state would regulate the

whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both.

It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing, to which the legislation in question was addressed. Adopted when game was plentiful,—when the cultivation contemplated by the whites was not expected to interfere with its abundance,—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the [564] grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U. S. 371, 384, 49 L. ed. 1089, 1093, 25 Sup. Ct. Rep. 662, where the court, in sustaining the fishing rights of the Indians on the Columbia river, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859 [12 Stat. at L. 951], said (referring to the authority of the state of Washington): "Nor does it" (that is, the right of "taking fish at all usual and accustomed places") "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

We have assumed the applicability of the state law in question, as its construction is determined by the decision of the state court. We also assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the *locus in quo*. Ward v. Race Horse and United States v. Winans, supra. There is no question of conflict with any legislation of Congress or with action under its authority; for the case rests on the construction of the treaty. The only action of Federal authority, that is pertinent, is found in the convention itself. It should be added that we have not considered any question relating to conduct or fishing rights upon territory, not ceded, which is comprised within the Indian Reservation; nor is it necessary to deal with other matters which have been discussed in argument touching the relation of the state of New York to the Indians within its borders.

We find no error in the judgment of the state court, and it is accordingly affirmed.

Judgment affirmed.

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[565] STATE OF OHIO ON RELATION OF DAVID DAVIS, Plff. in Err.,

v.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor and Inspector of Elections, and State Supervisor of Elections, et al.

(See S. C. Reporter's ed. 565–570.)

Error to state court — scope of review — non-Federal question.

1. Whether a state, so far as it had the power to do so, had by constitutional amendment vested a part of the legislative power in the people, by reserving a right by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly, is a question of state law, a decision of which by the highest state court is not reviewable by the Federal Supreme Court on writ of error to the state court.

[For other cases, see Appeal and Error, 2072–2226, in Digest Sup. Ct. 1908.]

Congress — reapportionment — recognition of referendum as state legislative power.

2. Congress, by providing in the reap-

NOTE.—On the general subject of writs of error from the United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to Missouri ex rel. Hill v. Dockery, 63 L.R.A. 571.

On initiative and referendum—see note to State ex rel. Davies v. White, 50 L.R.A. (N.S.) 195.

portionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), that the redistricting of the congressional districts should be made by each state "in the manner provided by the laws thereof," manifestly intended that where, by the state Constitution and laws, the referendum is treated as a part of the legislative power, the power thus constituted should be held and treated as the state legislative power for the purpose of creating congressional districts by law.

[Matters as to Congress, see Congress, in Digest Sup. Ct. 1908.]

Congress — reapportionment — recognition of referendum as state legislative power.

3. The recognition by Congress in the congressional reapportionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), of the referendum as a part of the state legislative power for the purpose of creating congressional districts, where, by the state Constitution and laws, the referendum is so regarded, does not violate the provision of U. S. Const. art. 1, § 4, that the "times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations."

[Matters as to Congress, see Congress, in Digest Sup. Ct. 1908.]

Courts — jurisdiction — political question — republican form of government — referendum.

4. Whether or not a state has ceased to be republican in form, within the meaning of the guaranty of U. S. Const. art. 4, § 4, because it has made the referendum a part of the legislative power, is not a judicial question, but a political one, which is solely for Congress to determine.

[For other cases, see Courts, I. e, 2; Constitutional Law, III. c, in Digest Sup. Ct. 1908.]

Courts — jurisdiction — political question — congressional apportionment — referendum — republican form of government.

5. The courts may not treat the provisions of the congressional apportionment act of August 8, 1911 (37 Stat. at L. 13, chap. 5, Comp. Stat. 1913, § 15), under which the referendum is recognized as a part of the state legislative power for the purpose of creating congressional districts, where so treated by the state Constitution and laws, as repugnant to the republican form of government guaranteed by U. S. Const. art 4, § 4, since Congress is vested with the exclusive authority to uphold this guaranty.

[For other cases, see Courts, I. e, 2; Constitutional Law, III. c, in Digest Sup. Ct. 1908.]

[No. 987.]

Submitted May 22, 1916. Decided June 12, 1916.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment denying a writ of mandamus to compel state election officers to disregard the popular vote on a referendum disapproving a statute redistricting the state for the purpose of congressional elections. Affirmed.

The facts are stated in the opinion.

Messrs. Sherman T. McPherson and J. Warren Keifer submitted the cause for plaintiff in error:

The Constitution of the United States is supreme whenever it speaks; and certainly as to matters relating to its own organization and existence.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Ex parte Yarbrough, 110 U. S. 651, 658, 661, 28 L. ed. 274, 276, 277, 4 Sup. Ct. Rep. 152.

The consequences of a Constitution or law should be taken into consideration in construing it.

Slaughter-House Cases, 16 Wall. 36, 78, 21 L. ed. 394, 409; 4 Enc. U. S. Sup. Ct. Rep. 50, ¶ 12, and note 83; 6 Am. & Eng. Enc. Law, 1079, 1080, note 1; Cooley, Const. Lim. 62; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 672, 29 L. ed. 524, 6 Sup. Ct. Rep. 252.

Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is *obsta principiis*, not *de minimis non curat lex*. And so, whenever a particular object is to be effected, the language of the Constitution is always imperative.

Fairbank v. United States, 181 U. S. 283, 291, 45 L. ed. 862, 866, 21 Sup. Ct. Rep. 648, 15 Am. Crim. Rep. 135; 4 Enc. U. S. Sup. Ct. Rep. 50, ¶ 12, p. 83.

The Constitution is a written agreement. As such its meaning does not alter. That which it meant when adopted it means now.

4 Enc. U. S. Sup. Ct. Rep. 36, ¶ 3, note 39; Scott v. Sandford, 19 How. 393, 426, 15 L. ed. 691, 709; McPherson v. Blacker, 146 U. S. 1, 36, 36 L. ed. 869, 877, 13 Sup. Ct. Rep. 3; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 621, 39 L. ed. 1108, 1120, 15 Sup. Ct. Rep. 912; South Carolina v. United States, 199 U. S. 437, 448, 50 L. ed. 261, 264, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Veazie Bank v. Fenno, 8 Wall. 542, 19 L. ed. 486; Locke v. New Orleans, 4 Wall. 172, 18 L. ed. 334; United States v. Harris, 1 Abb. (U. S.) 110, Fed. Cas. No. 15,312; United States v. Block, 4 Sawy. 211, Fed. Cas. No. 14,609; Fox v. McDonald, 101 Ala. 51, 21 L.R.A. 529, 46 Am. St. Rep. 98, 13 So. 416; Evansville v. State, 118 Ind. 441, 4 L.R.A. 93, 21 N. E. 267; 9 Bancroft, History of U. S. Const. 260; Martin v.

Hunter, 1 Wheat. 314, 4 L. ed. 99; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Texas v. White, 7 Wall. 721, 19 L. ed. 236; Minor v. Happersett, 21 Wall. 171, 22 L. ed. 629; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

Courts must look to the history of the times and examine the state of things then existing when it (the Constitution) was framed and adopted in order to correctly interpret its meaning.

4 Enc. U. S. Sup. Ct. Rep. 37, note, 41; Rhode Island v. Massachusetts, 12 Pet. 657, 723, 9 L. ed. 1233, 1260; Missouri v. Illinois, 180 U. S. 208, 219, 45 L. ed. 497, 504, 21 Sup. Ct. Rep. 331.

So as to contemporary exposition.

4 Enc. U. S. Sup. Ct. Rep. 37, 38, note, 43.

A state is described and defined—"a government under which the people live, etc."

Texas v. White, 7 Wall. 700, 19 L. ed. 227.

See, as to constitutional limitations of states,—4 Enc. U. S. Sup. Ct. Rep. 138, 139, note, 61; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672.

The Constitution of the United States renders void and annuls whatever is done in opposition to it.

Poole v. Fleeger, 11 Pet. 185, 212, 9 L. ed. 680, 691; Cummings v. Chicago, 188 U. S. 410, 428, 47 L. ed. 525, 530, 23 Sup. Ct. Rep. 472; 4 Enc. U. S. Sup. Ct. Rep. 180.

The language of the Constitution is imperative on the state legislature, to make laws prescribing the times, places, and manner of holding elections for senators and representatives, and for the electors of President and Vice President.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97.

Perhaps the safest rule of interpretation will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.

Prigg v. Pennsylvania, 16 Pet. 540, 610, 10 L. ed. 1061, 1087.

Nothing in a state Constitution could interfere with the right given to the legislature of the state by art. 1, § 4 of the Constitution of the United States.

1 Hinds, Precedents, p. 653; Martin v. Hunter, supra.

The power exclusively given to the legislature by the supreme organic law of the United States cannot be either delegated or assumed in any manner by the people of the state of Ohio.

McPherson v. Blacker, 92 Mich. 377, 16 L.R.A. 475, 31 Am. St. Rep. 587, 52 N. W. 469, 146 U. S. 1, 35, 36 L. ed. 869, 877, 13 Sup. Ct. Rep. 3; Texas v. White, 7 Wall. 700, 721, 19 L. ed. 227, 236; Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440; Leitensdorfer v. Webb, 20 How. 176, 15 L. ed. 891; Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; Re Green, 134 U. S. 377, 33 L. ed. 951, 10 Sup. Ct. Rep. 586; 6 Am. & Eng. Enc. Law, 1021, note 6; Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St. 77; 1 Bartlett, Election Cases, pp. 47, 60; 1 Hinds, Precedents, pp. 170–172, 180, 181, 286, 287, 300–302, 391, 392, 654, 659, 661–672, 841–843, 1099, 1100, §§ 309, 310, 313, 359, 360, 363, 367, 522, 524, 525, n. 24, 632, 844, 856; 2 Hinds, Precedents, pp. 24–26, 230, 238, 240, 241, 738, 742, §§ 856, 945, 946, 947, 1132, 1133; Baldwin v. Trowbridge, 2 Bartlett, Election Cases, 46; Donnelly v. Washburn, 1 Ells. 495; McCrary, Elections, pp. 109–112.

Each government is sovereign within its own powers.

4 Enc. U. S. Sup. Ct. Rep. 185, note 19; Respublica v. Cobbet, 3 Dall. 467, 473, 1 L. ed. 683, 685; M'Culloch v. Maryland, 4 Wheat. 376, 4 L. ed. 594.

In the instances where (as under U. S. Const. art. 1, § 4) the right is given to exercise a certain power by law, and the right is reserved to Congress to make or alter such legislation, the latter's failure to act leaves the legislature with such full power.

4 Enc. U. S. Sup. Ct. Rep. 175, note 90; Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur.

4 Enc. U. S. Sup. Ct. Rep. 175, 176, note 91; Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96.

There has been some confusion rather than conflict of views growing out of admitting new states and electing representatives at the same time, as provided in a prior convention plan. Such provisions have sometimes been held to anticipate the action of a yet to be chosen legislature, but it has always been held that where there was a state legislature, its power was exclusive.

1 Hinds, Precedents, pp. 649, 653, 655; 1 Bartlett, Election Cases, p. 392; Jameson, Const. Conventions, p. 409.

Such referendum as is provided for by art. 2, of the Constitution of Ohio, is not republican in form for the reason that it seeks to provide a separate popular form

of government, wholly independent of the representative constitutional government established for the United States, and inconsistent with it.

Re Duncan, 139 U. S. 461, 35 L. ed. 224, 11 Sup. Ct. Rep. 573; Luther v. Borden, 7 How. 1, 12 L. ed. 581; 6 Webster's Works, p. 217; 4 Enc. U. S. Sup. Ct. Rep. pp. 319, 330, and notes; Minor v. Happersett, 21 Wall. 162, 175, 176, 22 L. ed. 627, 630, 631; Downes v. Bidwell, 182 U. S. 279, 45 L. ed. 1103, 21 Sup. Ct. Rep. 770; Von Holst, Const. Law, 236, 237; Koehler v. Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; Allyn's Appeal, 81 Conn. 534, 23 L.R.A. (N.S.) 630, 129 Am. St. Rep. 225, 71 Atl. 794; Cooley, Const. Lim. 7th ed. p. 62; 3 Elliot Debates, p. 55; Black, Const. Law, 2d ed. 262; Rice v. Foster, 4 Harr. (Del.) 479; Martin v. Martin, 20 N. J. Eq. 421; United States v. Cruikshank, 92 U. S. 549, 23 L. ed. 590; M'Culloch v. Maryland, 4 Wheat. 419, 4 L. ed. 604; Cohens v. Virginia, 6 Wheat. 418, 5 L. ed. 294; Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. ed. 1233; 12 Hamilton's Works, 28; Federalist, Nos. 10, 14, 48; 2 Elliot, Debates, 253; 3 Elliot, Debates, 225, 233; 5 Elliot, Debates, 136, 239; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 124, 125, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; State v. Swisher, 17 Tex. 448; Clarke v. Rochester, 28 N. Y. 633; Story, Const. 388; Yearman, Study of Government; Bartlett, Election Cases, 446; Cooley, Const. Lim. 194; 15 Jefferson's Writings, 452; 11 Hamilton's Works, 75, 101, 103.

Whenever an action, as in this case, involves a denial of individual rights, courts possess the right and the duty to exclude the operation of the unconstitutional provision, and to regard the question arising as judicial.

Luther v. Borden, 7 How. 1, 54, 59, 12 L. ed. 581, 604, 606; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 127, 128, 56 L. ed. 377, 32 Sup. Ct. Rep. 220; Forsyth v. Hammond, 166 U. S. 519, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; Yick Wo v. Hopkins, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; Boyd v. Nebraska, 143 U. S. 135, 6 L. ed. 103, 12 Sup. Ct. Rep. 375; Coyle v. Smith, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; South Carolina v. United States, 199 U. S. 437, 454, 50 L. ed. 261, 266, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; Taylor v. Beckham, 178 U. S. 548, 578, 44 L. ed. 1187, 1200, 20 Sup. Ct. Rep. 890, 1009; Texas v. White, 7 Wall. 700, 19 L. ed. 227; Re Duncan, 139 U. S. 449, 461, 35 L. ed. 219, 224, 11 Sup. Ct. Rep. 573.

There, necessarily, can be but one legislature of a state, and especially as empowered by art. 1, § 4, of the United States Constitution, to prescribe the "times, places, and manner" of electing representatives.

Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 120, 56 L. ed. 377, 32 Sup. Ct. Rep. 224.

Legislatures are the creatures of the Constitution. They owe their existence to the Constitution.

Luther v. Borden, 7 How. 66, 12 L. ed. 609; Vanhorne v. Dorrance, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; Vattel, Nations, chap. 3, § 34.

Congress must always act "by law" in making or altering the regulations of a state on the subject; it cannot, "by law," authorize a state legislature to act in a particular manner, or to act with an outside agency authorized to reject its action.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717; 2 Hinds, Precedents, § 247, p. 240; 1 Bartlett, Election Cases, p. 52.

Mr. **Edward C. Turner**, Attorney General of Ohio, submitted the cause for defendants in error:

Does the language of U. S. Const. art. 1, § 4, refer only to a bicameral body?

1 Story, Const. §§ 548, 560, pp. 408, 416; 1 Bryce, American Commonwealth, pt. 2, chap. XL. p. 484.

Was said section meant to refer only to a representative body?

State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848.

Is the question presented in this case a justiciable one?

Richardson v. McChesney, 128 Ky. 363, 129 Am. St. Rep. 299, 108 S. W. 322, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

Messrs. **Edmond H. Moore** and **Timothy S. Hogan** also submitted the cause for defendants in error:

The case of McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3, really supports the contention of the defendants.

If the governor has a qualified negative on the acts of the legislature, surely the whole electorate have.

Story, Const. § 527.

[566] Mr. Chief Justice White delivered the opinion of the court:

By an amendment to the Constitution of Ohio, adopted September 3d, 1912, the legislative power was expressly declared to be

vested not only in the senate and house of representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly. And by other constitutional provisions the machinery to carry out the referendum was created. Briefly they were this: Within a certain time after the enactment of a law by the senate and house of representatives, and its approval by the governor, upon petition of 6 per centum of the voters, the question of whether the law should become operative was to be submitted to a vote of the people, and, if approved, the law should be operative; and, if not approved, it should have no effect whatever.

In May, 1915, the general assembly of Ohio passed an act redistricting the state for the purpose of congressional elections, by which act twenty-two congressional districts were created, in some respects differing from the previously established districts, and this act, after approval by the governor, was filed in the office of the secretary of state. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved. Thereupon, in the supreme court of the state, the suit before us was begun against state election officers for the purpose of procuring a mandamus, directing them to disregard the vote of the people on the referendum, disapproving the law, and to proceed to discharge their duties as such officers in the next congressional election, upon the assumption that the action by way of referendum was void, and that the law which was disapproved was [567] subsisting and valid. The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed, it was in substance charged that both from the point of view of the state Constitution and laws and from that of the Constitution of the United States, especially § 4 of article 1, providing that "the times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law, make or alter such regulations, except as to the places of choosing Senators;" and also from that of the provisions of the controlling act of Congress of August 8, 1911 (chap. 5, 37 Stat. at L. 13, Comp. Stat. 1913, § 15), apportioning representation among the states, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. The court below adversely disposed of these contentions, and held that the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

Without going into the many irrelevant points which are pressed in the argument, and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view,—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States, referred to.

1. As to the state power, we pass from its consideration, [568] since it is obvious that the decision below is conclusive on that subject, and makes it clear that, so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power; and therefore the claim that the law which was disapproved and was no law under the Constitution and laws of the state was yet valid and operative is conclusively established to be wanting in merit.

2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress, in 1911, in enacting the controlling law concerning the duties of the states, through their legislative authority, to deal with the subject of the creation of congressional districts, expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since, under the act of Congress dealing with apportionment, which preceded the act of 1911, by § 4 it was commanded that the existing districts in a state should continue in force "until the legislature of such state, in the manner herein

prescribed, shall redistrict such state" (act of February 7, 1891, chap. 116, 26 Stat. at L. 735); while in the act of 1911 there was substituted a provision that the redistricting should be made by a state "in the manner provided by the laws thereof." And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do [569] it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec. vol. 47, pp. 3436, 3437, 3507.

3. To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 of the Constitution and hence void, even if sanctioned by Congress, because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance, for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution. Const. § 4, art. 4. But the proposition and the argument disregard the settled rule that the question of whether that guaranty of the Constitution has been disregarded presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution. Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224. In so far as the proposition challenges the power of Congress, as manifested by the clause in the act of 1911, treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which, from the point of view of § 4 of article 1, previously considered, the Constitution expressly gave the right to do. In so far as the proposition may be considered as asserting, on the other hand, that any attempt by Congress to recognize the referendum as a part of the legislative authority of a state is obnoxious to a republican form of government as provided by § 4 [570] of article 4, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guaranty of a republican form of government, has done something which it is deemed is repugnant to that guaranty, therefore there was automatically created judicial authority to go beyond the limits of judicial power, and, in doing so, to usurp congressional power, on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control, free from judicial interference.

It is apparent from these reasons that there must either be a dismissal for want of jurisdiction, because there is no power to re-examine the state questions foreclosed by the decision below, and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent, as to the result, which of the two be applied. In view, however, of the subject-matter of the controversy and the Federal characteristics which inhere in it, we are of opinion, applying the rule laid down in Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, the decree proper to be rendered is one of affirmance, and such a decree is therefore ordered.

Affirmed.

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[571] STANLEY BROWN, Petitioner,
v.
PACIFIC COAST COAL COMPANY.

(See S. C. Reporter's ed. 571–574.)

Master and servant — fellow servant — delegation of master's duty.

As construed by the state courts, Wash. Laws 1897, chap. 45, imposes an absolute and nondelegable duty upon owners or operators of coal mines to inspect, prevent, and remove any accumulation of gas, so that a fire boss, one of whose duties is

NOTE.—As to master's liability for breach of nondelegable duties by superior servant—see note to O'Neil v. Great Northern R. Co. 51 L.R.A. 588.

As to what duties are deemed to be nondelegable—see note to Quigley v. Levering, 54 L.R.A. 63.

As to assignability of duty of inspection—see note to Walkowski v. Penokee & G. Consol. Mines, 41 L.R.A. 109.

As to what servants are deemed to be in the same common employment apart from statute, where no questions as to vice principalship arise—see note to Sofield v. Guggenheim Smelting Co. 50 L.R.A. 417.

On statutory duty to ventilate and keep mine clear from gas—see note to Deserant v. Cerillos Coal R. Co. 44 L. ed. U. S. 1127.

to test for gas, is not a fellow servant of the miners, so far as he is engaged in the performance of that duty.

[For other cases, see Master and Servant, II. d, 2; II. d, 5, d, in Digest Sup. Ct. 1908.]

[No. 303.]

Argued March 14, 1916. Decided June 12, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Washington in favor of plaintiff in an action for personal injuries received by a miner from the explosion of gas. Judgment reversed, and judgment of District Court affirmed.

See same case below, 128 C. C. A. 247, 211 Fed. 869; on rehearing, 130 C. C. A. 625, 214 Fed. 255.

The facts are stated in the opinion.

Mr. H. R. Lea argued the cause, and Messrs. Charles F. Consaul and Charles C. Heltman filed a brief for petitioner:

The provisions of the Washington statutes are mandatory and nondelegable.

Costa v. Pacific Coast Co. 26 Wash. 138, 66 Pac. 398; Czarecki v. Seattle & S. F. R. & Nav. Co. 30 Wash. 288, 70 Pac. 750; Delaski v. Northwestern Improv. Co. 61 Wash. 260, 112 Pac. 341; Nalewaja v. Northwestern Improv. Co. 63 Wash. 393, 115 Pac. 847; Deserant v. Cerillos Coal R. Co. 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573.

Mr. C. H. Farrell argued the cause, and, with Messrs. W. B. Stratton, J. H. Kane, and Stanley J. Padden, filed a brief for respondent:

Shot Lighter Rigghi was a fellow servant of Stanley Brown at common law.

Alaska Treadwell Gold Min. Co. v. Whelan, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; Quincy Min. Co. v. Kitts, 42 Mich. 34, 3 N. W. 240, 16 Am. Neg. Cas. 58; Coal & Min. Co. v. Clay (Consolidated Coal & Min. Co. v. Floyd) 51 Ohio St. 542, 25 L.R.A. 848, 38 N. E. 610; Davis v. Trade Dollar Consol. Min. Co. 54 C. C. A. 636, 117 Fed. 122; Browne v. King, 40 C. C. A. 545, 100 Fed. 561; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810; Westinghouse, C. K. & Co. v. Callaghan, 19 L.R.A.(N.S.) 361, 83 C. C. A. 669, 155 Fed. 397; Minneapolis v. Lundin, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614; Stephens v. Doe, 73 Cal. 26, 14 Pac. 378.

He was also a fellow servant under the Washington statute.

Hughes v. Oregon Improv. Co. 20 Wash. 294, 55 Pac. 119; 1 Shearm. & Redf. Neg. 4th ed. § 235; Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 12 U. S. App. 490, 56 Fed. 810; Lehigh Valley Coal Co. v. Jones, 86 Pa. 432, 10 Mor. Min. Rep. 30; Brazil & C. Coal Co. v. Cain, 98 Ind. 282; Peterson v. Whitebreast Coal & Min. Co. 50 Iowa, 673, 32 Am. Rep. 143, 11 Mor. Min. Rep. 1; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Northern P. R. Co. v. Peterson, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; Northern P. R. Co. v. Charless, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; Dollar v. Northwestern Improv. Co. 72 Wash. 1, 129 Pac. 578; Sommer v. Carbon Hill Coal Co. 46 C. C. A. 255, 107 Fed. 230; Pacific Coast Coal Co. v. Brown, 128 C. C. A. 247, 211 Fed. 869, 130 C. C. A. 625, 214 Fed. 255.

[572] Mr. Justice Holmes delivered the opinion of the court:

This is an action for personal injuries caused to the petitioner, the plaintiff, a miner, by an explosion of gas in a coal mine, in consequence, it is alleged, of the defendant's neglect of its duty so to ventilate the mine as to make an explosion impossible. The trial judge left to the jury questions of the plaintiff's contributory negligence or assumption of risk, but instructed them that the law required the defendant to provide a sufficient amount of ventilation; that the duty of the inspection, prevention, and removal of any accumulation of gas was a personal duty of the defendant that could not be delegated; and that an employee, one of whose duties was to test for gas, was not a fellow servant of the miners so far as he was engaged in the performance of that duty. There was a verdict for the plaintiff, which was set aside by the circuit court of appeals. 128 C. C. A. 247, 211 Fed. 869; 130 C. C. A. 625, 214 Fed. 255.

The duty of the fire boss who exploded the gas was to test for gas as well as to fire the shots in blasting, which last he was about to do. It is unnecessary to go into further details, as the only matter that requires discussion is whether the circuit court of appeals was right in reversing the judgment on the ground that this man was a fellow servant of the plaintiff, and that the defendant's duty to secure ventilation was not absolute. The statute of 1897, which was in force at the time of the ac-

cident, September 7, 1910, enacts that the owner or operator of every coal mine "shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein," fixing a minimum amount, "and said air must be made to circulate through the shafts, levels, stables, and working places of each mine and on the traveling roads to and from all [573] such working places." Then the division of mines into districts or splits, and the number of men to be employed in each, are provided for, and then the act goes on: "Each district or split shall be ventilated by a separate and distinct current of air, conducted from the down-cast through said district, and thence directed to the up-cast. . . . In all mines where fire damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book," etc. Laws of 1897, chap. 45, § 4; Bal. Wash. Code, § 3165; Rem. & Bal. Code, § 7381.

In the case of a similar accident occurring under the same law, the supreme court said: "The duty of inspection, prevention, and removal of any accumulation of gas is imposed on the coal company. This duty is personal, and cannot be delegated. . . . The gas tester, under the facts in this case, was not a fellow servant with the plaintiff. He was the representative of principal duties of the defendant." The refusal of the instruction that the gas tester was a fellow servant with the plaintiff, a miner, was upheld. Costa v. Pacific Coast Co. 26 Wash. 138, 142, 143, 66 Pac. 398. The language of this case was quoted and the same principle applied in Czarecki v. Seattle & S. F. R. & Nav. Co. 30 Wash. 288, 294, 295, 70 Pac. 750. And the same words were repeated by the judge to the jury in the present case.

When this case came before the circuit court of appeals, it seems to have been thought that Costa v. Pacific Coast Co. arose under an earlier statute. Upon a petition for rehearing, the court merely stated that no decision of the supreme court had been found that held the person required to examine the working places every morning to be the representative of the master, and that the fire boss must be regarded as a fellow servant with the plaintiff. We are unable to reconcile this view with the [574] language that we have quoted. It now is suggested that there is a distinction between the point decided there and here, the failure there having been to warn the miner, and that the remarks of the court were *obiter dicta*. We shall go into no nice inquiry upon this point. The statements were statements of the principle of the decision, and it was the duty of the circuit court of appeals to follow them. Still less does it matter in a case like this, if, as is said, the latter court had decided otherwise at an earlier time.

Concerning the facts to which the ruling here dealt with applied, it is enough to say that the evidence warranted a finding by the jury that the defendant had neglected the duties absolutely imposed upon it, without now going into the details of the different views that might have been taken. The other matters that have been argued here, as to the plaintiff's contributory negligence, etc., need not be mentioned further than to say that we see no ground in them for a different result from that which we have reached.

Judgment reversed.

Judgment of District Court affirmed.

SUPREME LODGE, KNIGHTS OF PYTHIAS, Plff. in Err.,
v.
S. MIMS.

(See S. C. Reporter's ed. 574–582.)

Error to state court — Federal question — rights asserted under Federal charter.

1. The Federal Supreme Court has jurisdiction of a writ of error to a state court to review a judgment in favor of plaintiff in a suit which necessarily turns on the construction of an act of Congress incorporating the defendant, under which the latter justifies.

[For other cases, see Appeal and Error, 1751–1797, in Digest Sup. Ct. 1908.]

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884, and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

On the right of mutual benefit association to raise rates—see notes to Reynolds v. Supreme Council, R. A. 7 L.R.A.(N.S.) 1154; Dowdall v. Supreme Council, C. M. B. A. 31 L.R.A.(N.S.) 417, and Thomas v. Knights of Maccabees, L.R.A.1916A 789

Benevolent societies — re-organization — membership in new corporation.

2. A member of a voluntary unincorporated fraternal and benevolent association, the successor of an earlier corporation, became, upon incorporation under the act of June 29, 1894 (28 Stat. at L. 96, chap. 119), a member of the new corporation by virtue of his assent to § 3 of that act, providing that all claims, accounts, things in action, or other matters of business of whatever nature, now existing, for or against the present association, shall survive and succeed to and against the new corporation.

Benevolent societies — changes in constitution — increase of rates.

3. The right of a fraternal and benevolent order, under its charter of June 29, 1894 (28 Stat. at L. 96, chap. 119), § 4, to amend its constitution at pleasure, provided that such constitution or amendments thereof do not conflict with the laws of the United States or of any state, extends to an increase in its insurance rates.

Benevolent societies — changes in constitution — increase of rates.

4. A benevolent and fraternal order having power to alter and amend its constitution at will may raise its insurance rates, notwithstanding a clause in its laws that monthly payments of a member of the endowment rank shall continue the same so long as his membership continues, since this clause is not to be regarded as a contract, but as a regulation, subject to the possibility that a raise in rates may be necessary in order to pay benefits.

Benevolent societies — re-organization —increase in rates.

5. The assumption, under the act of June 29, 1894 (28 Stat. at L. 96, chap. 119), § 3, investing the fraternal order incorporated by that act with all "claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present" unincorporated association, of an existing insurance contract with a member, cannot be deemed the assumption of a contract for immutable assessments, where both the old and new organizations possessed the power to amend their laws.

[No. 345.]

Argued May 1 and 2, 1916. Decided June 12, 1916.

IN ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which affirmed, with a modification, a judgment of the District Court of Dallas County, in that state, in favor of plaintiff in a suit against a fraternal and benevolent order to recover back the dues paid by him as a member. Reversed.

See same case below, — Tex. Civ. App. —, 167 S. W. 835.

The facts are stated in the opinion.

Messrs. M. M. Crane and H. P. Brown argued the cause, and, with Messrs. Edwin Crane, James P. Goodrich, Ward H. Watson, James E. Watson, and Sol. H. Esarey, filed a brief for plaintiff in error:

The charter of the plaintiff in error is a public statute of the United States. By virtue of the Constitution of the United States, this court is the final arbiter of all questions relating thereto and depending thereon.

Texas & P. R. Co. v. Hill, 237 U. S. 208, 59 L. ed. 918, 35 Sup. Ct. Rep. 575; Texas & P. R. Co. v. Marcus, 237 U. S. 215, 59 L. ed. 924, 35 Sup. Ct. Rep. 578.

The judicial construction of a charter of a Federal corporation constitutes a suit arising under the laws of the United States.

Pacific R. Removal Cases, 115 U. S. 1, 29 L. ed. 319, 15 Sup. Ct. Rep. 1113; Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, 10 Am. Neg. Cas. 585.

The mere acceptance of dues or premiums by the plaintiff in error did not constitute an assumption of the contract or policy sued upon.

Eddy v. Hinnant, 82 Tex. 354, 18 S. W. 562; Hutchinson v. International & G. N. R. Co. —Tex. Civ. App. —, 111 S. W. 1106.

The policy sued upon and application therefor, the old policies for which it was substituted, the constitution and by-laws, construed together, gave to the old Supreme Lodge the right to raise the rates in the event it should become necessary so to do.

Union P. R. Co. v. Myers, 115 U. S. 1, 25, 29 L. ed. 319, 327, 5 Sup. Ct. Rep. 1113; Messer v. Grand Lodge, A. O. U. W. 180 Mass. 321, 62 N. E. 252; Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696; Williams v. Supreme Council, C. M. B. A. 152 Mich. 1, 115 N. W. 1060; Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Barbot v. Mutual Reserve Fund Life Asso. 100 Ga. 681, 28 S. E. 498; Mutual Reserve Fund Life Asso. v. Taylor, 99 Va. 208, 37 S. E. 854; Richmond v. Supreme Lodge, O. M. P. 100 Mo. App. 8, 71 S. W. 736; Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 830; Head Camp, P. J. W. W. v. Woods, 34 Colo. 1, 81 Pac. 261; Shepperd v. Bankers' Union, 77 Neb. 85, 108 N. W. 188, 110 N. W. 1019; Conner v. Supreme Commandery, G. C. 117 Tenn. 549, 97 S. W. 306; Champion v. Hannahan, 138 Ill. App. 387; Pierce v. Bankers' Union, 140 Ill. App. 495; Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Fullenwider v. Supreme Council, R. L. 73 Ill. 331, 180 Ill. 621, 72 Am. St. Rep. 239,

54 N. E. 485; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7; Bartram v. Supreme Council, R. A. 6 Ont. Week. Rep. 404; Haydel v. Mutual Reserve Fund Life Asso. 98 Fed. 200, 44 C. C. A. 169, 104 Fed. 718.

The defendant in error is now estopped from denying the right of plaintiff in error to increase the rates as it did in 1910, if necessary, because he had acquiesced in that right and concurred with the old corporation in the fact that it had such power.

Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696; Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11; Manning v. San Antonio Club, 63 Tex. 166, 51 Am. Rep. 639; 29 Cyc. 70.

When an old corporation issues a policy or a contract, and a new corporation is organized and receives the dues on the old certificates issued by its predecessor, the obligation thus existing by reason of the dues received must be measured and the liabilities must be fixed by the laws of the corporation.

Bollman v. Supreme Lodge, K. H. — Tex. Civ. App. —, 53 S. W. 722, 54 S. W. 246; Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696; Gibbs v. Knights of Pythias, supra.

Any liability under the certificate sued on must be treated as if it were a liability under a certificate issued by the new corporation, and limited and controlled by the new corporation's charter and by-laws.

Watson v. National Life & T. Co. 111 C. C. A. 134, 189 Fed. 872; Niblack, Ben. Soc. 2d ed. § 18, pp. 33, 34; 29 Cyc. 70.

Messrs. James E. Watson, H. P. Brown, M. M. Crane, and Edward Crane filed a separate brief for plaintiff in error:

The old corporation issuing the contract sued on reserved the right to amend its by-laws, and, if necessary, to re-rate its membership.

Korn v. Mutual Assur. Soc. 6 Cranch, 195, 3 L. ed. 196; Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7; Newman v. Supreme Lodge, K. P. — Miss. —, L.R.A.1916C, 1051, 70 So. 241; Supreme Lodge, K. H. v. Bieler, — Ind. —, 105 N. E. 244; Supreme Commandery, K. G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Barbot v. Mutual Reserve Fund Life Asso. 100 Ga. 681, 28 S. E. 498; Haydel v. Mutual Reserve Fund Life Asso. 98 Fed. 200; Mutual Reserve Fund Life Asso. v. Taylor, 99 Va. 208, 37 S. E. 854; Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 830.

The by-law fixing the level premium rate is no more sacred than the provision in the by-laws and charter authorizing it to change these by-laws. The level rate premium was subordinate to the power to change in the case of necessity.

Korn v. Mutual Assur. Soc. 6 Cranch, 195, 3 L. ed. 196; Powers v. Clark, 127 N. Y. 425, 28 N. E. 402.

It being the purpose of this organization to insure its membership and to pay the insurance upon the death of a member, its by-laws should be so construed as to make the accomplishment of that purpose possible. It must be conceded that the persons who made the by-law fixing the level premium rate had no greater authority than those who subsequently changed it.

Richardson v. Union Cong. Soc. 58 N. H. 189; Supreme Lodge, K. P. v. Kutscher, 179 Ill. 346, 70 Am. St. Rep. 115, 53 N. E. 620; Supreme Lodge, K. P. v. Trebbe, 179 Ill. 353, 70 Am. St. Rep. 120, 53 N. E. 730; Dornes v. Supreme Lodge, K. P. 75 Miss. 478, 23 So. 191; Christ Church v. Pope, 8 Gray, 142.

It did have the power to change these rates, in order to meet its liability, even though they had been fixed under the level premium by-law.

Thomas v. Knights of Maccabees, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7; Fullenwider v. Supreme Council, R. L. 73 Ill. App. 331, 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Newman v. Supreme Lodge, K. P. — Miss. —, L.R.A.1916C, 1051, 70 So. 241; Messer v. Grand Lodge, A. O. U. W. 180 Mass. 321, 62 N. E. 252; Conner v. Supreme Commandery, G. C. 117 Tenn. 549, 97 S. W. 306; Williams v. Supreme Council, C. M. B. A. 152 Mich. 1, 115 N. W. 1060; Bartram v. Supreme Council, R. A. 6 Ont. Week. Rep. 404; Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 150; Supreme Lodge, K. H. v. Bieler, — Ind. —, 105 N. E. 244.

If this were a suit against the old corporation issuing this policy, it must be held that the old corporation would have had the right to increase these rates had it become necessary so to do. But when we find that the defendant in error became a member of the new corporation created by its charter in 1894, then it must follow that his rights under his policy, issued by the old corporation, and the liabilities of the new corporation to him, must be measured by the charter and by-laws of the new corporation.

Bollman v. Supreme Lodge, K. H. — Tex. Civ. App. —, 53 S. W. 722, 54 S. W. 246; Wineland v. Knights of Maccabees, 148 Mich. 608, 112 N. W. 696; Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11; Watson v. National Loan & T. Co. 1'

C. A. 134, 189 Fed. 872; Niblack, Ben. Soc. 2d ed. § 18, pp. 33, 34; 29 Cyc. 70.

The leading principle of fraternal insurance is that there must be equality between the members.

Mock v. Supreme Council, R. A. 121 App. Div. 474, 106 N. Y. Supp. 155; Reynolds v. Supreme Council, R. A. 192 Mass. 150, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 150; Hall v. Western Travelers' Acci. Asso. 69 Neb. 601, 96 N. W. 170; Swan v. Mutual Reserve Fund Life Asso. 155 N. Y. 9, 49 N. E. 258.

The new corporation had no authority to receive members except as authorized by its charter, and it received the membership with the express understanding that it, the corporation, would have the power to change its by-laws when it became necessary. It had no power to repeal a section of its charter. That could be done by the American Congress, but not by the corporation. That charter was the measure of its power. It could exercise all the powers conferred upon it, but none other. One of the powers not conferred upon it was to deny itself the privilege by contract of amending its by-laws. Such a contract, depriving it of such power, would be *ultra vires* and void.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 35, 64 L.R.A. 390, 72 Am. St. Rep. 245, 54 N. E. 619.

Members coming from an old corporation into a new corporation come subject to the by-laws of the new corporation.

Gibbs v. Knights of Pythias, 173 Mo. App. 34, 156 S. W. 11; Watson v. National Life & T. Co. 111 C. C. A. 134, 189 Fed. 872; Niblack, Ben. Soc. § 18, pp. 33, 34; 29 Cyc. 70.

The power to conduct a fraternal order carries with it the power to adopt all reasonable regulations and by-laws necessary to make the order effective, even to increasing rates.

Ebert v. Mutual Reserve Fund Life Asso. 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 412, 20 N. E. 479; Clark v. Mutual Reserve Fund Life Asso. 14 App. D. C. 154, 43 L.R.A. 395; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 894; May v. New York Safety Reserve Fund Soc. 14 Daly, 389, 13 N. Y. S. R. 70; Willison v. Jewelers' & T. Co. 30 Misc. 197, 61 N. Y. Supp. 1126; 10 Cyc. 1097.

Mr. Lawrence C. McBride argued the cause, and, with Messrs. Edward Gray and Joseph E. Cockrell, filed a brief for defendant in error:

The charter of plaintiff in error, as granted by the Congress, did not, expressly or impliedly, give it the right to raise the rate of assessment, or otherwise affect Mims's contract, as was attempted by the law passed by plaintiff in error in 1910, and complained of herein.

Smythe v. Supreme Lodge, K. P. 198 Fed. 967, 137 C. C. A. 32, 220 Fed. 438; Wright v. Knights of Maccabees, 48 Misc. 558, 95 N. Y. Supp. 996, 196 N. Y. 391, 31 L.R.A. (N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; Rosenfeld v. Boston Mut. L. Ins. Co. — Mass.—, 110 N. E. 305; Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417, 54 L. ed. 259, 30 Sup. Ct. Rep. 118; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

The inhibition in defendant's charter as to having a constitution with power to amend the same being that such constitution or amendments must not conflict with of the laws of the United States or of any state, the amended by-laws complained of are inoperative, not only because they conflict with the common law of the state of Texas, as announced in the instant case and in prior Texas cases which same follows (Ericson v. Supreme Ruling, F. M. C. 105 Tex. 170, 146 S. W. 160), but such amended laws are likewise of no effect because in conflict with the 5th Amendment and with the Texas Constitution.

Kent v. Quicksilver Min. Co. 78 N. Y. 159, 4 Mor. Min. Rep. 47; Parish v. New York Produce Exch. 169 N. Y. 34, 56 L.R.A. 149, 61 N. E. 977.

The right given in defendant's charter to "have a constitution and shall have power to amend same at pleasure, provided that such constitution and amendments thereof do not conflict with the laws of the United States or of any state," is certainly no greater than the right usually reserved to a state to amend or alter a charter granted by it, and the authorities are to the effect that such reserved power of alteration and amendment is not without limit; that alterations must be reasonable and consistent with the scope and object of the act of incorporation; that a right reserved by the general statutes to amend or repeal privileges and franchises conferred by the charter is one thing, but the power to take from the stockholders or others, rights or property interests acquired or vested before such repeal or amendment, is another and quite a different thing. The first comes within the legislative authority; the second lies

beyond the limits of such authority, because the legislature cannot defeat or impair rights previously vested, which have sprung up or grown out of such corporate privileges or franchises, while the corporation was allowed to exercise the same.

Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Hill v. Glasgow R. Co. 41 Fed. 610; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961.

Under this reserved power legislatures can only affect future contracts; they can in nowise change or alter corporate contracts already entered into, so as to affect the rights of parties already acquired.

Bank of the Old Dominion v. McVeigh, 20 Gratt. 457.

A general power reserved either by statute or by the constitution of a society, to amend its by-laws, does not authorize an amendment impairing vested rights of the members; the reserved right to amend is not intended to cover the case of existing members, and was applicable solely to those who should join the order after amendments.

Beach v. Supreme Tent, K. M. 177 N. Y. 100, 69 N. E. 282.

A by-law must be reasonable. This rule of reasonableness forbids any retroactive efficacy in abrogation of subsisting contract rights; and the articles of association and by-laws existing at the time of acquisition of membership are in many respects to be regarded as establishing between the association and every member, and among themselves, such rights of a fundamental character.

Thomp. Corp. 2d. ed. § 999.

The function of a by-law is to prescribe the rights and duties of the members with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing between the members *inter se*. The proper office of by-laws is to regulate the incidental business of a corporation. They should not affect rights of property or create obligations unknown to the law.

1 Thomp. Corp. 2d ed. § 975.

The very fact alone that the new law undertook to apply the rate in accordance with the attained age and occupation of the member was a breach of the contract.

Ayers v. Grand Lodge, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020.

As likewise was the attempt of the Supreme Lodge to delegate its functions to the board of control, which has been expressly decided to be without effect in numerous cases against this self-same plaintiff in error.

Supreme Lodge, K. P. v. McLennan, 171 Ill. 417, 49 N. E. 531; Supreme Lodge, K. P. v. Stein, 75 Miss. 107, 37 L.R.A. 775, 65 Am. St. Rep. 589, 21 So. 559.

The right to decrease the financial value of the benefit certificate does not exist under the general agreement of the member, as, for instance, to be governed by all the laws of the order now in force or hereafter to be enacted.

Supreme Lodge, K. P. v. Weller, 93 Va. 605, 25 S. E. 891; Richter v. Supreme Lodge, K. P. 137 Cal. 8, 69 Pac. 483; Pearson v. Knight Templars & M. Indemnity Co. 114 Mo. App. 283, 89 S. W. 588; Morton v. Supreme Council, R. A. 100 Mo. App. 76, 73 S. W. 259; Knights Templars & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 638; Dowdall v. Supreme Council, C. M. B. A. 196 N. Y. 405, 31 L.R.A.(N.S.) 417, 89 N. E. 1075; Evans v. Southern Tier Masonic Relief Asso. 182 N. Y. 453, 75 N. E. 317; Ericson v. Supreme Ruling, F. M. C. 10. Tex. 170, 146 S. W. 160; Green v. Supreme Council, R. A. 206 N. Y. 591, 100 N. E. 411; Smythe v. Supreme Lodge, K. P. 198 Fed. 967, 137 C. C. A. 32, 220 Fed. 438; Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1074.

Messrs. Thomas F. West and Lawrence C. McBride also filed a brief for defendant in error:

If it appears from the face of the record that the decision of the state court is entirely consistent with the construction of a Federal statute contended for by the plaintiff in error, no case is made out for the appellate jurisdiction of the Supreme Court of the United States.

Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 L. ed. 105.

When the jurisdiction of this court is invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right so set up and claimed was expressly denied, or that such was the necessary effect of the judgment in law.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did base it upon the latter ground, the Supreme Court will not take jurisdiction, even though it thinks the state court decision erroneous.

Klinger v. Missouri, 13 Wall. 257, 20 L. ed. 635.

A decision by a state court, holding that the rights of parties who make conflicting claims under United States patents are determined by a contract which they have made, and also that plaintiff's claim is defeated by estoppel, does not involve a Federal question for review by the Supreme Court of the United States on writ of error.

Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

Where the Federal questions involved in a case were correctly decided by the state supreme court, the judgment of that court must be affirmed without determining any other questions not of a Federal character.

Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939.

If the Federal question raised in the state court was erroneously decided, then this court must inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue.

Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

Where the supreme court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hammond v. Connecticut Mut. L. Ins. Co. 150 U. S. 633, 37 L. ed. 1206, 14 Sup. Ct. Rep. 236.

Fair color for claiming that rights under the Federal Constitution have been violated is necessary to give jurisdiction to the Supreme Court of the United States on writ of error to a state court, based on such Federal question.

Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

A decision which does not deny the validity of an act of Congress, or deny any right claimed under it, does not present a Federal question merely because the rights of the parties were in some respects based upon an act of Congress.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

It does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction, because the suit might have been brought in a circuit court of the United States, or removed thereto from the state court, on the ground that it arose under the laws of the United States.

Texas & P. R. Co. v. Griffin, 151 U. S. 105, 38 L. ed. 90, 14 Sup. Ct. Rep. 259.

The Federal Supreme Court, on a writ of error to a state court, has not the jurisdiction of a general reviewing court in error, but is limited to a consideration of the specific instances of denials of Federal rights.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220.

The legal correctness of the rule by which the damages were ascertained and assessed in the state court is not reviewable in the Supreme Court of the United States.

Gelston v. Hoyt, 3 Wheat. 246, 4 L. ed. 381.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit against a corporation chartered by Congress on June 29, 1894 (chap. 119, 28 Stat. at L. 96), to recover all sums paid by the plaintiff, the defendant in error, to the defendant and its predecessors; the ground alleged being that the defendant, the plaintiff in error, has demanded monthly dues in excess of its rights, and thereby has entitled the plaintiff to recover all that he had paid, with interest.

The facts are as follows: The plaintiff originally took out two certificates of insurance from an earlier corporation of the same name, the charter of which expired on [576] August 5, 1890. In May, 1885, he surrendered these certificates and took out a new one in what was called the Fourth Class, by which, in consideration of his original declarations and representations, and of the payment "of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted and shall be in good standing under said laws," the sum of $3,000 was to be paid to the plaintiff's wife, or such other beneficiary as he might direct in proper form, upon notice and proof of death and good standing at the time; provided, as hereafter stated. It was further stipulated that any violation of the conditions mentioned or the requirements of the laws governing this rank should avoid all claims. By the certificate of incorporation the corporation had power "to alter and amend its Constitution and by-laws at will;" the laws of 1880, then in force, provided that "these laws [regulating assessments *inter alia*] may be altered or amended at any regular session of the Supreme Lodge K. of P.;" and by his original application the plaintiff agreed to conform to the laws and regulations of the order then in force or that might thereafter be enacted, or submit to the penalties therein contained.

The plaintiff contends that his contract took him out of these reiterated provisions for possible change; and his ground is that by article 5, § 4, of the laws of 1884, creating the Fourth Class, the endowment fund for the payment of benefits in that class was to be derived from monthly payments from each member for each $1,000 of endowment, to be graded according to the age of the member at the time of making application, and his expectancy of life, the age to be taken at the nearest birthday, "Said monthly payments shall be based upon the average expectancy of life of the applicant, and shall continue the same so long as his membership continues." A table appended gave the rate for the different ages from [577] twenty-one to sixty. At that time members were transferred to the Fourth Class at the original entry age, which, in the plaintiff's case, was forty-two. These same laws of 1884 repeated the former provision as to amendment by the Supreme Lodge, now requiring a two-thirds vote. The recension of 1886 repeated the last-mentioned provision, and set forth a form of application by which the applicant agreed not only, as heretofore, that he, but also that "this contract, shall be controlled" by the laws then in force or that might be enacted thereafter. The power to alter was applied in 1888 to the payments to be made by the Fourth Class. The board of control was ordered to rerate members transferred to the Fourth Class as the plaintiff was, so that thereafter they should pay as of the age at which they were transferred, instead of that at which they first became members. Thereafter the plaintiff paid as of the age of forty-eight.

After the charter expired, in 1890, the business was kept going under the same name by a voluntary association, the plaintiff paying his assessments as before, until on June 29, 1894, the act of Congress mentioned incorporated certain persons named, "officers and members of the Supreme Lodge Knights of Pythias," by the name of "The Supreme Lodge Knights of Pythias," and authorized them to use the powers "incidental to fraternal and benevolent corporations within the District of Columbia." By the 3d section of the charter "all claims, accounts, debts, things in action, or other matters of business of whatever nature now existing for or against the present Supreme Lodge Knights of Pythias, mentioned in § 1 of this act, shall survive and succeed to and against the body corporate and politic hereby created; provided that nothing contained herein shall be construed to extend the operation of any law which provides for the extinguishing of claims or contracts by limitations of time." This is the main ground upon which the defendant is [578] sought to be charged with the certificate issued by the former corporation. By § 4 "said corporation shall have a constitution and shall have power to amend the same at pleasure; provided, that such constitution or amendments thereof do not conflict with the laws of the United States or of any state." Amendments to the laws of the association were adopted this same year, 1894, by one of which the existing rates were retained, and it was provided that each member of the endowment rank should continue to pay the same amount each month thereafter so long as he remained a member, "unless otherwise provided for by the Supreme Lodge or board of control of the endowment rank." A similar provision was made in 1900, but the rate for the age of forty-eight was made $2.45, or $7.35 for the $3,000 in the certificate. The plaintiff paid the rates as established from time to time.

The split came in 1910. In that year the corporation passed a law providing for a rerating of every member of the Fourth Class on January 1, 1911, in accordance with his attained age and occupation, under which the plaintiff's monthly payment would be raised to $34.80, unless he accepted one of several options offered to him. It should be added that his occupation played no part, as it was not ranked as hazardous. He was notified, but declined to pay or otherwise accede to the change. On January 20, 1911, he tendered $22.05 for the months of January, February, and March of that year, the tender was refused, and in May this suit was begun. The court of civil appeals affirmed a judgment for the plaintiff on a verdict directed by the trial court, modifying it so far as to confine the recovery to payments made since the issue of the certificate of 1885, with interest. An application to the supreme court for a writ of error was refused.

There is a motion to dismiss, but as the case necessarily will turn on the construction of the present charter, an act of Congress, and the defendant justifies under it, the [579] motion is denied. Creswill v. Grand Lodge, K. P. 225 U. S. 246, 258, 56 L. ed. 1074, 1078, 32 Sup. Ct. Rep. 822. There is no ground for treating the plaintiff as not having come into the new company by virtue of § 3. That section provided for his doing so, and when he was treated and acted as a member, the presumption is conclusive that he did so in pursuance of the law that authorized it.

We assume without argument that by § 3 of the charter, and his assent thereto, the plaintiff became a member of the organization, with whatever rights he might

have as such. It is not to be conceived, however, that the charter was intended to create a privileged class, or that the right of the corporation to amend its laws was less in his case than in that of one joining after 1894. As to later members, we can have no doubt, notwithstanding the difference of opinion in state courts, that the right to amend extends to a change in the rates to be paid. Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. Its charter expressly provides by § 5 that it "shall not engage in any business for gain; the purpose of said corporation being fraternal and benevolent." It is manifest, therefore, that it would be a perversion of its purposes if, through some ambiguity of phrase, the necessary source of benefits were closed in favor of certain members, while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other cause, either they must pay more or the beneficiary take less.

[580] The same conditions applied to the original corporation, and the plaintiff testifies that he understood them. He says in so many words that he knew that the only source of revenue to meet his and other policies was from assessments of the insured, and that if, after a proper rate was fixed for a membership of five thousand, the membership fell to two thousand, the rate would have to be increased if the obligations were to be met. The statute and the words of the law of the company under which the plaintiff entered the Fourth Class should be construed in the light of these considerations. In determining his rights it is important to bear in mind that there was no specific promise to him, like the promise to pay, in the certificate, but that his whole reliance is upon a law of the corporation; and that he had notice that all laws of the corporation were liable to be repealed. The only language in the certificate bearing on the matter pointed to possible changes, one condition being the payment of all monthly payments "as required." It was obvious and understood that, to pay a benefit, an increase in the assessment might be necessary. In our opinion the present charter, like the first, must be construed to authorize such an increase, and the clause in the law of 1884, relied upon,—that the payments should continue the same so long as the membership continued,—was not a contract, but was a regulation subject to the possibility inherent in the case. More than ambiguous words in an amendable law would be needed to establish a departure from the ground on which the relation of the parties obviously stood, and to create a privilege that attacked the corporation in its very life. Compare the language in Supreme Council, R. A. v. Green, 237 U. S. 531, 542, 59 L. ed. 1089, 1100, L.R.A.1916A, 771, 35 Sup. Ct. Rep. 724, and the same case below, sub nom. Reynolds v. Supreme Council, R. A. 192 Mass. 150, 157, 7 L.R.A.(N.S.) 1154, 78 N. E. 129, 7 Ann. Cas. 776.

The persons incorporated in 1894 were described as officers and members of the Supreme Lodge then existing; that is, of a voluntary association; and it was the rights [581] and duties of that association that the defendant assumed, if we are to take the words in their literal sense. We spend no time upon the inquiry what those rights and duties were, because, as we have said, we assume that the plaintiff acquired a standing in the new company. But in the second stage, as in the first, the law establishing the Fourth Class had received a practical construction as being open to change, by the continued rating of the plaintiff at forty-eight instead of forty-two, as at first, and although the plaintiff says in a general way that he protested, he paid, and he had notice of what the earlier companies asserted to be their rights when he came into the new one that asserted the same and put them in force as against him. We mention these details to show that the plaintiff suffers no injustice and meets with no surprise when we state our opinion that the assumption under § 3 of the new charter of a relation with the plaintiff that originally arose under a law of the old corporation was not the assumption of a contract for immutable assessments, and decide that the power to amend, given by § 4, included the power to raise the rates to such point as was necessary for the corporation to go on.

The plaintiff's certificate did not absolutely promise to pay $3,000 if the plaintiff had performed the conditions. It contained a proviso by which, if one monthly payment by members holding an equal amount of endowment should not be sufficient to pay the sum, the amount of the monthly payment should be the benefit received. If all other Fourth Class certificates were in similar form, it may be asked whether it was reasonable to increase the assessments rath-

er than to allow the payments to abate. The answer, in addition to what we already have said, is that, unless the corporation continued to make substantial payments at death, it could not go on. On the evidence, at the end of 1910 the plaintiff's certificate was worth very little or nothing. It well may have been [582] thought better to rehabilitate the class rather than to allow their certificates to become waste paper. At all events, that was the prevailing view in the republic to which the plaintiff belonged, and, as we have said, the charter authorized it to be enforced. It is unnecessary to discuss the options that were offered in the alternative, but it is proper to remember that for many years the plaintiff has been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived, he has to bear the burdens incident to the nature of the enterprise into which he went open-eyed.

Judgment reversed.

SOUTHERN SURETY COMPANY, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(See S. C. Reporter's ed. 582–588.)

Federal courts — jurisdiction — effect of admission as state.

1. A criminal prosecution for adultery is an offense which would not have been cognizable in a court of the United States had it been committed within a state, within the meaning of the provisions of Okla. enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), §§ 16, 20, as amended by the act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), and of the Oklahoma Constitution accepting them, under which all prosecutions pending in the temporary courts of the Indian Territory for offenses which would not have been cognizable in a court of the United States had they been committed within a state were to be proceeded with in the courts of the state as successors of the temporary courts.

[For other cases, see Courts, III. b, in Digest Sup Ct. 1908.]

Federal courts — jurisdiction — effect of admission as state.

2. A prosecution or proceeding was "pending" in a temporary United States court of the Indian Territory within the meaning of the provisions of Okla. enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), §§ 16, 20, as amended by the act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), and of the Oklahoma Constitution accepting them, that all prosecutions, proceedings, causes, and matters pending in those courts which would not have been cognizable in a court of the United States had they arisen within a state were to be proceeded with in the courts of the state as successors of the temporary courts, where the accused was not only held by a magistrate to await the action of the grand jury at the next term of the temporary court, but had given bail for his appearance in the court at that term, and such court, through the state's admission, went out of existence before an indictment could be found and returned in regular course.

[For other cases, see Courts, III. b, in Digest Sup. Ct. 1908.]

Bail — in Indian Territory — effect of admission as state — state as beneficiary.

3. The state of Oklahoma became the beneficiary of a bail bond given for the appearance at the next term of the temporary United States court of the Indian Territory of a person held upon a charge of adultery to await the action of the grand jury at that term by virtue of the operation of the provisions of the Okla. enabling act of June 16, 1906 (34 Stat. at L. 267, chap. 3335), §§ 16, 20, as amended by the act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), and of the Oklahoma Constitution accepting them, under which all prosecutions pending in such temporary courts for offenses which would not have been cognizable in a court of the United States had they been committed within a state were to be proceeded with in the courts of the state as successors of the temporary courts, and the state, therefore, was entitled to sue upon such bail bond when its condition was broken.

[Bail in criminal cases, see Bail and Recognizance, II., in Digest Sup. Ct. 1908.]

[No. 124.]

Submitted December 9, 1915. Decided June 12, 1916.

IN ERROR to the Supreme Court of the State of Oklahoma to review a judgment which affirmed a judgment of the District Court of Pittsburg County, in that state, in favor of the state in an action on a bail bond. Affirmed.

See same case below, 34 Okla. 781, 127 Pac. 409.

The facts are stated in the opinion.

Mr. C. S. Arnold submitted the cause for plaintiff in error:

The beneficiary under this bond could not be changed by legislation, nor could there be a legislative assignment of the bond from the United States to the state of Oklahoma.

Stearns, Suretyship, p. 64; Reese v. United States, 9 Wall. 13, 19 L. ed. 541; 32 Cyc. 73.

The district court of Pittsburg county, Oklahoma, had no jurisdiction of the offense named in the bond, and for which he was

indicted by such court, and consequently could not forfeit the bond.

United States v. Baum, 74 Fed. 43.

It is a significant fact that prosecutions for felonies and misdemeanors of a local nature in the territory of Utah were carried on in the name of the people of Utah, while crimes deemed to be against the United States were carried on in the name of the United States of America.

People v. Berlin, 9 Utah, 383, 35 Pac. 498; People v. Kessler, 13 Utah, 69, 44 Pac. 97; People v. Burtleson, 14 Utah, 258, 47 Pac. 87.

The state court had no jurisdiction of the case because the crime was committed prior to statehood, was an offense against the United States, and could not be transferred to the state courts by act of Congress.

Pickett v. United States, 216 U. S. 456, 54 L. ed. 566, 30 Sup. Ct. Rep. 265; Martin v. Hunter, 1 Wheat. 304, 337, 4 L. ed. 97, 105; United States v. Baum, 74 Fed. 43; Gwin v. Breedlove, 2 How. 29, 11 L. ed. 167; Re Loney, 134 U. S. 372, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; The Antelope, 10 Wheat. 66, 6 L. ed. 268; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The act of admission creates a state upon an equal footing with every other state, and by this act of admission, a division and distribution of the sovereignty is brought about. Hence, to burden a state with the prosecution of criminal offenses committed in the country under the control of Congress would be an unequal burden, and prevent that equality guaranteed under the enabling act to the state, and be assuming to transact business at its own expense, arising under a foreign jurisdiction.

Shively v. Bowlby, 152 U. S. 34, 38 L. ed. 344, 14 Sup. Ct. Rep. 548; Pollard v. Hagan, 3 How. 233, 11 L. ed. 575; Permoli v. New Orleans, 3 How. 590, 11 L. ed. 739; Strader v. Graham, 10 How. 92, 13 L. ed. 337; Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245; Benner v. Porter, 9 How. 239, 13 L. ed. 121; Hunt v. Palao, 4 How. 589, 11 L. ed. 1115; Calkin v. Cocke, 14 How. 237, 14 L. ed. 402.

If Congress had the power to transfer this jurisdiction to the state courts, the power of the sovereignty exercised by the Congress to create a court and attach jurisdiction thereto to hear and determine causes of action accruing within the territory before the admission of the state is supreme and is exclusive; and inasmuch as it failed to act, the right of action is in suspense until Congress does act.

Forsyth v. United States, 9 How. 572, 13 L. ed. 263; United States v. Baum, 74 Fed. 43; United States v. Partello, 48 Fed. 677; McNulty v. Batty, 10 How. 72, 13 L. ed. 333; Freeborn v. Smith, 2 Wall. 160, 169, 177, 17 L. ed. 922; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Koenigsberger v. Richmond Silver Min. Co. 158 U. S. 41, 39 L. ed. 889, 15 Sup. Ct. Rep. 751; Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Ames v. Colorado C. R. Co. 4 Dill. 251, Fed. Cas. No. 324; Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13,245; Benner v. Porter, 9 How. 235, 13 L. ed. 119; Inerarity v. Curtis, 4 Fla. 175; Carter v. Bennett, 4 Fla. 322; Cook v. United States, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268; Larkin v. Saffarans, 15 Fed. 153; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937; Ex parte McCardle, 7 Wall. 514, 19 L. ed. 265.

In construing the constitution or statute granting judicial powers, such constitution or statute reciting conditions or subjects over which jurisdiction is extended must be construed as restrictive, and is not to be extended by implication or inference to or over subjects not designated.

Ex parte McCardle, supra; Murdock v. Memphis, 20 Wall. 620, 22 L. ed. 439; Northpoint Consol. Irrig. Co. v. Utah & S. L. Canal Co. 14 Utah, 163, 46 Pac. 824; United States v. Bailey, 1 McLean, 234, Fed. Cas. No. 14,495; Durousseau v. United States, 6 Cranch, 308, 3 L. ed. 232; Jungk v. Holbrook, 15 Utah, 198, 62 Am. St. Rep. 925, 49 Pac. 305; Eastman v. Gurrey, 14 Utah, 171, 46 Pac. 828; Farrell v. Winchester Ave. R. Co. 61 Conn. 130, 23 Atl. 757.

The court should decline jurisdiction.

Meyer v. Herrera, 41 Fed. 67; Re Cilley, 58 Fed. 984; State ex rel. Church v. Weeks, 38 Mo. App. 579; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231; South Carolina v. Gaillard, 101 U. S. 433, 25 L. ed. 937.

Mr. R. E. Wood submitted the cause for defendant in error. Messrs. S. P. Freeling and Smith C. Matson were on the brief:

It was within the power of Congress to confer, and within the power of the state to accept, jurisdiction of the cause pending in the territorial court of the Indian Territory in which this appellant became surety.

Benner v. Porter, 9 How. 246, 13 L. ed. 124; Higgins v. Brown, 20 Okla. 355, 94 Pac. 703; Damon's Case, 6 Me. 148; Hudspeth v. State, 1 Ark. 20; Drummond v. Republic, 2 Tex. 157; People v. Richards, 1 Mich. 217, 51 Am. Dec. 75; Cook v. United States, 1 G. Greene, 56; Bonsell v. United States, 1 G. Greene, 112; People v. Daniels, 1 Cal. 107; People v. Bonds, 1

Nev. 33; People v. Logan, 1 Nev. 110; Wilson v. People, 3 Colo. 325; State v. Williams, 9 Mont. 179, 23 Pac. 335; State v. Leehman, 2 S. D. 174, 49 N. W. 3; Thompson v. Utah, 170 U. S. 344, 42 L. ed. 1064, 18 Sup. Ct. Rep. 620.

Mr. Justice Van Devanter delivered the opinion of the court:

This is an action on a bail bond given by an accused held upon a charge of adultery to await the action of the grand jury at McAlester, in the Indian Territory. The bond was given shortly before Oklahoma became a state, named the United States as the obligee, and called for the accused's appearance before the temporary court at McAlester at the next term and from term to term until discharged. When the courts of the new state were organized, an indictment for the adultery was returned against the accused in the state court at McAlester. He did not appear, a forfeiture was declared, and the state sued on the bond, the surety alone being reached by the process. There was a judgment for the state, which [584] was affirmed (34 Okla. 781, 127 Pac. 409), and the surety sued out this writ of error.

The Federal questions presented involve the construction and application of the enabling act, and are, first, whether, after the admission of the state, the further proceedings upon the charge of adultery were to be had in a Federal court or in a state court; and, second, whether, by operation of law, the state became the beneficiary of the bond and entitled to sue on it.

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory. Up to the time it became a part of the state of Oklahoma it was governed under the immediate direction of Congress, which legislated for it in respect of many matters of local or domestic concern which, in a state, are regulated by the state legislature, and also applied to it many laws dealing with subjects which, under the Constitution, are within Federal rather than state control. In what was done Congress did not contemplate that this situation should be of long duration, but, on the contrary, that the territory should be prepared for early inclusion in a state. Courts designated as "United States Courts" were temporarily established, and invested with a considerable measure of civil and criminal jurisdiction, and there was also provision for beginning public prosecutions before subordinate magistrates. There being no organized local government, such prosecutions, regardless of their nature, were commenced and conducted in the name of the United States, and in taking bail bonds it was named as the obligee.

The enabling act (chap 3335, 34 Stat. at L. 267, chap. 2911, 34 Stat. at L. 1286) provided that the new state should embrace the Indian Territory as well as the territory of Oklahoma. It contemplated that the state, by its Constitution, would establish a system of courts of its own, and provided for dividing the state into two districts, [585] and creating therein United States courts like those in other states. The temporary courts were to go out of existence, and this made it necessary to provide for the disposition of the business pending before them in various stages. To that end the following provisions, among others, not material here, were embodied in an amendment to the act (34 Stat. at L. 1286, 1287, chap. 2911):

"Sec. 16. . . . Prosecutions for all crimes and offenses committed within the territory of Oklahoma or in the Indian Territory, pending in the district courts of the territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such territories as a state, which, had they been committed within a state, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a state."

"Sec. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma territory, or in the United States courts in the Indian Territory, at the time said territories become a state, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be proceeded with, held, and determined by the courts of said state, the successors of said district courts of the territory of Oklahoma, and the United States courts in the Indian Territory; . . . All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the state of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory."

Section 28 of the schedule to the state Constitution referred to these and other closely related provisions, and [586] said, they "are hereby accepted and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the state."

Thus, by the concurrent action of Congress and the state, all prosec

ing in the temporary courts of the Indian Territory, for offenses which would not have been cognizable in a court of the United States had they been committed within a state, were to be proceeded with in the courts of the state, as successors to the temporary courts. In other words, the test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a state when the offenses were committed. In this view it is plain that the prosecution in question was rightly proceeded with in the state court. Adultery is an offense against the marriage relation, and belongs to the class of subjects which each state controls in its own way. It is a punishable offense only where the common or statute law of the state makes it such; and where punishable, it is cognizable only in the courts of the state. Of course, we exclude from present consideration forts, arsenals, and like places within the exterior limits of a state, but over which exclusive jurisdiction has been ceded to the United States, because they are regarded, not as part of the state, but as excepted out of it. And we pass the question of the power of Congress to deal with such offenses in respect of tribal Indians within a state, because the statute under which this prosecution arose was general in its terms, and because it is not claimed that either of the participants in the adulterous act was an Indian.

Some reliance is placed upon § 14 of the enabling act, which refers in part to offenses committed prior to the state's admission; but of this section it is enough for present purposes to say that when it is read in connection with the provisions of §§ 16 and 20, before quoted, it is apparent that it was intended to mark the line separating [587] the jurisdiction of the Federal courts in the two districts, as between themselves, and not the line separating their jurisdiction from that of the state courts.

Because no indictment was returned in the temporary court at McAlester before the state was admitted, it is contended that this prosecution was not "pending" in that court in the sense of §§ 16 and 20. These sections included all pending "causes, proceedings, and matters," as well as "prosecutions" and "cases," and evidently were designed to be very comprehensive. The accused not only was held by a magistrate to await the action of the grand jury at the next term of the temporary court, but gave bail for his appearance in the court at that term. After this was done we think a prosecution or proceeding was pending in the court in the sense of the statute. That no indictment was returned in that court in explained by the fact that the court, through the state's admission, went out of existence before an indictment could be found and returned in regular course.

The enabling act and the state Constitution united in declaring that the state courts, in respect of the prosecutions which were to be transferred to them, should be the successors of the temporary courts. The bail bond was given several months after the act and the state Constitution were adopted. Indeed, the state's admission was imminent at the time. So, the bond must be taken as given with the approaching change in mind, and as meaning that the accused's appearance should be in the state court as the legal successor of the temporary court, if the latter should go out of existence before the time for appearance arrived. The law existing when a contract is made, and affecting its performance, becomes a part of it. Northern P. R. Co. v. Wall, 241 U. S. 87, ante, 905, 36 Sup. Ct. Rep. 493.

The enabling act, when taken in connection with the schedule to the state Constitution, leaves no doubt that the state was to take the place of the United States in [588] dealing with and conducting this prosecution. The bail bond was essentially a part of the proceeding that was transferred, and was without force or value in any other connection. So, when the power and duty resting upon the United States were passed to the state, there went with them the right to use and enforce the bond as the United States might have done, had the proceeding remained in its control; in other words, the state became, by operation of law, the beneficiary of the bond, and was entitled to sue on it when its condition was broken.

Judgment affirmed.

WILLIAM L. DAYTON, Trustee, etc.,
v.
A. H. STANARD, Treasurer of the County of Pueblo, Colorado, et al.

(See S. C. Reporter's ed. 588–590.)

Bankruptcy — property in custodia legis — sale for taxes and assessments.

1. Sales for taxes and special assessments of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy are invalid where made without leave of the bankruptcy court.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

NOTE.—As to right to enforce payment of delinquent taxes on property *in custodia legis*—see note to Eppstein v. Orahood, 17 L.R.A.(N.S.) 465.

Bankruptcy — property in custodia legis — reimbursement of certificate holders.

2. Holders of certificates of purchase of real property belonging to a bankrupt estate which was sold for taxes and special assessments when the property was in the course of administration in a court of bankruptcy are entitled to be reimbursed out of the general assets, upon the cancelation of their certificates, for the taxes and assessments paid by them, with interest at the ordinary legal rate, by virtue of the provisions of the bankrupt act of July 1, 1898 (30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9648), § 64a, that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt in advance of payment of dividends to creditors, but are not entitled to the larger interest required by the local law to be paid on redemption from tax sales.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 404.]

Submitted January 7, 1916. Decided June 12, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which, modifying a decree of the District Court for the District of Colorado, directed that holders of certificates of purchase at tax sales made pending bankruptcy proceedings be reimbursed out of the general fund for the amounts of the taxes and assessments, together with interest at the rate payable under the local law on redemption from tax sales. Modified by reducing the allowance of interest to the ordinary legal rate, and as modified affirmed.

See same case below, 137 C. C. A. 35, 220 Fed. 441.

The facts are stated in the opinion.

Mr. **Harvey Riddell** submitted the cause for petitioner:

When property is in the custody of the court, whether through and by a receiver, trustee in bankruptcy, or other similar means, neither the title nor possession can be interfered with, nor a lien fixed upon it, nor a change in the conditions of the property or title be made, except by permission of the court.

Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; King v. Wooten, 4 C. C. A. 519, 2 U. S. App. 651, 54 Fed. 612; Ledoux v. La Bee, 83 Fed. 761; Clark v. McGhee, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789; High, Receivers, 3d ed. § 140a; Virginia T. & C. Steel & I. Co. v. Bristol Land Co. 88 Fed. 134; Johnson v. Southern Bldg. & L. Asso. 132 Fed. 540; Re Eppstein, 17 L.R.A.(N.S.) 465, 84 C. C. A. 208, 156 Fed. 42, 209 U. S. 545, 52 L. ed. 919, 28 Sup. Ct. Rep. 571; Re Dana, 93 C. C. A. 238, 167 Fed. 529; Mound Mines Co. v. Hawthorne, 97 C. C. A. 400, 173 Fed. 882; Re Rathman, 106 C. C. A. 253, 183 Fed. 913; Lazarus v. Prentice, 234 U. S. 263, 58 L. ed. 1305, 34 Sup. Ct. Rep. 851; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 57, 56 L. ed. 327, 349, 38 L.R.A.(N.S.) 44, 23 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Hecox v. Teller County, 117 C. C. A. 338, 198 Fed. 634.

Are the interest and penalties accruing, under the terms of the state statutes, for nonpayment of the taxes at particular times, to be counted as part of the taxes to be paid by the trustee?

Re William F. Fisher & Co. 135 Fed. 223, 148 Fed. 907; Re Wylie, 82 C. C. A. 411, 153 Fed. 281.

Taxes are to be paid on property in the hands of a trustee in bankruptcy only in the instances and in the way provided by the bankruptcy law, and appellant holders of certificates of purchase are not within the act.

Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 18; Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462, 12 Am. Neg. Rep. 398, reversed in 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. 99 Diamonds, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 139 Fed. 961.

Mr. **Horace Phelps** submitted the cause for respondents:

Even in bankruptcy proceedings the lien of a tax purchaser may not be destroyed without payment of his taxes.

Re Eppstein, 17 L.R.A.(N.S.) 465, 84 C. C. A. 208, 156 Fed. 42.

Before the district court of the United States, in an action brought by the trustee in which these tax purchasers are defendants or respondents, can declare these tax sales to be void or the certificates to be void, or destroy the lien and relegate us to the condition of a general creditor, they must redeem from these tax sales strictly, pursuant to the provisions of the statutes of Colorado.

Whitehead v. Farmers' Loan & T. Co. 39 C. C. A. 34, 98 Fed. 13; Hecox v. Teller County, 117 C. C. A. 338, 198 Fed. 634; Swarts v. Hammer, 56 C. C. A. 92, 120 Fed. 256; Virginia, T. & C. Steel & I. Co. v. Bristol Land Co. 88 Fed. 134; Re Kallak, 147 Fed. 276; Re Scheidt Bros. 177 Fed. 599.

The manifest intent of the law is that while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which

would be collectable under the law, if the property had remained in the possession and control of the bankrupt himself.

Re Conhaim, 100 Fed. 268.

Even though the proceedings of the sale are void, still the owner of the certificate must have his money before the lien can be destroyed.

Pueblo Realty Co. v. Tate, 32 Colo. 67, 75 Pac. 402.

[589] Mr. Justice Van Devanter delivered the opinion of the court:

This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain. Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Re Tyler, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; Re Eppstein, 17 L.R.A.(N.S.) 465, 84 C. C. A. 208, 156 Fed. 42. The court further directed in its decree that the several tracts be sold by the trustee free from any lien for the taxes and assessments, and that the holders of the certificates of purchase be severally reimbursed out of the proceeds of the respective tracts, but not out of the general assets, for the taxes and special assessments paid thereon, with the interest and penalties which accrued prior to the time the trustee took possession. Upon appeal to the court of appeals, that court modified the decree by requiring that the certificate holders be reimbursed for the amounts paid at such sales and for subsequent taxes, together with interest thereon, "as provided by the laws of Colorado on redemption from tax sales of land," the same to be paid "out of the general fund, regardless of the amount which the property may bring at bankruptcy sale." 137 C. C. A. 35, 220 Fed. 441.

The trustee urges, first, that the certificate holders should not be reimbursed at all; second, that, if reimbursed, they should not be allowed any interest or penalties other than such as accrued prior to the time when the trustee qualified and took possession; and, third, that they should not be reimbursed out of the general [590] assets, but only out of the proceeds of the trustee's sale of the tracks for which they severally had certificates.

Considering the plain provision in § 64a of the bankruptcy act, that "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt . . . in advance of the payment of dividends to creditors" [30 Stat. at L. 563, chap. 541, Comp. Stat. 1913, § 9648], we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancelation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well.

And while we are of opinion that the certificate holders were entitled to interest upon the amounts paid, at the ordinary legal rate, applicable in the absence of an express contract, we think they were not entitled to the larger interest required to be paid on redemption from tax sales. They were not in a position to stand upon the terms of the redemption statute, for the sales were invalid, and the only recognition which they could ask was such as resulted from an application of equitable principles to their situation. The decree of the Circuit Court of Appeals is modified to conform to what is here said respecting the allowance of interest. In other respects it is affirmed.

Decree modified and affirmed.

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[591] UNITED STATES, Plff. in Err.,
v.
FRED NICE.

(See S. C. Reporter's ed. 591–601.)

Indian allottees — emancipation from Federal control.

1. No intention to dissolve the tribal relations and terminate the national guardianship upon the making of the allotments and the issuing of the trust patents without waiting for the expiration of the trust period can be gathered from the Indian allotment act of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), § 6, which grants to the allottees the privilege of citizenship, and gives them the benefit of, and requires them to be subject to, the laws, both civil and criminal, of the state of their residence, in view of the provision of § 5, which, after requiring that the title to the allotted lands be withheld for twenty-five years, and rendering them inalienable during that period, authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands as the tribe shall, from time to time, consent to sell, directs that the purchase money be held in the treasury for the sole use of the tribe, and requires that it, with the interest thereon, shall be at all times subject to appropriation by Congress for

the education and civilization of such tribe or its members.

[For other cases, see Indians, I., in Digest Sup. Ct. 1908.]

Indian allottees — Federal control — emancipation — sale of intoxicating liquor.

2. So long as Indian allottees under the acts of February 8, 1887 (24 Stat. at L. 388, chap. 119, Comp. Stat. 1913, § 4195), or March 2, 1889 (25 Stat. at L. 888, chap. 405), remain tribal Indians and under national guardianship, *i. e.*, during the twenty-five years in which, under those acts, the allotted lands are to be held in trust by the government and are to be inalienable, Congress may, as is done by the act of January 30, 1897 (29 Stat. at L. 506, chap. 109, Comp. Stat. 1913, § 4137), regulate or prohibit the sale of intoxicating liquors to such Indians within a state.

[For other cases, see Indians, 54–61, in Digest Sup. Ct. 1908.]

[No. 681.]

Argued and submitted April 24, 1916. Decided June 12, 1916.

IN ERROR to the District Court of the United States for the District of South Dakota to review a judgment sustaining a demurrer to and dismissing an indictment charging the unlawful sale of intoxicating liquors to an allottee within the state. Reversed.

The facts are stated in the opinion.

Assistant Attorney General Warren argued the cause and filed a brief for plaintiff in error:

The decision of this court in United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396, was clearly inconsistent with Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, and must be deemed to overrule it.

The power of Congress to regulate commerce with the Indian tribes is exclusive.

Worcester v. Georgia, 6 Pet. 515, 560, 8 L. ed. 483, 501; Howard v. Ingersoll, 13 How. 381, 409, 14 L. ed. 189, 201; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 194, 23 L. ed. 846, 847; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; Joplin Mercantile Co. v. United States, 236 U. S. 531, 545, 59 L. ed. 705, 711, 35 Sup. Ct. Rep. 291.

Commerce with the Indian tribes includes commerce with the individual members of a tribe.

United States v. Holliday, 3 Wall. 407, 18 L. ed. 182.

The act of January 30, 1897, is a regulation of commerce with the Indian tribes.

Ibid.

The Heff Case was wrong in treating the act of 1897 merely as an exercise of police power. It was enacted under the commerce clause of the Constitution; and the power to regulate trade with the Indian tribes belongs exclusively to Congress as long as any Indian tribal status exists.

Ibid.

It is for Congress, and not for this court, to say when the tribal existence shall be deemed to have terminated.

United States v. 43 Gallons of Whiskey, 108 U. S. 491, 496, 27 L. ed. 803, 805, 2 Sup. Ct. Rep. 906, 93 U. S. 188, 195, 23 L. ed. 846, 847; United States v. Sandoval, 231 U. S. 28, 46, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1; Perrin v. United States, 232 U. S. 478, 482, 486, 58 L. ed. 691, 694, 695, 34 Sup. Ct. Rep. 387; Lone Wolf v. Hitchcock, 187 U. S. 553, 565, 47 L. ed. 299, 306, 23 Sup. Ct. Rep. 216; United States v. Rickert, 188 U. S. 432, 433, 445, 47 L. ed. 532, 534, 539, 23 Sup. Ct. Rep. 478; Rainbow v. Young, 88 C. C. A. 653, 161 Fed. 835; United States v. Sutton, 215 U. S. 291, 296, 54 L. ed. 200, 202, 30 Sup. Ct. Rep. 116; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 315, 316, 55 L. ed. 738, 749, 750, 31 Sup. Ct. Rep. 578.

The grant of citizenship does not, *ipso facto*, terminate the tribal status.

United States v. Sandoval, 231 U. S. 28, 46, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1.

An Indian allottee, even though a citizen, is still an Indian, and an Indian ward as well.

United States v. Celestine, 215 U. S. 278, 290, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93; United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396; United States v. Sandoval, 231 U. S. 28, 47, 48, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1.

Congress has no authority to delegate a power vested by the Constitution in it exclusively.

Stoutenburgh v. Hennick, 129 U. S. 141, 149, 32 L. ed. 637, 639, 9 Sup. Ct. Rep. 256; Re Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Cooley v. Port Wardens, 12 How. 299, 317, 13 L. ed. 996, 1004.

Even if it could so delegate, Congress must act expressly, and not by implication, for the presumption is strongly against the surrender of Federal power by implication.

Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664.

Congress, by the act of 1887, clearly did not terminate the tribal relationship or status of the allottee Indians. Hence it had no power irrevocably to commit the regulation of commerce with the Indian tribes into the hands of the states. And when, by the act of 1897, it exercised power to regulate, it had the right to do so.

Farrell v. United States, 49 C. C. A. 183, 110 Fed. 942.

Mr. O. D. Olmstead submitted the cause for defendant in error. Messrs. W. B. Backus and W. J. Hooper were on the brief:

The decision of the district court was based on the construction given to the statute under which the indictment was drawn in Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506. The defendant in error stands on the decision in that case, and respectfully contends that this decision correctly construes the statute, and that, thereunder, he is not guilty of an offense.

[595] Mr. Justice Van Devanter delivered the opinion of the court:

This is a prosecution for selling whisky and other intoxicating liquors to an Indian, in violation of the act of January 30, 1897 (chap. 109, 29 Stat. at L. 506, Comp. Stat. 1913, § 4137). According to the indictment, the sale was made August 9, 1914, in Tripp county, South Dakota; the Indian was a member of the Sioux Tribe, a ward of the United States, and under the charge of an Indian agent; and the United States was still holding in trust the title to land which had been allotted to him April 29, 1902. A demurrer was sustained and the indictment dismissed on the ground that the statute, in so far as it purports to embrace such a case, is invalid, because in excess of the power of Congress. The case is here on direct writ of error under the criminal appeals act (chap. 2564, 34 Stat. at L. 1246, Comp. Stat. 1913, § 1704).

By the act of 1897 the sale of intoxicating liquor to "any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the government, or to any Indian a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments, exercises guardianship," is denounced as a punishable offense.

The allotment to this Indian was made from the tribal lands in the Rosebud Reservation, in South Dakota, under the act of March 2, 1889 (chap. 405, 25 Stat. at L. 888), the 11th section of which provided that each allotment should be evidenced by a patent, inaptly so called, declaring that for a period of twenty-five years—and for a further period if the President should so direct—the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the end of that period would convey the [596] same to him or his heirs in fee, discharged of the trust and free of all charge or encumbrance; that any lease or conveyance of the land, or contract touching the same, made during the trust period, should be null and void, and that each allottee should "be entitled to all the rights and privileges and be subject to all the provisions" of § 6 of the general allotment act of February 8, 1887 (chap. 119, 24 Stat. at L. 388, Comp. Stat. 1913, § 4195). The act of 1889 recognized the existence of the tribe, as such, and plainly disclosed that the tribal relation, although ultimately to be dissolved, was not to be terminated by the making or taking of allotments. In the acts of March 3, 1899 (chap. 450, 30 Stat. at L. 1362), and March 2, 1907 (chap. 2536, 34 Stat. at L. 1230), that relation was recognized as still continuing, and nothing is found elsewhere indicating that it was to terminate short of the expiration of the trust period.

By the general allotment act of 1887 provision was made for allotting lands in any tribal reservation in severalty to members of the tribe, for issuing to each allottee a trust patent similar to that just described and with a like restraint upon alienation, and for conveying the fee to the allottee or his heirs at the end of the trust period. Its 6th section, to which particular reference was made in § 11 of the act of 1889, declared that, upon the completion of the allotments and the patenting of the lands, the allottees should have "the benefit of and be subject to the laws, both civil and criminal, of the state or territory" of their residence, and that all Indians born in the United States, who were recipients of allotments under "this act, or under any law or treaty," should be citizens of the United States, and entitled to all the rights, privileges, and immunities of such citizens. This act, like that of 1889, disclosed that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians [597] having allotments under the act was recognized during the trust period as still continuing.

With this statement of the case, we come to the questions presented for decision, which are these: What was the status of this Indian at the time the whisky and other liquors are alleged to have been sold to him? And is it within the power of Congress to regulate or prohibit the sale of intoxicating liquor to Indians in his situation?

The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, whether upon

or off an Indian reservation, is well settled. It has long been exercised, and has repeatedly been sustained by this court. Its source is twofold; first, the clause in the Constitution expressly investing Congress with authority "to regulate commerce . . . with the Indian tribes," and, second, the dependent relation of such tribes to the United States. Of the first it was said in United States v. Holliday, 3 Wall. 407, 417-419, 18 L. ed. 182, 185, 186: "Commerce with the Indian tribes means commerce with the individuals composing those tribes. . . . The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of a member of the tribe with whom it is carried on. . . . This power residing in Congress, that body is necessarily supreme in its exercise." And of the second it was said in United States v. Kagama, 118 U. S. 375, 383, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109: "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and, with it, the power." [598] What was said in these cases has been repeated and applied in many others.[1]

Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.[2] Thus, in United States v. Holliday, a prosecution for selling spiritous liquor to a tribal Indian in Michigan when not on a reservation, the contention that he had become a citizen was dismissed as "immaterial;" in Hallowell v. United States, a prosecution for taking whisky upon an allotment held by a tribal Indian in Nebraska, the fact that he had been made a citizen was held not to take the case out of the congressional power or regulation; and in United States v. Sandoval, a prosecution for introducing intoxicating liquors into an Indian pueblo in New Mexico, it was held that whether the Indians [599] of the pueblo were citizens need not be considered, because that would not take from Congress the power to prohibit the introduction of such liquors among them.

The ultimate question, then, is whether § 6 of the act of 1887—the section as originally enacted—was intended to dissolve the tribal relation and terminate the national guardianship upon the making of the allotments and the issue of the trust patents, without waiting for the expiration of the trust period. According to a familiar rule, legislation affecting the Indians is to be construed in their interest, and a purpose to make a radical departure is not lightly to be inferred. Upon examining the whole act, as must be done, it seems certain that the dissolution of the tribal relation was in contemplation; but that this was not to occur when the allotments were completed and the trust patents issued is made very plain. To illustrate: Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands "as such tribe shall, from

[1] United States v. Forty-three Gallons of Whiskey (United States v. Lariviere) 93 U. S. 188, 23 L. ed. 846; Dick v. United States, 208 U. S. 340, 52 L. ed. 520, 28 Sup. Ct. Rep. 399; United States v. Sutton, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; Hallowell v. United States, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; United States v. Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; United States v. Sandoval, 231 U. S. 28, 58 L. ed. 107, 34 Sup. Ct. Rep. 1; United States v. Pelican, 232 U. S. 442, 58 L. ed. 676, 34 Sup. Ct. Rep. 396; Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; Johnson v. Gearlds, 234 U. S. 422, 58 L. ed. 1383, 34 Sup. Ct. Rep. 794; Joplin Mercantile Co. v. United States, 236 U. S. 531, 545, 59 L. ed. 705, 711, 35 Sup. Ct. Rep. 291.

[2] United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; Cherokee Nation v. Hitchcock, 187 U. S. 294, 308, 47 L. ed. 183, 188, 23 Sup. Ct. Rep. 115; United States v. Rickert, 188 U. S. 432, 445, 57 L. ed. 532, 539, 23 Sup. Ct. Rep. 478; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; Marchie Tiger v. Western Invest. Co. 221 U. S. 286, 311-316, 55 L. ed. 738, 747-749, 31 Sup. Ct. Rep. 578; Hallowell v. United States, 221 U. S. 317, 324, 55 L. ed. 750, 753, 31 Sup. Ct. Rep. 587; United States v. Sandoval, 231 U. S. 28, 48, 58 L. ed. 107, 114, 34 Sup. Ct. Rep. 1; Eells v. Ross, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; Farrell v. United States, 49 C. C. A. 183, 110 Fed. 942; Mulligan v. United States, 56 C. C. A. 50, 120 Fed. 98.

time to time, consent to sell;" directs that the purchase money be held in the Treasury "for the sole use of the tribe;" and requires that the same, with the interest thereon, "shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof." This provision for holding and using these proceeds, like that withholding the title to the allotted lands for twenty-five years, and rendering them inalienable during that period, makes strongly against the claim that the national guardianship was to be presently terminated. The two together show that the government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their "education and civilization" implies the retention of a control reaching far beyond their property.

As pointing to a different intention, reliance is had [600] upon the provision that when the allotments are completed and the trust patents issued the allottees "shall have the benefit of and be subject to the laws, both civil and criminal, of the state" of their residence. But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not devest itself. It could be exerted at any time and in various forms during the continuance of the tribal relation, and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable.

The act of 1887 came under consideration in United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478, a case involving the power of the state of South Dakota to tax allottees under that act, according to the laws of the state, upon their allotments, the permanent improvements thereon, and the [601] horses, cattle, and other personal property issued to them by the United States and used on their allotments, and this court, after reviewing the provisions of the act, and saying: "These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition," held that the state was without power to tax the lands and other property, because the same were being held and used in carrying out a policy of the government in respect of its dependent wards, and that the United States had such an interest in the controversy as entitled it to maintain a bill to restrain the collection of the taxes.

In addition to the fact that both acts—the general one of 1887 and the special one of 1889—disclose that the tribal relation and the wardship of the Indians were not to be disturbed by the allotments and trust patents, we find that both Congress and the administrative officers of the government have proceeded upon that theory. This is shown in a long series of appropriation and other acts, and in the annual reports of the Indian Office.

As, therefore, these allottees remain tribal Indians and under national guardianship, the power of Congress to regulate or prohibit the sale of intoxicating liquor to them, as is done by the act of 1897, is not debatable.

We recognize that a different construction was placed upon § 6 of the act of 1887 in Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, but, after re-examining the question in the light of other provisions in the act, and of many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled.

Judgment reversed.

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[602] UNITED STATES, Plff. in Err.,
v.
DENNIS QUIVER.

(See S. C. Reporter's ed. 602-606.)

Federal courts — jurisdiction — crime on Indian reservation — adultery.

Adultery committed by an Indian

NOTE.—On jurisdiction to punish crimes committed by or against Indians—see notes to State v. Campbell, 21 L.R.A. 169, and Kitto v. State, L.R.A.1915F, 587.

with another Indian on an Indian reservation cannot be regarded as punishable under U. S. Penal Code, § 316 (Comp. Stat. 1913, § 10,489), in view of the failure of that section to refer in terms to Indians, and of the express enumeration in §§ 328, 329 (Comp. Stat. 1913, §§ 10,502, 10,503), of certain other crimes as offenses against the United States when committed on Indian reservations; nor is a different conclusion demanded on the theory that adultery is not an offense "by one Indian against the person or property of another Indian," within the meaning of the provisions of U. S. Rev. Stat. § 2146, Comp. Stat. 1913, § 4149, excepting such offenses from the operation of § 2145 (Comp. Stat. 1913, § 4148), by which the general criminal laws of the United States were extended to the Indian country.

[For other cases, see Courts, 1454–1471, in Digest Sup. Ct. 1908.]

[No. 682.]

Submitted February 28, 1916. Decided June 12, 1916.

IN ERROR to the District Court of the United States for the District of South Dakota to review a judgment sustaining a demurrer to and dismissing an indictment for adultery committed by one Indian with another Indian on an Indian reservation. Affirmed. [1]

The facts are stated in the opinion.

Assistant Attorney General Warren submitted the cause for plaintiff in error:

Adultery is not an offense against the person or property of any person.

Bassett v. United States, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939.

The enactment of the statutes incorporated in §§ 328 and 329 of the Criminal Code (35 Stat. at L. 1151, chap. 321, Comp. Laws 1913, §§ 10,502, 10,503), neither expressly nor impliedly repealed or superseded the provisions of U. S. Rev. Stat. § 2145, Comp. Stat. 1913, § 4148.

Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710.

The enabling act of the state of South Dakota in nowise supersedes U. S. Rev. Stat. § 2145, so far as an offense committed by Indians upon Indian reservations within that state is involved.

United States v. Pelican, 232 U. S. 442, 445, 58 L. ed. 676, 677, 34 Sup. Ct. Rep. 396.

And § 329 of the Penal Code was enacted in order to broaden the scope of jurisdiction of the United States district court for the district of South Dakota, and not to repeal the jurisdiction it already had under U. S. Rev. Stat. § 2145.

Hollister v. United States, 76 C. C. A. 337, 145 Fed. 777; United States v. McBratney, 104 U. S. 621, 26 L. ed. 869; Draper v. United States, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107; Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; United States v. Ewing, 47 Fed. 809.

Messrs. George A. Jeffers and Albert G. Granger submitted the cause for defendant in error:

It has been the policy of Congress, since the organization of the government, to give to the courts of the United States only such limited jurisdiction as has been conferred upon them, from time to time, by the acts of Congress.

United States v. Hudson, 7 Cranch, 32, 3 L. ed. 260; Re Wilson, 140 U. S. 576, 578, 35 L. ed. 513, 514, 11 Sup. Ct. Rep. 870; United States v. Kagama, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

Adultery between Indians on an Indian reservation in the state of South Dakota is not such a crime as was contemplated by the acts of Congress.

Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; Donnelly v. United States, 228 U. S. 243, 57 L. ed. 820, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710; Re Gon-shay-ee, 130 U. S. 343, 351, 32 L. ed 973, 976, 9 Sup. Ct. Rep. 542; State v. Mimrod, 30 S. D. 239, 138 N. W. 377; State v. Campbell, 53 Minn. 354, 21 L.R.A. 169, 55 N. W. 553; State v. George, 39 Or. 127, 65 Pac. 604; Re Blackbird, 109 Fed. 139; People ex rel. Cusick v. Daly, 212 N. Y. 183, 105 N. E. 1048, Ann. Cas. 1915D, 367; Ex parte Hart, 157 Fed. 130; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; United States v. King, 81 Fed. 625.

If there is any doubt as to whether or not adultery between Indians on an Indian reservation in the state of South Dakota constitutes a crime, that doubt should be resolved in favor of the defendant.

United States v. Brewer, 139 U. S. 278, 286, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 538; Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; State v. George, 39 Or. 127, 65 Pac. 604.

Mr. Justice Van Devanter delivered the opinion of the court:

This is a prosecution for adultery committed on one of the Sioux Indian Re-

[1] Leave granted to present a petition for rehearing herein within sixty days if counsel are so advised, on motion of Solicitor General Davis for the United States.
June 12, 1916.

tions in the state of South Dakota. Both participants in the act were Indians belonging to that reservation. The statute upon which the prosecution is founded was originally adopted as part of the act of March 3, 1887 (chap. 397, 24 Stat. at L. 635), and is now § 316 of the Penal Code [35 Stat. at L. 1149, chap. 321, Comp. Stat. 1913, § 10,489]. The section makes no mention of Indians, and the question for decision is whether it embraces adultery committed by one Indian with another Indian, on an Indian reservation. The district court answered the question in the negative.

At an early period it became the settled policy of Congress [604] to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws. Thus the Indian intercourse acts of 1796 (chap. 30, 1 Stat. at L. 469), and 1802 (chap. 13, 2 Stat. at L. 139), provided for the punishment of various offenses by white persons against Indians, and by Indians against white persons, but left untouched those by Indians against each other; and the act of 1834 (chap. 161, 4 Stat. at L. 729, Comp. Stat. 1913, § 4148), while providing that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country," qualified its action by saying, "the same shall not extend to crimes committed by one Indian against the person or property of another Indian." That provision with its qualification was later carried into the Revised Statutes as §§ 2145 and 2146, Comp. Stat. 1913, §§ 4148, 4149. This was the situation when this court, in Ex parte Crow Dog (Ex parte Kang-Gi-Shun-Ca) 109 U. S. 556, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396, held that the murder of an Indian by another Indian, on an Indian reservation, was not punishable under the laws of the United States, and could be dealt with only according to the laws of the tribe. The first change came when, by the act of March 3, 1885 (chap. 341, § 9, 23 Stat. at L. 385, Comp. Stat. 1913, § 10,502), now § 328 of the Penal Code, Congress provided for the punishment of murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, when committed by one Indian against the person or property of another Indian. In other respects the policy remained as before. After South Dakota became a state, Congress, acting upon a partial cession of jurisdiction by that state (chap. 106, Laws 1901), provided by the act of February 2, 1903, (chap. 351, 32 Stat. at L. 793, Comp. Stat. 1913, § 10,503), now § 329 of the Penal Code, for the punishment of the particular offenses named in the act of 1885 when [605] committed on the Indian reservations in that state, even though committed by others than Indians; but this is without bearing here, for it left the situation in respect of offenses by one Indian against the person or property of another Indian as it was after the act of 1885.

We have now referred to all the statutes. There is none dealing with bigamy, polygamy, incest, adultery, or fornication, which in terms refers to Indians, these matters always having been left to the tribal customs and laws, and to such preventive and corrective measures as reasonably could be taken by the administrative officers.

But counsel for the government invite attention to the letter of the statute, and urge that adultery is not an offense "by one Indian against the person or property of another Indian," and therefore is not within the exception in § 2146 of the Revised Statutes (Comp. Stat. 1913, § 4149). It is true that adultery is a voluntary act on the part of both participants, and, strictly speaking, not an offense against the person of either. But are the words of the exception to be taken so strictly? Murder and manslaughter are concededly offenses against the person, and much more serious than is adultery. Was it intended that a prosecution should lie for adultery, but not for murder or manslaughter? Rape also is concededly an offense against the person, and is generally regarded as among the most heinous, so much so that death is often prescribed as the punishment. Was it intended that a prosecution should lie for adultery, where the woman's participation is voluntary, but not for rape, where she is subjected to the same act forcibly and against her will? Is it not obvious that the words of the exception are used in a sense which is more consonant with reason? And are they not intended to be in accord with the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians among themselves—the conduct of one toward another—is to be controlled by the customs and laws of [606] the tribe, save when Congress expressly or clearly directs otherwise? In our opinion this is the true view. The other would subject them not only to the statute relating to adultery, but also to many others which it seems most reasonable to believe were not

intended by Congress to be applied to them. One of these prohibits marriage between persons related within, and not including the fourth degree of consanguinity, computed according to the rules of the civil law, and affixes a punishment of not more than fifteen years' imprisonment for each violator. To justify a court in holding that these laws are to be applied to Indians, there should be some clear provision to that effect. Certainly that is not so now. Besides, the enumeration in the acts of 1885 and 1903, now §§ 328 and 329 of the Penal Code, of certain offenses as applicable to Indians in the reservations, carries with it some implication of a purpose to exclude others.

Judgment affirmed.

JAMES J. ABBOTT, Appt.,
v.
JAMES C. BROWN, United States Marshal in and for the Southern District of Florida.

(See S. C. Reporter's ed. 606–613.)

New trial — jurisdiction — delay in filing motion.

1. A breach of a court rule requiring motions for new trials to be made within four days after the entry of the verdict would, at the utmost, be a mere error of procedure, not affecting the jurisdiction.

[For other cases, see Trial, V. a, in Digest Sup. Ct. 1908.]

Federal courts — term — keeping alive during absence of judge.

2. A term of the Federal district court for the southern district of Florida, which, under the Judicial Code, §§ 9–11, 76, must always be open as a court of admiralty and equity, and may hold special terms at any time for the transaction of any kind of business, was not brought to an end, so far as criminal business was concerned, so as to prevent the subsequent granting of a new trial, by an adjournment "in accordance with" a specified court rule which, after referring to the legal requirement that the court be always open for the transaction of certain kinds of business, orders that, pending the temporary absence of the judge, the clerk be present daily for the transaction of business under the orders of the judge, and that, upon such days as there is business to be transacted, the court be open and a record of the same be entered upon the minutes.

[For other cases, see Courts, 307–314; New Trial, VI. a, in Digest Sup. Ct. 1908.]

Estoppel — assuming inconsistent positions in judicial proceedings.

3. A person acquitted of crime on a new trial granted after conviction is not estopped to assert the jurisdiction of the court to grant such new trial by demurring to, and moving to quash, an indictment charging him with subornation of perjury by the persons who made affidavits in support of the motion for the new trial, where such demurrer and motion to quash were based upon the ground that the motion was not filed within the specified number of days after verdict, which, though true in fact, the court held in effect not to be well founded in law, proceeding to sustain the demurrer and quash the indictment on another ground, and one not taken by him, *viz.*, that a previous adjournment order had brought the term to a conclusion.

[For other cases, see Estoppel, III. c, in Digest Sup. Ct. 1908.]

[No. 611.]

Argued April 13, 1916. Decided June 12, 1916.

APPEAL from the District Court of the United States for the Southern District of Florida to review an order discharging a writ of habeas corpus. Reversed and cause remanded for further proceedings.[1]

The facts are stated in the opinion.

Mr. **Charles B. Parkhill** argued the cause and filed a brief for appellant:

Every term continues until the call of the next succeeding term, unless previously adjourned *sine die;* and until that time the judgment may be modified or stricken out.

Noonan v. Bradley, 12 Wall. 129, 20 L. ed. 281; Rex v. Justices of Oxfordshire, 1 Maule & S. 442; Ex parte Friday, 43 Fed. 918, 8 Am. Crim. Rep. 351; Ex parte Lange, 18 Wall. 192, 21 L. ed. 885.

The appellant's motion for a new trial was acted upon and granted in term time, at a lawful term of the United States district court for the southern district of Florida.

Florida v. Charlotte Harbor Phosphate Co. 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. 885; East Tennessee Iron & Coal Co. v. Wiggin, 15 C. C. A. 510, 37 U. S. App. 139, 68 Fed. 446; United States v. Finnell, 185 U. S. 236, 242, 46 L. ed. 890, 892, 22 Sup. Ct. Rep. 633; United States v. Pitman, 147 U. S. 669, 670, 37 L. ed. 324, 325, 13 Sup. Ct. Rep. 425; Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582; Harlan v. McGourin, 218 U. S. 442, 54 L. ed. 1101, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849; United States v. McCarthy, 18 Fed. 87; United States v. Radford, 131 Fed. 378; Harrison v. German-American F. Ins. Co. 90 Fed. 758; Parsons v. Hathaway, 40 Me. 132; Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Duff v. Fisher, 15 Cal.

[1] Leave granted to present petition for rehearing herein within sixty days if counsel are so advised, on motion of Mr. Solicitor General Davis for the United States.
June 12, 1916.

375; State ex rel. Brainerd v. Adams, 84 Mo. 315; De Vall v. De Vall, 60 Or. 493, 40 L.R.A.(N.S.) 291, 118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 412; Ex parte Lange, 18 Wall. 192, 21 L. ed. 884; Ex parte Friday, 43 Fed. 916, 8 Am. Crim. Rep. 351.

Even though the motion was made more than four days after the rendition of the verdict, and was required by the rule to be made within four days, yet the court may treat the motion for a new trial, filed out of time, as a suggestion invoking the exercise of judicial discretion.

Scott v. Joffee, 125 Mo. 573, 102 S. W. 1039; Emma Silver Min. Co. v. Park, 14 Blatchf. 411, Fed. Cas. No. 4,467; Rex v. Teal, 11 East, 307, 10 Revised Rep. 516; Reg. v. Newman, 3 Car. & K. 252, Dears. C. C. 88, 1 El. & Bl. 268, 17 Jur. 617, 22 L. J. Q. B. N. S. 156; Reg. v. Hetherington, 5 Jur. 529.

An estoppel may not be raised in criminal cases. It has no application to criminal causes. The accused may show the actual state of facts, notwithstanding what he may have said or done.

Hughes, Crim. Law & Proc. §§ 537, 3185; Gillett, Indirect & Collateral Ev. § 119; State v. Hutchinson, 60 Iowa, 478, 15 N. W. 298, 4 Am. Crim. Rep. 162; Jackson v. People, 126 Ill. 144, 18 N. E. 286; Moore v. State, 53 Neb. 831, 74 N. W. 319; Bailey v. State, 57 Neb. 710, 73 Am. St. Rep. 540, 78 N. W. 284, 11 Am. Crim. Rep. 660.

Assistant Attorney General Wallace argued the cause and filed a brief for appellee:

The district court was without power to entertain the second motion for a new trial. Its order, therefore, and the second retrial and apparent acquittal, were each and all mere nullities.

United States v. Mayer, 235 U. S. 55, 67, 59 L. ed. 129, 135, 35 Sup. Ct. Rep. 16.

The appellant is estopped to assert that there was not a final adjournment of the court, and that the motion for a new trial was not made after such final adjournment.

2 Co. Inst. p. 39; People v. Royce, 106 Cal. 187, 37 Pac. 630, 39 Pac. 524; State v. Spaulding, 24 Kan. 1; State v. O'Brien, 94 Tenn. 79, 26 L.R.A. 252, 28 S. W. 311; State ex rel. Clark v. District Ct. 31 Mont. 428, 78 Pac. 769, 3 Ann. Cas. 841; Bigelow, Estoppel, 6th ed. pp. 783, 785; Davis v. Wakelee, 156 U. S. 680, 691, 39 L. ed. 578, 585, 15 Sup. Ct. Rep. 555; Abbot v. Wilbur, 22 La. Ann. 368; Davis v. Cornwall, 15 C. C. A. 559, 26 U. S. App. 777, 35 U. S. App. 315, 68 Fed. 522; Michels v. Olmstead, 157 U. S. 198, 39 L. ed. 671, 15 Sup. Ct. Rep. 580; Hughes v. Dundee Mortg. & Trust Invest. Co. 28 Fed. 46; The New York, 51 C. C. A. 482, 113 Fed. 810; Long v. Lockman, 135 Fed. 197; Nixon v. Fidelity & D. Co. 80 C. C. A. 336, 150 Fed. 576; Smith v. Warden, 19 Pa. 429; Taylor v. Crook, 136 Ala. 378, 96 Am. St. Rep. 26, 34 So. 905; Boatmen's Bank v. Fritzlen, 75 Kan. 490, 22 L.R.A.(N.S.) 1235, 89 Pac. 915; Test v. Larsh, 76 Ind. 460; Harbaugh v. Albertson, 102 Ind. 75, 1 N. E. 298; Kile v. Yellowhead, 80 Ill. 211; Denver City Irrig. & Water Co. v. Middaugh, 12 Colo. 436, 13 Am. St. Rep. 234, 21 Pac. 565; Arthur v. Israel, 15 Colo. 153, 10 L.R.A. 693, 22 Am. St. Rep. 381, 25 Pac. 81; Ellis v. White, 61 Iowa, 646, 17 N. W. 28; De Metton v. De Mello, 12 East, 234, 2 Campb. 420; Daniels v. Tearney, 102 U. S. 415, 419, 421, 26 L. ed. 187–189.

Mr. Justice Pitney delivered the opinion of the court:

This is an appeal from a final order discharging a writ of habeas corpus and remanding appellant to the custody of the United States marshal. The facts are as follows: Appellant was indicted in the United States district court for the southern district of Florida, at Tampa, [608] for a violation of a section of the Criminal Code, and in the month of March, 1912, was tried and found guilty. On the 12th day of the same month he was sentenced to confinement in the penitentiary at Atlanta for the term of one year and six months. On the same day, and after passing the sentence, the court entered the following order: "Ordered that court be adjourned in accordance with general rule No. 1, and all orders and other matters be entered as of the term. Thereupon court is adjourned as ordered." After the entry of this order, Judge Locke, the district judge, went to Jacksonville, in the same district, and the deputy clerk noted on the minutes from day to day that court was open in accordance with general rule No. 1, after which he entered orders made from time to time by the court in vacation. On May 24, 1912, appellant filed a motion for a new trial upon the ground of newly discovered evidence, with several affidavits in support of it. On June 26 Judge Locke, at Jacksonville, granted this motion, and made a proper order, pursuant to which appellant was brought to trial on February 11, 1913, when the jury disagreed. He was again tried on March 13, 1914, and the jury returned a verdict of not guilty. Thereafter, and in February, 1915, the persons who had made the affidavits in support of the motion for a new trial were indicted for perjury, and appellant was indicted for subornation of perjury. Appellant demurred to this indictment and moved to quash it upon the ground that Judge Locke had no jurisdic-

tion to grant a new trial because the motion was not filed within four days after the verdict. The demurrer and motion to quash were heard by the then presiding judge, who sustained the demurrer and quashed the indictment upon the ground that Judge Locke had no power or authority, after the making of the adjournment order of March 12, 1912, to vacate or set aside the sentence passed upon appellant on that date.

[609] Thereafter, and on March 20, 1915, the government procured a commitment to be issued upon the original judgment of conviction, and it is under this writ that appellant is now held in custody.

Two questions arise: (1) Were the order for a new trial, and the trial proceedings had thereunder, null and void? (2) If not, should they nevertheless be so regarded as against appellant, because of what he did in obtaining the quashing of the indictment for subornation of perjury?

Under the first head, counsel for appellee cites a rule of the district court, reading thus: "Motions for new trials shall be made within four days after the entry of the verdict, during which time no judgment shall be entered, except by leave of court," etc. We find in the record no evidence that there was such a rule; but, assuming we may take judicial notice of its existence, it was a mere regulation of practice, and a breach of it would be, at the utmost, a mere error of procedure, not affecting the jurisdiction.

The principal insistence, and the ground upon which the court rested the decision that is now under review, is that the adjournment order of March 12 brought the term to an end, so far as criminal business was concerned, and left the court without jurisdiction to entertain the motion of May 24, or grant a new trial thereon, because a court of law cannot set aside or alter its final judgment after the expiration of the term at which it was rendered, except pursuant to an application made within the term. United States v. Mayer, 235 U. S. 55, 67, 59 L. ed. 129, 135, 35 Sup. Ct. Rep. 16.

The order of March 12 must be read in connection with the general rule to which it refers, and this must be interpreted in the light of the law regulating the terms and the business of the court. General rule No. 1 is as follows:

"The law requiring the court to be always open for the transaction of certain kinds of business which may be [610] transacted under the statutes, and under the orders of the judge, who may at the time be absent from the place in which the court is held, and which business can be transacted by the clerk under the orders of the judge, and is transacted from day to day in the court, it is ordered that, pending the temporary absence of the presiding judge of this district from the district, or the division of the district in which business is presented to be transacted, the clerk be present, either by himself or his deputy, daily, for the transaction of business, and upon such days as there is business to be transacted the court be opened, and that a record of the same be entered upon each of said days upon the minutes."

The provisions of law referred to are to be found in the Judicial Code (act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, Comp. Stat. 1913, § 1061), of which § 76 divides the state of Florida into two districts, northern and southern, and provides: "Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction."

Other sections to be considered are: Sec. 9 (§§ 574 and 638, Rev. Stat.), which declares that the district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing pleadings, issuing and returning process, and making interlocutory motions, orders, etc., preparatory to the hearing upon the merits; § 10 (§ 578, Rev. Stat.), requiring such courts to hold monthly adjournments of their regular terms for the trial of criminal causes when the business requires it; [611] and § 11 (§ 581, Rev. Stat.), which declares that a special term of the district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge, and that any business may be transacted at such special term which might be transacted at a regular term.

The provision of § 76, which requires the district court to be open at all times for the purpose of hearing and deciding admiralty causes, traces its origin to the act of February 23, 1847 (chap. 20, 9 Stat. at L. 131, Comp. Stat. 1913, § 1061), which established the southern district of Florida, evidently for the especial purpose of disposing of admiralty business; and this particular provision was carried into the Re-

vised Statutes as § 575. It covers the *hearing and deciding* of admiralty causes, while the provision now found in § 9, Judicial Code (§§ 574 and 638, Rev. Stat.), which originated in an act of August 23, 1842 (chap. 188, § 5, 5 Stat. at L. 517, Comp. Stat. 1913, § 976), relates to interlocutory proceedings *"preparatory to the hearing."*

The statutory provisions referred to are designed to render the district courts readily accessible to applicants for justice in all branches of the jurisdiction; and while they *require* those courts to be always open only as courts of admiralty and as courts of equity, they *permit* "special terms" to be held at any time for the transaction of any kind of business.

The celebrated remark of Lord Eldon: "The court of chancery is always open" (Temple v. Bank of England, 6 Ves. Jr. 770, 771), evidenced the great adaptability of the practice of that court to the needs of litigants; and modern legislation has shown a strong tendency to reform the practice of common-law courts by facilitating the transaction of their business in vaction. The sections we have quoted from the Judicial Code indicate a policy of avoiding the hardships consequent upon a closing [612] of the court during vacations. The general rule in question was evidently designed to carry out this policy, and should receive a liberal interpretation consonant with its spirit: that is, as keeping the term alive, by adjournments from day to day, pending the temporary absence of the presiding judge, so that court might and should be actually opened upon such days as there was business of any character to be transacted. Thus interpreted, its effect was not different from that of the rule which this court, in Harlan v. McGourin, 218 U. S. 442, 449, 450, 54 L. ed. 1101, 1105, 1106, 31 Sup. Ct. Rep. 44, 21 Ann. Cas. 849, construed as keeping the court open from the beginning of one statutory term until the beginning of the next. Judge Locke so construed the general rule and the adjournment order made under it, when he entertained and granted the motion for new trial filed May 24, 1912, and we are satisfied that he committed no jurisdictional error in so doing. It is obvious that the order for a new trial necessarily vacated the sentence of March 12, 1912, and that the subsequent acquittal of appellant exhausted the power of the court under the first indictment.

Nor is appellant, in our opinion, estopped to assert the jurisdiction of Judge Locke to entertain the motion for a new trial. The estoppel is sought to be based upon the position he is said to have taken in demurring to and moving to quash the indictment for subornation of perjury. The record shows, however, that the demurrer and motion were based upon the ground that the motion for new trial was not filed within four days after verdict. This was true in fact, but the court in effect held it not well founded in law; for it proceeded to sustain the demurrer and quash the indictment upon another ground, and one not taken by appellant, *viz.*, that the adjournment order of March 12, 1912, brought the term to a conclusion and deprived Judge Locke of power to set aside the final judgment and sentence passed upon appellant [613] on that day. The fundamental ground of an estoppel is wanting, and we need not weigh other considerations that might operate against it.

The judgment of conviction having been vacated by an order of the court, made within the scope of its power and jurisdiction, there remains no legal foundation for the commitment issued on March 20, 1915, and appellant is entitled to be discharged from custody.

Final order reversed, and the cause remanded for further proceedings in conformity with this opinion.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Petitioner,
v.
L. HILTON-GREEN and W. A. Finlay, Jr., as Executors of the Estate of C. L. Wiggins, Deceased.

(See S. C. Reporter's ed. 613-624.)

Insurance — false representations — fraudulent intent.

1. Material incorrect representations in the application for a policy of life insurance, which is made an essential constituent of the policy, if known to be untrue by the assured when made, invalidate the policy without further proof of actual, conscious design to defraud.

[For other cases, see Insurance, V. a, 4, in Digest Sup. Ct. 1908.]

Notice — imputed — knowledge of agent.

2. The rule which imputes an agent's knowledge to the principal does not apply

NOTE.—On effect of knowledge by insurance agent of falsity of statement in application—see note to Clemans v. Supreme Assembly, R. S. G. F. 16 L.R.A. 33.

On bad faith of insured as affecting estoppel of insurer to set up falsity of answers in application because of agent's knowledge of such falsity—see note to Mudge v. Supreme Ct. I. O. F. 14 L.R.A. (N.S.) 279.

when the third party was acquainted with circumstances plainly indicating that the agent would not advise his principal.

[For other cases, see Notice, II. a, in Digest Sup. Ct. 1908.]

Insurance — estoppel — agent's knowledge — fraudulent misrepresentations.

3. The designation as agent of an insurance company, made by Florida Gen. Stat. § 2765, of any person who in anywise, directly or indirectly, makes or causes to be made any contract of insurance for or on account of such insurance company, does not affect the true relationship to the parties to a life insurance contract of the local manager, soliciting agent, and local medical examiners, who were in fact designated agents of the company, with power to bind it within their apparent authority, and their knowledge of the falsity and fraudulent character of material representations by the insured in the application, which is made an essential constituent of the policy, is not the knowledge of the company, and does not estop it to rely upon such misrepresentations as a defense to an action on the policy.

[For other cases, see Insurance, VII. a; II. a, in Digest Sup. Ct. 1908.]

[No. 126.]

Argued December 9 and 10, 1915. Decided June 12, 1916.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of Florida in favor of plaintiffs in an action upon policies of life insurance. Reversed and remanded for further proceedings.

See same case below, 127 C. C. A. 467, 211 Fed. 31.

The facts are stated in the opinion.

Mr. **Frederick L. Allen** argued the cause, and, with Messrs. Emmett Wilson, Philip D. Beall, and Murray Downs, filed a brief for petitioner:

What the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made fair and true answers.

Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466.

Under the provisions of the policy sued upon, it having been conclusively established that Wiggins made false statements in regard to matters material to the risk, as a matter of law, there cannot be a recovery.

Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186; Prudential Ins. Co. v. Moore, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. Rep. 191; Thorner v. John Hancock Mut. L. Ins. Co. 164 App. Div. 34, 149 N. Y. Supp. 345; Archer v. Equitable Life Assur. Soc. 169 App. Div. 43, 154 N. Y. Supp. 519, 53 N. Y. L. J. 1831; Gardner v. North State Mut. L. Ins. Co. 163 N. C. 367, 48 L.R.A.(N.S.) 714, 79 S. E. 806, Ann. Cas. 1915B, 652; March v. Metropolitan L. Ins. Co. 186 Pa. 640, 65 Am. St. Rep. 887, 40 Atl. 1100; Equitable Life Assur. Soc. v. Keiper, 91 C. C. A. 433, 165 Fed. 595; Mutual L. Ins. Co. v. Mullan, 107 Md. 457, 69 Atl. 385; Metropolitan L. Ins. Co. v. Brubaker, 78 Kan. 146, 18 L.R.A. (N.S.) 362, 130 Am. St. Rep. 356, 96 Pac. 62, 16 Ann. Cas. 267; Cobb v. Covenant Mut. Ben. Asso. 153 Mass. 176, 10 L.R.A. 666, 26 Am. St. Rep. 619, 26 N. E. 230; Lippincott v. Supreme Council, R. A., 64 N. J. L. 310, 45 Atl. 774; Farrell v. Security Mut. L. Ins. Co. 60 C. C. A. 374, 125 Fed. 684; Mutual L. Ins. Co. v. Powell, 133 C. C. A. 417, 217 Fed. 565; Life Asso. of America v. Edwards, 86 C. C. A. 243, 159 Fed. 53; Hubbard v. Mutual Reserve Fund Life Asso. 40 C. C. A. 665, 100 Fed. 719; Sladden v. New York L. Ins. Co. 29 C. C. A. 596, 58 U. S. App. 482, 86 Fed. 102; Brady v. United Life Ins. Asso. 9 C. C. A. 252, 20 U. S. App. 337, 60 Fed. 727; Butler v. Michigan Mut. L. Ins. Co. 184 N. Y. 337, 77 N. E. 398; Foley v. Royal Arcanum, 151 N. Y. 196, 56 Am. St. Rep. 621, 45 N. E. 456; McCollum v. Mutual L. Ins. Co. 55 Hun, 103, 8 N. Y. Supp. 249, 124 N. Y. 642, 27 N. E. 412; Foote v. Ætna L. Ins. Co. 61 N. Y. 571; Smith v. Ætna L. Ins. Co. 49 N. Y. 211; Hoffman v. Metropolitan L. Ins. Co. 141 App. Div. 713, 126 N. Y. Supp. 436; Dentz v. O'Neill, 25 Hun, 442; Kasprzyk v. Metropolitan L. Ins. Co. 79 Misc. 263, 140 N. Y. Supp. 211; Mutual Reserve Fund Life Asso. v. Cotter, 72 Ark. 620, 83 S. W. 321; Crosse v. Supreme Lodge, K. L. H. 254 Ill. 80, 45 L.R.A.(N.S.) 162, 98 N. E. 261; Royal Neighbors v. Spore, 160 Ky. 572, 169 S. W. 984; Metropolitan L. Ins. Co. v Schmidt, 29 Ky. L. Rep. 255, 93 S. W. 1055; Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553; Dwyer v. Mutual L. Ins. Co. 72 N. H. 572, 58 Atl. 502; Brunjes v. Metropolitan L. Ins. Co. 83 N. J. L. 296, 84 Atl. 1062; Bryant v. Metropolitan L. Ins. Co. 147 N. C. 180, 60 S. E. 983; Van Woert v. Modern Woodmen, 29 N. D. 441, 151 N. W. 224; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83, 17 Ann. Cas. 1199; Smith v.

Northwestern Mut. L. Ins. Co. 196 Pa. 314, 46 Atl. 426; Mengel v. Northwestern Mut. L. Ins. Co. 176 Pa. 280, 35 Atl. 197; Fidelity Mut. Life Asso. v. Harris, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

Wiggins made a false and untrue statement with reference to a matter material to the risk.

Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356, 34 Sup. Ct. Rep. 186; Prudential Ins. Co. v. Moore, 231 U. S. 560, 58 L. ed. 367, 34 Sup. Ct. Rep. 191; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Home L. Ins. Co. v. Myers, 50 C. C. A. 544, 112 Fed. 846; Security Mut. L. Ins. Co. v. Webb, 55 L.R.A. 122, 45 C. C. A. 648, 106 Fed. 808; Floyd v. Metropolitan L. Ins. Co. — Del. —, 90 Atl. 404; Kelly v. Life Ins. Clearing Co. 113 Ala. 453, 21 So. 361; Moore v. Mutual Reserve Fund Life Asso. 133 Mich. 526, 95 N. W. 573; Finn v. Metropolitan L. Ins. Co. 70 N. J. L. 255, 57 Atl. 438; Edington v. Ætna L. Ins. Co. 77 N. Y. 564, 100 N. Y. 536, 3 N. E. 315; McCollum v. Mutual L. Ins. Co. 55 Hun, 103, 8 N. Y. Supp. 249, 124 N. Y. 642, 27 N. E. 412; Stuart v. Mutual Reserve Fund Life Asso. 78 Hun, 191, 28 N. Y. Supp. 944; March v. Metropolitan L. Ins. Co. 186 Pa. 629, 65 Am. St. Rep. 887, 40 Atl. 1100; Mutual L. Ins. Co. v. Nichols, — Tex. Civ. App. —, 24 S. W. 910; American Union L. Ins. Co. v. Judge, 191 Pa. 484, 43 Atl. 374; Meyer-Bruns v. Pennsylvania Mut. L. Ins. Co. 189 Pa. 579, 42 Atl. 297; Hardy v. Phœnix Mut. L. Ins. Co. 167 N. C. 22, 83 S. E. 5.

Wiggins intended to deceive the insurance company.

Studwell v. Mutual Ben. Life Asso. 29 Jones & S. 287, 19 N. Y. Supp. 709, affirmed without opinion in 139 N. Y. 615, 35 N. E. 204; Northwestern L. Ins. Co. v. Montgomery, 116 Ga. 799, 43 S. E. 79; Williams v. St. Louis L. Ins. Co. 97 Mo. App. 449, 71 S. W. 376; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686.

Knowledge of an agent will not be imputed to his principal where the third party and agent are committing a fraud upon the principal.

Eagle Fire Co. v. Lewallen, 56 Fla. 246, 47 So. 947; Florida L. Ins. Co. v. Dillon, 63 Fla. 140, 58 So. 643; Maier v. Fidelity Mut. Life Asso. 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503; American Nat. Bank v. Miller, 107 C. C. A. 456, 185 Fed. 338, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. Rep. 883; Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; Lindsey v. Lambert Bldg. & L. Asso. 4 Fed. 48; Iverson v. Metropolitan L. Ins. Co. 151 Cal. 746, 13 L.R.A. (N.S.) 866, 91 Pac. 609; Loftin v. Great Southern Home Benev. Asso. 9 Ga. App. 121, 70 S. E. 353; Forwood v. Prudential Ins. Co. 117 Md. 254, 83 Atl. 169; Bonewell v. North American Acci. Ins. Co. 160 Mich. 137, 125 N. W. 59; Sprinkle v. Knights Templar & M. Life Indemnity Co. 124 N. C. 405, 32 S. E. 734; Burruss v. National Life Asso. 96 Va. 543, 32 S. E. 49; Elliott v. Knights of Modern Maccabees, 46 Wash. 320, 13 L.R.A.(N.S.) 856, 89 Pac. 929; Wilhelm v. Columbian Knights, 149 Wis. 585, 136 N. W. 160.

The defendant did not ratify the acts of Torrey, Hogue, or the medical examiners, Turberville and Kilpatrick.

Oxford Lake Line v. First Nat. Bank, 40 Fla. 349, 24 So. 480; Skinner Mfg. Co. v. Douville, 57 Fla. 180, 49 So. 125.

The knowledge of Hogue, Torrey, and the doctors cannot be imputed to the petitioner to establish an estoppel or waiver.

Mutual L. Ins. Co. v. Powell, 133 C. C. A. 417, 217 Fed. 565; John Hancock Mut. L. Ins. Co. v. Houpt, 113 Fed. 572; Butler v. Michigan Mut. L. Ins. Co. 184 N. Y. 337, 77 N. E. 398; Smith v. Ætna L. Ins. Co. 49 N. Y. 215; Flynn v. Equitable L. Assur. Soc. 67 N. Y. 503, 23 Am. Rep. 134; Foot v. Ætna L. Ins. Co. 61 N. Y. 571; McCollum v. Mutual L. Ins. Co. 55 Hun, 106, 8 N. Y. Supp. 249, 124 N. Y. 642, 27 N. E. 412; Lewis v. Phœnix Mut. L. Ins. Co. 39 Conn. 100; Ryan v. World Mut. L. Ins. Co. 41 Conn. 168, 19 Am. Rep. 490; Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330; Madsen v. Maryland Casualty Co. 168 Cal. 204, 142 Pac. 51; Dimick v. Metropolitan L. Ins. Co. 69 N. J. L. 384, 62 L.R.A. 774, 55 Atl. 291; Silcox v. Grand Fraternity, 79 N. J. L. 502, 76 Atl. 1018.

The statutes of the states of Massachusetts, Wisconsin, Missouri, Illinois, and Texas contain provisions similar to the provisions of the Florida statute on the subject of agents.

The purpose of the statutes was to make a person doing the acts specified in the statutes amenable to the penalties imposed by the statutes in the event of the so-called "agent" attempting to represent or representing a foreign corporation which had not submitted itself to the jurisdiction of the state.

Markey v. Mutual Ben. L. Ins. Co. 103 Mass. 78; Wood v. Firemen's F. Ins. Co. 126 Mass. 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co. 95 Wis. 226, 37 L.R.A. 131, 70 N. W. 84; Hartford F. Ins. Co. v.

Walker, 94 Tex. 473, 61 S. W. 705; Mallen v. National Life Asso. 168 Mo. App. 503, 153 S. W. 1065; United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 455, 34 C. C. A. 240, 92 Fed. 127.

Hogue was Wiggins's broker.

United Firemen's Ins. Co. v. Thomas, supra; American Steam Laundry Co. v. Hamburg Bremen F. Ins. Co. 121 Tenn. 13, 21 L.R.A.(N.S.) 442, 113 S. W. 394.

Courts will enforce the contracts as made by the parties.

Maier v. Fidelity Mut. Life Asso. 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; Russell v. Prudential Ins. Co. 176 N. Y. 188, 98 Am. St. Rep. 656, 68 N. E. 252; Provident Sav. Life Assur. Soc. v. Withers, 132 Ky. 541, 116 S. W. 350; New York L. Ins. Co. v. O'Dom, 100 Miss. 219, 56 So. 379, Ann. Cas. 1914A, 583; Ijams v. Provident Sav. Life Assur. Co. 185 Mo. 466, 84 S. W. 51.

Mr. W. A. Blount argued the cause, and, with Messrs. F. B. Carter and A. C. Blount, filed a brief for respondents:

The blank form when filled out and signed by the applicant, and delivered to the agent, constituted and completed the application for insurance. Everything that followed the application was an element of its result.

Edington v. Ætna L. Ins. Co. 100 N. Y. 536, 3 N. E. 315.

Remembering that all ambiguities must be resolved against the company (Thompson v. Phœnix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019), and that the policy will not be so construed as to embrace causes of invalidity, unless absolutely required (McMaster v. New York L. Ins. Co. 183 U. S. 25–40, 46 L. ed. 64–73, 22 Sup. Ct. Rep. 10), it should be held that the application does not include the medical examiner's report; and so it has been held (Boehm v. Commercial Alliance Ins. Co. 9 Misc. 529, 30 N. Y. Supp. 660, affirmed in 35 N. Y. Supp. 1103; Higbee v. Guardian Mut. L. Ins. Co. 66 Barb. 462).

The parties may, by their contract, make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts; at least, when statements regarding them are required by the insurers as part of the basis of contract.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, 10 L. ed. 1044; Jeffries v. Economical Mut. L. Ins. Co. 22 Wall. 47, 22 L. ed. 833; Anderson v. Fitzgerald, 4 H. L. Cas. 484, 17 Jur. 995; Macdonald v. Law Union F. & L. Ins. Co. L. R. 9 Q. B. 328, 43 L. J. Q. B. N. S. 131, 30 L. T. N. S. 545, 22 Week. Rep. 530; Edington v. Ætna L. Ins. Co. 77 N. Y. 564, 100 N. Y. 536, 3 N. E. 315; Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 189, 30 L. ed. 646, 7 Sup. Ct. Rep. 500.

But answers to questions propounded by the insurers in an application for insurance, unless they are clearly shown by the face of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations, as to which substantial truth, in everything material to the risk, is all that is required of the applicant.

Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381; Thomson v. Weems, L. R. 9 App. Cas. 671; Phœnix Mut. L. Ins. Co. v. Raddin, supra.

By the questions inserted in the application, the defendant was seeking for information bearing upon the risk it was to take,—the probable duration of the life to be insured. It was not seeking for information as to merely temporary disorders, or functional disturbances, having no bearing upon health or continuance of life.

Cushman v. United States L. Ins. Co. 70 N. Y. 72.

An illness must not be temporary, leaving no after-effects, but must be such as to disturb or derange, at least for a time, vital functions.

Connecticut Mut. L. Ins. Co. v. Union Trust Co. 112 U. S. 251, 28 L. ed. 709, 5 Sup. Ct. Rep. 119.

A statement in the absence of a warranty, and so being a representation, must not only be false, but must, in order to avoid the policy, have been made knowingly, with a fraudulent intent to mislead and deceive.

Ætna L. Ins. Co. v. Rehlaender, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251.

The language of this policy requires that an avoiding representation shall not only be material and false, but fraudulent.

Pelican v. Mutual L. Ins. Co. 44 Mont. 277, 119 Pac. 778; Ætna L. Ins. Co. v. Outlaw, 114 C. C. A. 608, 194 Fed. 862; Mutual L. Ins. Co. v. Hilton-Green, 127 C. C. A. 467, 211 Fed. 31.

A soliciting agent who prepares an application and gets the agent of another company to procure his company to issue a policy is agent of the insurer, and his knowledge binds it.

Kausal v. Minnesota Farmers' Mut. F.

Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430.

And such an agent, soliciting the insurance, preparing the application, giving it to such other agent, and delivering the policy and receiving the premium, is the agent of the insurer.

Sias v. Roger Williams Ins. Co. 8 Fed. 183; May v. Western Assur. Co. 27 Fed. 200; Palatine Ins. Co. v. McElroy, 40 C. C. A. 441, 100 Fed. 391; Ahlberg v. German Ins. Co. 94 Mich. 259, 53 N. W. 1102; Bliss v. Potomac F. Ins. Co. 134 Mich. 212, 95 N. W. 1083; Michigan F. & M. Ins. Co. v. Wich, 8 Colo. App. 409, 46 Pac. 687; Queen Ins. Co. v. Union Bank & T. Co. 49 C. C. A. 555, 111 Fed. 697.

The general rule that the knowledge of an insurance agent is imputable to the company applies also in most instances to a soliciting agent, with reference to matters made known to him prior to the execution of the policy.

Cooley, Briefs on Ins. p. 2524; Bliss v. Potomac F. Ins. Co. 134 Mich. 212, 95 N. W. 1083; Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 234–236, 20 L. ed. 623, 624.

Hogue was the agent of the petitioner under Fla. Gen. Laws, §§ 2765, 2777.

New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 105.

Under a like statute, a broker who obtains for another, from the regular agent of an insurance company, a policy which he delivers to that other, and collects premiums from him, is the agent of the company, and his knowledge of facts affecting the validity of the policy is equivalent to knowledge of such facts by the company.

Welch v. Fire Asso. of Philadelphia, 120 Wis. 456, 98 N. W. 227.

Under a like statute, a local agent may make a verbal contract of insurance, and waive conditions.

Zell v. Herman Farmers' Mut. Ins. Co. 75 Wis. 521, 44 N. W. 828.

And under the same statute, the agent is authorized to change a policy.

Continental Ins. Co. v. Ruckman, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77.

And under a like statute this court has said, in effect, that the agent (in that case a local agent) stood in the same position as the company's principal officer, having authority in the premises, and acting in the home office.

Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304–311, 33 L. ed. 341–344, 10 Sup. Ct. Rep. 87.

In a case where (as here) the agent of one company, having failed to get insurance in his company, for an applicant, sought and obtained it in another company, through that other company's agent, he was held (under the Wisconsin statute) to be the agent of the latter company.

Speiser v. Phœnix Mut. L. Ins. Co. 119 Wis. 530, 97 N. W. 207.

And under the same statute, the same rule was applied to the case where the agent of one company applied to the agent of another company for insurance upon an applicant, and, in pursuance of such application, a policy was issued. The person who was agent of the first company was held to be the agent of the insurer.

Schomer v. Hekla F. Ins. Co. 50 Wis. 575, 7 N. W. 544; Alkan v. New Hampshire Ins. Co. 53 Wis. 136, 10 N. W. 91.

The binding effect of the knowledge and acts of the agent under a like statute (Nebraska) is shown in New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 106.

The question as to the defendants being bound by knowledge of the general agent, made so by the statute, is foreclosed by the decision of this court, in a case where an Iowa statute made a solicitor for an insurance company an agent of the company.

Continental L. Ins. Co. v. Chamberlain, supra.

When a medical examiner is authorized by an insurance company to fill up blanks for answers to questions to be propounded to applicants for insurance in a medical examination, or filling them up is within the apparent scope of his authority, and he writes down false answers, and thereafter procures the signature of the applicant thereto, who had given correct answers to the questions, and the company afterwards receives the premium, and issues a policy, the company will, upon the death of the insured, be estopped from insisting on the falsity of the answers, although warranted to be true.

Providence Life Assur. Soc. v. Reutlinger, 58 Ark. 528, 25 S. W. 835; Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016; Flynn v. Equitable L. Ins. Co. 78 N. Y. 568, 34 Am. Rep. 561; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372; Connecticut General L. Ins. Co. v. McMurdy, 89 Pa. 363; Pudritzky v. Supreme Lodge, K. H. 76 Mich. 428, 43 N. W. 373; Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 348, 7 L.R.A. 217, 16 Am. St. Rep. 893, 12 S. W. 621; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 106; Hœland v. Western U. L. Ins. Co. 58 Wash. 100, 107 Pac. 866; Endowment Rank, K. P. v. Cogbill, 99 Tenn. 28, 41 S. W. 340; Mutual Ben. L. Ins. Co. v. Robison, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723;

Franklin L. Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102.

So much does the statute make the person who directly or indirectly causes to be made any contract of insurance for or on account of an insurance company, to all intents and purposes an agent or representative of such company, that the company cannot, even by its contract with the insured, convert such person into the agent of the insured.

Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87.

Consultation of physician within five years was not material, unless about a matter which itself would make it material, —that is, which would affect the soundness of the health or the length of the life, or would derange vital functions, etc.,—of the applicant.

Hoeland v. Western U. L. Ins. Co. 58 Wash. 100, 107 Pac. 866; Blumenthal v. Berkshire L. Ins. Co. 134 Mich. 216, 104 Am. St. Rep. 604, 96 N. W. 17; Franklin L. Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102; Valentini v. Metropolitan L. Ins. Co. 106 App. Div. 487, 94 N. Y. Supp. 758; Smith v. Metropolitan L. Ins. Co. 183 Pa. 504, 38 Atl. 1038; Genung v. Metropolitan L. Ins. Co. 60 App. Div. 424, 69 N. Y. Supp. 1041.

The fraud or dishonesty of the agent will not defeat the policy.

Fidelity Mut. F. Ins. Co. v. Lowe, 4 Neb. (Unof.) 159, 93 N. W. 749; Germania L. Ins. Co. v. Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Germania F. Ins. Co. v. McKee, 94 Ill. 494; Kister v. Lebanon Mut. Ins. Co. 128 Pa. 553, 5 L.R.A. 646, 15 Am. St. Rep. 696, 18 Atl. 447; Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016; Menk v. Home Ins. Co. 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Creed v. Sun Fire Office, 101 Ala. 522, 23 L.R.A. 177, 46 Am. St. Rep. 134, 14 So. 323; Grattan v. Metropolitan L. Ins. Co. 92 N. Y. 286, 44 Am. Rep. 372.

The refutation of the idea that the binding force of the knowledge of the agent is based upon the presumption that the agent will communicate knowledge which he has gained to the principal runs through several decisions of this court, which hold that when the applicant communicates to the agent facts which would prevent the insurer from accepting the risk, but the agent construes such facts, and inserts his construction in the policy, the insurer is bound.

Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298.

The knowledge of Wiggins that the statement was false did not avoid the policy, nor would his intent to defraud the defendant.

2 Pom. Eq. Jur. § 894; Follette v. Mutual Acci. Asso. 110 N. C. 377, 15 L.R.A. 668, 28 Am. St. Rep. 696, 14 S. E. 923, 107 N. C. 241, 12 L.R.A. 315, 22 Am. St. Rep. 878, 12 S. E. 370; Sun L. Ins. Co. v. Phillips, — Tex. Civ. App. —, 70 S. W. 605; Miller v. Mutual Ben. L. Ins. Co. 31 Iowa, 216, 7 Am. Rep. 122; Speiser v. Phœnix Mut. L. Ins. Co. 119 Wis. 530, 97 N. W. 207; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304–310, 33 L. ed. 341–344, 10 Sup. Ct. Rep. 87; Mutual Ben. L. Ins. Co. v. Robison, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 728; Crouse v. Hartford F. Ins. Co. 79 Mich. 249, 44 N. W. 496.

The mere fact that Wiggins knew, if he read the application, that the answer as to the prior application to the Prudential was not true, and that he knew that the agents knew that it was not true, does not prove collusion.

Speiser v. Phœnix Mut. L. Ins. Co. 119 Wis. 530, 97 N. W. 207.

The agent has power to construe the requirements made by the principal, and to determine whether they have in a given case been complied with or not, and if he knows, in such case, that there has been an incomplete or insufficient compliance, and accepts it, he construes it to be sufficient.

Ætna Live Stock Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 252, 4 Am. Rep. 483; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 105; American L. Ins. Co. v. Mahone, 21 Wall. 156, 22 L. ed. 594.

The representation in an application that an applicant has not been attended by a physician, nor has consulted one previously, is not false, if the applicant merely omits to state a treatment for some temporary indisposition.

Blumenthal v. Berkshire L. Ins. Co. 134 Mich. 216, 104 Am. St. Rep. 604, 96 N. W. 17.

Mere carelessness or negligence cannot have the effect, in insurance representations, of fraud.

Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co. 38 L.R.A. 70, 19 C. C. A. 316, 43 U. S. App. 75, 73 Fed. 654.

Mr. Justice McReynolds delivered the opinion of the court:

Respondents sued to recover upon four

policies, not different except as to numbers, for $7,662 each, and dated December 16, 1908, on the life of their testator, Wiggins, who died March 26, 1910. By various pleas the insurance company set up that application upon which policies were based contained material representations both false and fraudulent. In reply the executors denied truth of each plea, and also alleged that if application [615] contained any misrepresentations, the actual circumstances were known to company when policies issued.

Two separate application blanks, each plainly printed upon a large, single sheet, were filled out and presented. They are substantially identical except medical examiner's report upon one, dated December 15, 1908, is signed by Geo. C. Kilpatrick, M. D., in two places, while the other, dated December 16, 1908, is twice signed by J. S. Turberville, M. D. (Under the company's rules, where insurance applied for amounted to $30,000, two medical examinations were required.)

At the top of each sheet the following appears: "THIS APPLICATION made to the Mutual Life Insurance Company of New York is the basis and a part of a proposed contract of insurance, subject to the charter of the company and the laws of the state of New York. I hereby agree that all the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept, and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been signed by the president and secretary and countersigned by the registrar of the company and issued during my continuance in good health; unless a binding receipt has been issued as hereinafter provided."

Immediately thereafter are statements concerning assured's address, occupation, birth, character of policy desired, etc., and finally this, alleged and shown to be untrue: "22. I have never made an application for life insurance to any company or association upon which a policy has not been issued on the plan and premium rate originally applied for, except as to the following companies or associations: None, and no such application [616] is now pending or awaiting decision." And this part of the paper concludes:

Dated at Pine Barren, Fla. Dec. 15, 1908.

Signature of person whose life is proposed for insurance, } Cilbey L. Wiggins

I have known the above named applicant for six years and saw him sign this application. I have issued binding receipt No. —.

J. D. Torrey, Soliciting Agent,
[by rubber stamp]
J. D. Torrey, Manager,
Mobile, Ala.

On lower portion of the same page, under caption, "Medical Examiner's Report," are sundry statements, ostensibly by applicant, concerning his health history, etc.,—among them the following, alleged and shown to be untrue:

"3. (a) What illnesses, diseases, or accidents have you had since childhood? Pneumonia. Number of attacks: One. Date of each: 1899. Duration: Thirty days. Severity: Not severe. Results: Complete recovery.

"4. State every physician whom you have consulted in the past five years. None."

"8. Have you undergone any surgical operation? No."

"13. (a) Have you ever been under treatment at any asylum, cure, hospital, or sanitarium. No."

"16. Have you ever been examined for a policy in any company or association which was not issued as applied for? No."

This division ends thus:

Dated at Pine Barren, State of Florida the 15 day of December 1908
Witness:
Geo. C. Kilpatrick, M. D.

I certify that my answers to the foregoing questions are correctly recorded by the Medical Examiner.
Cilbey L. Wiggins
Signature of person examined.

[617] At the top of reverse page, under "Medical Examiner's Report (Continued)," there are many answers purporting to be replies to inquiries propounded by medical examiner concerning applicant's figure, apparent age, measurements, pulse, results of physical examination and personal investigations, etc. And then the following:

I certify that I have made this examination at Pine Barren, Fla., on this 15 day of December, 1908, and that the foregoing questions have been put, and the answers of the applicant recorded as stated.

Geo. C. Kilpatrick, M. D.
Medical Examiner.

The four policies, after being signed in New York by the president, secretary, and registrar of the company, were delivered to assured in Florida. Among others, they contain these clauses:

"This policy and the application herefor, copy of which is indorsed hereon or attached hereto, constitutes the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, a copy of which is indorsed hereon or attached hereto." "Agents are not authorized to modify this policy or to extend the time for paying a premium."

During summer of 1907 assured suffered serious pains in his head, and, after consulting more than one physician, went to a sanitarium at Montgomery, Alabama, and was there operated on for a cystic enlargement of the lower jaw caused by an impacted wisdom tooth. He was confined to the sanitarium for ten days and remained under [618] immediate care of a physician from July 16th to August 13th, 1907.

Early in November, 1908, he applied to Prudential Insurance Company of America through J. C. Hogue, a special agent operating under J. R. Tapia, its manager at Mobile, Alabama, for insurance amounting to $40,000. The application was accompanied, according to its requirements, by two medical reports dated November 3d and 4th, signed respectively by Dr. J. C. McLeod and Dr. Geo. C. Kilpatrick. Several weeks later the company indicated unwillingness to accept risk because of location, but the application, although marked "withdrawn," was retained. At this time Wiggins had $30,000 insurance with the Prudential, $20,000 with the Equitable, and $5,000 with fraternal insurance companies.

The application of petitioner now under consideration resulted from earnest and persistent solicitation by the same J. C. Hogue. The circumstances under which papers were prepared and signed are not entirely clear; but it appears without contradiction that they were not signed by assured in Torrey's presence—there was no personal acquaintance between the two men. Also that neither medical report was signed by assured in presence of Dr. Geo. C. Kilpatrick or Dr. J. S. Turberville; and that neither physician made the personal examination certified by him. The physicians filled the blanks and signed their names at Hogue's request and because of his representations. Through Torrey, petitioner's district manager at Mobile, the application was forwarded to New York, and, relying upon its statements, officers there issued policies and sent them to assured with copies of application papers which, by reference, were incorporated therein. So far as appears, assured accepted them without objection and paid the premiums.

An effort was made to show that facts concerning Wiggins's medical history, former unsuccessful application to [619] Prudential, and circumstances surrounding transactions now in question, were known by Hogue, the medical examiners, or Torrey, each of whom, it is claimed, was petitioner's agent.

Assured was sixty-one years of age, president of a lumber company, apparently a man of considerable wealth, and experienced in insurance matters.

At conclusion of evidence, counsel for insurance company asked a directed verdict. This was refused; and the court in effect instructed the jury: That in order for company successfully to defend upon ground of false statements, these must have been material, and made by Wiggins with knowledge of their falsity, and with a fraudulent purpose,—that is, with intent to deceive. That if they believed it knew of their falsity when application was accepted, no defense could be based upon them. That it knew the actual facts if the jury "should find that an agent whose knowledge would be the knowledge of the defendant did so know." But if the jury found that falsity of statements was within knowledge of Hogue and Torrey and medical examiners, and further found an understanding, tacit or express, between Wiggins and said agents to procure the policies by collusive co-operation to conceal the truth, there could be no recovery. Excerpts which follow fairly indicate general import of charge:

"The contract of insurance in this case as expressed by the policies, embraces the statements and representations of Wiggins, the deceased, made to the agent, Hogue, or to Kilpatrick, or Turberville, the medical examiners. Such statements were required to be truthfully made, and was a condition for the issuance of the contract, and this contract provides that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties. Whether the representations made by Wiggins in his application for insurance had been rejected; or whether he had been treated in a cure, sanitarium, [620] or hospital; or whether he had undergone a surgical operation; or whether he had had any illness or disease; or whether he had consulted a physician for his health, to serve as a defense by the company to this action, depends on whether

such statements were knowingly false and fraudulently made.

"If Wiggins knew they were false, and that he made them with the fraudulent purpose of obtaining the policy of insurance, then such statements would avoid the policy and would serve as a good defense by the company; provided, that the company, at the time it accepted the application of the deceased as an insurance risk, had no knowledge of the falsity of the statements and representations made by Wiggins in his application for insurance.

"The knowledge of the agent of the insurance company would be the knowledge of the company, and if the agent representing the company in taking the application, or the statements of the medical examiners had knowledge of the falsity of the statements, then the insurance company would be estopped from setting up such false statements or misrepresentations of which they had knowledge before the issuance of the policy, as a defense to this action.

. . .

"If you find from the evidence that the statements of Wiggins in the several matters inquired about his health and operation and treatment in a sanitarium were false, and further find that the agents Hogue, and Torrey and Turberville knew they were false, and you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins and the said agents to procure the policies by collusive co-operation to conceal the truth from the company as to the several matters inquired about, then such conduct upon the part of Wiggins would avoid the policies, and the plaintiffs could not recover in this action."

Petitioner made timely objections and presented special [621] requests, setting forth its theory, which were denied. The circuit court of appeals affirmed a judgment upon verdict for respondents. Among other things it said (127 C. C. A. 467, 470, 471, 211 Fed. 31, 34, 35):

"That, under the language of the policies involved in this suit, the defendant, to avoid the policies for false representations, must establish their falsity, materiality, and the knowledge of the insured, actual or imputed, of their falsity.

. . .

"This leaves for consideration the representation of the insured that he had been examined by Dr. Turberville, defendant's medical examiner, and that the answers recorded by the medical examiner in his report were correct. In truth, there was no such examination had, and the insured must have known that there was none, and the representation that there had been one was a material one. So with regard to the representation of the insured that there had been no previous application for insurance made by him and rejected, or not passed upon favorably by the insurance company. This was untrue, must have been known to have been untrue by the insured when he made it, and it was material. Either of these two last representations would be sufficient to avoid the policies, unless the defendant is estopped to rely upon them, by reason of its knowledge of their falsity. It had such knowledge, if at all, because of the knowledge of its agents and examiners, who handled the matter for it."

And further (p. 37): "The statute [§ 2765, General Statutes of Florida—copied in margin] prescribes that every [622] person who receives money for an insurance company in payment of a contract of insurance, or who directly or indirectly causes to be made any contract of insurance, shall be deemed to all intents and purposes an agent or representative of such company. Under this description, we think Torrey, the defendant's Mobile manager, Hogue, the soliciting agent, and the two medical examiners, were agents of the defendant to all intents and purposes, and so, for the purpose of charging it with notice of what they know, when the policies were written."

All parties treat the policies as Florida contracts. The medical examiners' reports are plainly integral parts of application, and by apt words the latter became an essential constituent of the policies.

Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud. Moulor v. American L. Ins. Co. 111 U. S. 335, 345, 28 L. ed. 447, 450, 4 Sup. Ct. Rep. 466;

"2765. Agents.—Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm, or individual."

Phœnix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. Rep. 500; Ætna L. Ins. Co. v. Moore, 231 U. S. 543, 556, 557, 58 L. ed. 356, 365, 366, 34 Sup. Ct. Rep. 186; May, Ins. 4th ed. § 181.

The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows [623] there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing. Distilled Spirits (Harrington v. United States) 11 Wall. 356, 367, 20 L. ed. 167, 171; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 985, 18 Sup. Ct. Rep. 552; American Nat. Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 1313, 33 Sup. Ct. Rep. 883; Mechem, Agency, 2d ed. § 1815.

Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company, with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. See Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 343, 10 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, 103; Wood v. Firemen's F. Ins. Co. 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co. 95 Wis. 226, 234, 235, 37 L.R.A. 131, 70 N. W. 84.

The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the [624] representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 534, 29 L. ed. 934, 939, 940, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 361, 46 L. ed. 213, 234, 22 Sup. Ct. Rep. 133; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503.

Considered with proper understanding of the law, there is no evidence to support a verdict against petitioner, and the trial court should have directed one in its favor.

Judgment of the Circuit Court of Appeals is reversed and the cause remanded to the United States District Court, Northern District of Florida, for further proceedings in accordance with this opinion.

Reversed.

Mr. Justice Pitney dissents.

S. C. HOLMES, Plff. in Err.,
v.
E. S. CONWAY.

(See S. C. Reporter's ed. 624-632.)

Constitutional law — due process of law — summary proceeding — notice and hearing.

The attorney for the mortgagee, and later for the transferee of the certificate of purchase under a sale on foreclosure, cannot be said to have been deprived of his property without adequate notice or fair opportunity to defend, contrary to U. S. Const., 14th Amend., by a summary order directing him to restore to the treasury of the court the proceeds of fire insurance poli-

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NOTE.—As to what constitutes due process of law, generally—see notes to People v. O'Brien, 2 L.R.A. 255; Kuntz v. Sumption, 2 L.R.A. 655; Re Gannon, 5 L.R.A. 359; Ulman v. Baltimore, 11 L.R.A. 224; Gilman v. Tucker, 13 L.R.A. 304; Pearson v. Yewdall, 24 L. ed. U. S. 436, and Wilson v. North Carolina, 42 L. ed. U. S. 865.

On notice and hearing required generally to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194, and Ulman v. Baltimore, 11 L.R.A. 225.

On notice of proceedings after jurisdiction has attached as condition of due process of law—see note to Griggs v. Hanson, 52 L.R.A.(N.S.) 1161.

cies on the mortgaged property which he had withdrawn and applied on a personal judgment against the mortgagor, instead of applying them towards redeeming the property from the sale, in accordance with what the court found was the agreement between him and the counsel for the mortgagor, where he was accorded two hearings, six months apart, was present at every stage of the proceedings, failed to suggest surprise or prejudice because no formal notice had been served on him, or any desire for further hearing, and was perfectly acquainted with all the unusual circumstances.

[For other cases, see Constitutional Law, 696–724, in Digest Sup. Ct. 1908.]

[No. 335.]

Argued May 1, 1916. Decided June 12, 1916.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a summary order of the District Court of Woodson County, in that state, directing an attorney to restore to the treasury of the court moneys which it found that he had diverted. Affirmed.

See same case below, 92 Kan. 787, L.R.A. —, —, 142 Pac. 253; on rehearing, 93 Kan. 246, L.R.A.—, —, 144 Pac. 205.

The facts are stated in the opinion.

Mr. **Leonard S. Ferry** argued the cause, and, with Messrs. Thomas F. Doran and John S. Dean, filed a brief for plaintiff in error:

The supreme court of Kansas affirmed the judgment of the district court on the ground that summary proceedings may be employed in enforcing claims against attorneys for acts done in a professional capacity. Summary proceedings must be based upon notice, and the party must be apprised of the nature and purpose of the proceedings, and have an opportunity to be heard.

37 Cyc. 530; 4 Cyc. 975; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; Jeffries v. Laurie, 23 Fed. 786; Lynde v. Lynde, 64 N. J. Eq. 736, 97 Am. St. Rep. 692, 58 L.R.A. 471, 52 Atl. 694; Galpin v. Page, 18 Wall. 368, 21 L. ed. 963; Union Bldg. & Sav. Asso. v. Soderquist, 115 Iowa, 695, 87 N. W. 433; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Rees v. Watertown, 19 Wall. 107, 122, 123, 22 L. ed. 72, 76, 77; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Davis v. St. Louis County, 65 Minn. 310, 33 L.R.A. 432, 60 Am. St. Rep. 475, 67 N. W. 997; Kuntz v. Sumption, 2 L.R.A. 655, and note 117 Ind. 1, 19 N. E. 474; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; 3 Words & Phrases, pp. 2244, 2245; Hooker v. Los Angeles, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

The judgment affirmed by the supreme court of Kansas was rendered against S. C. Holmes without due process of law, as required by the 14th Amendment of the Constitution of the United States, as no notice was given him, and no adequate opportunity to defend was afforded him.

Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Davis v. St. Louis County, 65 Minn. 310, 33 L.R.A. 432, 60 Am. St. Rep. 475, 67 N. W. 997; Kuntz v. Sumption, 2 L.R.A. 655, and note 117 Ind. 1, 19 N. E. 474; Hooker v. Los Angeles, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395.

A man's business, occupation, profession, or calling is his property, and is protected and guaranteed by the Constitution of the United States.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Consolidated Steel & Wire Co. v. Murray, 80 Fed. 821; Ex parte Burr, 9 Wheat. 529, 6 L. ed. 152.

No counsel appeared for defendant in error.

Mr. Justice **McReynolds** delivered the opinion of the court:

Plaintiff in error, Holmes, a lawyer practising before the courts of Kansas, maintains that judgment has been rendered against him, in a cause where he appeared as counsel, without notice or opportunity to defend, contrary to inhibitions of the 14th Amendment.

Acting for one Hess, he instituted proceedings against defendant in error in the district court, Woodson county, Kansas, seeking personal judgment on a note and foreclosure of mortgage on real estate. Judgment was rendered November 16, 1910, for $2,612; and the sheriff sold the land January 19, 1911, to Hess, for $1,700, subject to redemption within eighteen months. An assignment prepared by Holmes immediately transferred the certificate of purchase to C. F. Harder, but no public record of this transaction was made until August 24, 1912.

An insured building on the mortgaged property burned shortly before sheriff's sale, and, upon motion presented by Holmes, the court made an order "restraining and enjoining the said defendant Conway from in any manner disposing of said insurance policies upon the buildings on said mortgaged premises, or disposing of any moneys [627] collected." Questions arose concerning validity of policies, and, following an

agreement between Holmes and Hogueland, attorney for Conway, a compromise was effected under which the companies paid $1,075,—$500, February —, 1911, and $575, March —, 1911. Conway and his attorney claimed that, under the agreement, this sum was to be applied towards redeeming the land. Holmes claimed it was to go towards discharging the personal judgment.

On February 24, 1911, $500 of the insurance money was paid into court by Hogueland. The clerk gave a receipt reciting, "the same being in part payment of the redemption in the above-entitled cause." On the next day this sum was withdrawn by Holmes, and, as he claims, remitted to Hess. On March 31, 1911, Hogueland delivered a draft for remainder of insurance money to Holmes, who claims that he remitted proceeds to Hess. Conway paid into court $738.03, July 15, 1912, which, with the $1,075 above referred to, made up amount necessary to redeem property sold by sheriff, and the clerk gave him a redemption receipt.

Exactly when Holmes began to represent Harder is not clear,—certainly it was not later than June 1, 1911. In August, 1912, Holmes, as counsel, entered a motion for an order directing the sheriff to convey to Harder the land theretofore sold. Conway resisted, claiming that, by paying the necessary sum, he had redeemed the property. Solution of the issue presented depended upon professional conduct of Holmes, and his affidavits were put in evidence. The motion was denied; but a rehearing was granted and took place in February, 1913. Additional proofs, including two more of his own affidavits, were offered by Holmes, then present in court, and taken under consideration. April 30, 1913, Holmes still being present, the court denied motion for instruction to sheriff, and further "ordered, adjudged and decreed, that the plaintiff, A. E. [628] Hess, and S. C. Holmes, his attorney of record, within thirty days from this date, . . . return to and deposit in the office of the clerk of this court, the sum of One Thousand and Seventy-five ($1,075) Dollars, together with interest . . . down to the day such sum is paid into the office of the clerk of this court . . . to be used in the redemption and cancelation of certificate of purchase issued by the sheriff of Woodson county, Kansas, to A. E. Hess, plaintiff herein."

Without suggesting to the trial court that he had been surprised or prejudiced because no formal notice had been served upon him, or that he wished the order set aside, or desired to present additional proof, or take any further action whatsoever, and when the thirty days were about to expire, Holmes entered appeals to the supreme court of the state for himself and Harder; and on very general assignments of errors, making no mention of Federal right, the controversy was there again presented and considered upon its merits.

Among other things the supreme court said (92 Kan. 787, L.R.A.—, —, 142 Pac. 253):

"On the eve of the sheriff's sale, Holmes and Hogueland, as attorneys for their respective clients, agreed that the insurance money should be applied to the redemption of the land. Hess purchased at the sheriff's sale subject to this condition, and when he assigned the certificate of purchase, he and Holmes knew that the insurance money would go to redeem the land, and not to satisfy the excess judgment. This is the turning point in the case. Mr. Holmes claims he understood the agreement with Mr. Hogueland differently. After carefully considering all the strong arguments for his view, this court, as already stated, feels that the trial court was best able to determine the matter. The result is that Holmes could draw the first payment of insurance money from the clerk of the court, who had received and receipted for it for redemption [629] purposes, for the benefit of no one but the holder of the certificate of purchase, who at that time was Harder; and Holmes received the proceeds of the draft for the second instalment of insurance money for the benefit of Harder. Soon afterwards, Holmes is found in court, engaged in the protection of Harder's interests as a holder of the certificate of purchase. Holmes had complete knowledge of all the facts relating to the insurance money. Harder's son and agent, F. H. Harder, was informed that Holmes had received $1,075 to apply in redemption of the premises, and Harder himself is noncommittal on the subject of his knowledge.

. . .

"On February 24, 1911, Conway, through his attorney, paid to the clerk of the district court the sum of $500 as redemption money, and took the clerk's receipt accordingly. Holmes could rightfully withdraw this money for no purpose unless to pay it to Harder. The draft for $575, which he cashed, was redemption money also, and, if not paid to Harder, ought to be in the hands of the clerk. It is conceded that Harder received none of the money. The order, therefore, is a summary one, made by the court in a pending proceeding, to secure restoration to the treasury of the court of moneys arising from the litigation which the attorney has diverted.

. . .

"In the present case the court was acting in its own behalf to secure the retur

money belonging in its own custody. By motion directed against the sheriff, filed for his client, Harder, the attorney himself instituted the investigation of his professional conduct. That was the only substantial issue in the case, and he was fully heard, both as a witness and as an attorney, in justification of his course. The evidence which justifies the denial of an order against the sheriff justifies the order against him."

[630] A petition for rehearing was presented and considered by the supreme court. Therein for the first time Holmes set up a claim under the 14th Amendment. In its opinion denying application, the court said (93 Kan. 246, L.R.A.—, —, 144 Pac. 205):

"Holmes still insists that the order upon him to restore to the clerk [of the court] the redemption money which came into his possession was irregular for informality of procedure. The form of procedure in summary disciplinary proceedings is not controlling so long as the essentials of fair notice and opportunity to be heard are present. In this case Harder's right to a deed depended upon what his attorney's professional conduct had been. That was the primary issue tendered by the motion to require the sheriff to make a deed, and the attorney himself filed the motion and brought on the investigation. A trial was had in which all the facts were developed, Holmes and Hogueland gave their versions of the agreement with respect to the application of the insurance money. The money was traced, step by step, from the insurance company through Holmes to Hess. Holmes was necessarily compelled to describe and to defend his conduct, and did so by his own testimony and by other evidence which he adduced. The result was that in legal effect he stood before the court as one of its officers who had diverted from its treasury funds arising from the litigation. Then the attorney asked for another hearing, which was granted. While on the face of the record he appeared as the attorney for Harder, the substance of the issue still was what the character of his professional conduct had been. The nature of the charge against him had been fully disclosed at the first trial. It appeared in detail and in writing in the affidavits filed in the case. It was that charge which he knew he must meet at the second trial, which he had secured. He had from August of one year to February of the next year in which to prepare. To say that he did not [631] make due preparation would be to impute to him unfaithfulness to Harder. He had command of the case, took such testimony from his former client, Hess, as he desired, and presented such other evidence as he desired, including additional affidavits of his own. At the final trial he was given full opportunity to defend in his own way and to an extent satisfactory to himself. Consequently every requirement of due process of law has been satisfied, and the court was not called upon to go through the ceremonious performance of instituting and prosecuting another proceeding, for the sake of stating the charges, giving notice, and having a hearing, before entering the disciplinary order."

The sole question presented for our determination is whether plaintiff in error has been deprived of a Federal right.

Considering Holmes's position as an officer of the court, and patient hearings accorded him, his own testimony, and duty to offer in evidence whatever was obtainable and material, his actual presence at every stage of the proceedings, his failure to suggest surprise or desire for any further hearing, the inquiry touching his conduct, pending for many months, his perfect acquaintance with all the unusual circumstances, including his own liability, and looking at the substance, and not mere form, of things, we are unable to say that he has been deprived of adequate notice or fair opportunity to defend, and thereby denied due process of law. The cause undoubtedly presents difficulties not to be ignored; and our conclusion is restricted to the peculiar circumstances before us.

In Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620, the principles applicable here are announced and applied. "It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in state courts, or regulate practice therein. All its [632] requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend."

Affirmed.

Mr. Justice Pitney dissents.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[637] LEONARD R. COATES, Plaintiff in Error, v. DISTRICT OF COLUMBIA. [No. 156.]

This case, as reported in vol. 241 U. S. p. 637, has been already reported herein, ante, p. 479.

WILLIAM B. THOMPSON, Plaintiff in Error, v. CITY OF ST. LOUIS. [No. 157.]

This case, as reported in vol. 241 U. S. p. 637, has been already reported herein, ante, p. 480.

HILMA NELSON, Plaintiff in Error, v. RICHARD G. WOOD. [No. 158.]

This case, as reported in vol. 241 U. S. p. 637, has been already reported herein, ante, p. 480.

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[638] VANDALIA RAILROAD COMPANY, Plaintiff in Error, v. CHARLES STILWELL. [No. 172.]

This case, as reported in vol. 241 U. S. p. 638, has been already reported herein, ante, p. 480.

ROBERT KITCHENS, Appellant, v. J. C. HAMILTON, Sheriff, etc. [No. 672.]

This case, as reported in vol. 241 U. S. p. 638, has been already reported herein, ante, p. 480.

FRANK R. SHATTUCK, Trustee, etc., et al., Appellants, v. TITLE GUARANTY & SURETY COMPANY. [No. 729.]

This case, as reported in vol. 241 U. S. p. 638, has been already reported herein, ante, p. 480.

[639] CYRUS BRADLEY, Plaintiff in Error, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY. [No. 186.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of Spokane County, in that state, in favor of defendant in an action of ejectment.

See same case below, 79 Wash. 455, L.R.A.—, —, 140 Pac. 688.

Mr. William H. Smiley for plaintiff in error.

Mr. Will G. Graves for defendant in error.

January 24, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 344, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parker v. McLain, 237 U. S. 469, 471, 59 L. ed. 1051, 1053, 35 Sup. Ct. Rep. 632; (2) Ross v. Oregon, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914C, 224; Moore-Mansfield Constr. Co. v. Electrical Installation Co. 234 U. S. 619, 58 L. ed. 1503, 34 Sup. Ct. Rep. 941; Willoughby v. Chicago, 235 U. S. 45, 59 L. ed. 123, 35 Sup. Ct. Rep. 23.

J. J. BROUSSARD, Plaintiff in Error, v. R. R. BAKER,[1] Chief of Police of the City of Beaumont, Tex. [No. 199.]

Error to state court—frivolous Federal question.

In Error to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction in the Dis-

[1] Death of N. N. Smith, and appointment of his successor, R. R. Baker, as chief of police of the city of Beaumont, Texas, suggested, and appearance of R. R. Baker, as the party defendant in error herein, filed and entered on November 29, 1915.

trict Court of Jefferson County, in that state, for maintaining a stock pen within designated limits without a municipal permit.

See same case below, 74 Tex. Crim. Rep. 333, L.R.A.—, —, 169 S. W. 660.

Mr. Frederick S. Tyler for plaintiff in error.

No appearance for defendant in error.

January 24, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 382, 59 L. ed. 279, 281, 35 Sup. Ct. Rep. 133; (2) Fischer v. St. Louis, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; Davis v. Massachusetts, 167 [640] U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731; (3) Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Washington v. Miller, 235 U. S. 422, 429, 59 L. ed. 295, 299, 35 Sup. Ct. Rep. 119; Roby v. South Park Comrs. 238 U. S. 610, 59 L. ed. 1488, 35 Sup. Ct. Rep. 791.

COUNTY OF SIOUX, Neb., Plaintiff in Error v. NEWTON RULE. [No. 207.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Nebraska to review a judgment which affirmed a judgment of the District Court for Sioux County, in that state, awarding damages to a landowner for land taken for a section line road.

See same case below, 94 Neb. 736, 144 N. W. 806.

Mr. Allen G. Fisher for plaintiff in error.

No brief filed for defendant in error.[1]

January 24, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Stewart v. Kansas City, 239 U. S. 14, ante, 120, 36 Sup. Ct. Rep. 15.

JOHN H. STROSNIDER, Appellant, v. EDMUND M. ALLEN, Warden, etc. [No. 343.]

Habeas corpus—Federal interference with state administration of criminal law.

Appeal from the District Court of the United States for the Northern District of Illinois to review an order refusing relief by habeas corpus to a person in custody under a conviction in a state court of obtaining money by means of the confidence game.

Mr. Benjamin C. Bachrach for appellant.

Messrs. Patrick J. Lucey and Lester H. Strawn for appellee.

January 24, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of Urquhart v. Brown, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459; Re Spencer, 228 U. S. 652, 659–661, 57 L. ed. 1010–1013, 33 Sup. Ct. Rep. 709; Frank v. Mangum, 237 U. S. 309, 328, 329, 59 L. ed. 969, 980, 981, 35 Sup. Ct. Rep. 582.

TALLULAH FALLS RAILWAY COMPANY, Plaintiff in Error, v. MASON COUNTY SUPPLY COMPANY. [No. 222.]

Commerce—state regulation of carrier—conflicting Federal regulation.

In Error to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Macon County, in that state, for the recovery of an overcharge on an interstate freight shipment, and for the penalty prescribed by a state statute for failure to refund the overcharge.

See same case below, 166 N. C. 82, L.R.A. —, —, 82 S. E. 13.

Mr. Hamilton McWhorter for plaintiff in error.

No appearance for defendant in error.

February 21, 1916. *Per Curiam:* Judgment reversed with costs upon the authority of Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; [641] Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error, v. CHARLES W. COUSINS. [No. 227.]

Master and servant—employers' liability—when servant is engaged in interstate commerce.

In Error to the Supreme Court of the State of Minnesota to review a judgment which affirmed a judgment of the District Court of Ramsey County, in that state, in favor of plaintiff in a suit brought under the Federal employers' liability act.

See same case below, 126 Minn. 172, L.R.A.—, —, 148 N. W. 58, 6 N. C. C. A. 182.

Mr. W. S. Horton for plaintiff in error.

Mr. Samuel A. Anderson for defendant in error.

February 21, 1916. *Per Curiam:* Judgment reversed with costs upon the authority of Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902; Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, ante, 436, 36 Sup. Ct. Rep. 188.

[1] Appearance of Albert W. Crites was entered for defendant in error, but no brief filed.

PAUL DAECHE, Appellant, v. ALBERT BOLLSCHWEILER, United States Marshal, etc. [No. 794.]

Appeal—from district court—frivolous Federal question.

Appeal from the District Court of the United States for the District of New Jersey to review an order dismissing a writ of habeas corpus.

Mr. Merritt Lane for appellant.

Mr. Solicitor General Davis for appellee.

February 21, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Fay v. Crozer, 217 U. S. 455, 54 L. ed. 837, 30 Sup. Ct. Rep. 568; Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 288, 54 L. ed. 482, 483, 30 Sup. Ct. Rep. 326; Hendricks v. United States, 223 U. S. 178, 184, 56 L. ed. 394, 396, 32 Sup. Ct. Rep. 313; (2) Benson v. Henkel, 198 U. S. 1, 10, 11, 49 L. ed. 919, 922, 25 Sup. Ct. Rep. 569; Pierce v. Creecy, 210 U. S. 387, 401, 402, 52 L. ed. 1113, 1120, 1121, 28 Sup. Ct. Rep. 714; (3) Glasgow v. Moyer, 225 U. S. 420, 56 L. ed. 1147, 32 Sup. Ct. Rep. 753; Johnson v. Hoy, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240; Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 Sup. Ct. Rep. 54.

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[642] SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. W. C. THURSTON. [Nos. 230, 231, 232, and 233.]

Commerce—state regulation of carrier—conflicting Federal legislation.

Four Writs of Error to the Supreme Court of the State of North Carolina to review judgments which affirmed judgments of the Superior Court of Alamance County, in that state, for the recovery of overcharges on interstate freight shipments, and for the penalty prescribed by a state statute for failure to refund such overcharges.

See same case below, 165 N. C. 598, 81 S. E. 785.

Mr. John K. Graves for plaintiff in error.

No appearance for defendant in error.

February 21, 1916. *Per Curiam:* Judgments reversed with costs upon the authority of Southern R. Co. v. Reid, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140; Yazoo & M. Valley R. Co. v. Greenwood Grocery Co. 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213; Charleston & W. C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 59 L. ed. 1137, 35 Sup. Ct. Rep. 715.

VALLEY STEAMSHIP COMPANY, Plaintiff in Error, v. JOHN J. WATTAWA [No. 546]; and VALLEY STEAMSHIP COMPANY, Plaintiff in error, v. JOHN MRAZ [No. 547].

Error to state court—to what court directed—dismissal.

Two Writs of Error to the Supreme Court of the State of Ohio to review an order dismissing the petition for a writ of error, directed to the Court of Appeals of Cuyahoga County, in that state, which had affirmed a judgment of the Court of Common Pleas of said county in favor of plaintiffs in personal-injury actions.

Mr. Frank S. Masten for plaintiff in error.

Mr. George H. Eichelberger for defendants in error.

February 28, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Western U. Teleg. Co. v. Crovo, 220 U. S. 364, 366, 55 L. ed. 498, 499, 31 Sup. Ct. Rep. 399; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 264, 268, 269, 56 L. ed. 1082, 1085, 1086, 32 Sup. Ct. Rep. 828; Stratton v. Stratton, 239 U. S. 55, ante, 142, 36 Sup. Ct. Rep. 26.

MARTHA L. STINE, Plaintiff in Error, v. MISSOURI STATE LIFE INSURANCE COMPANY. [No. 740.]

Error to district court—jurisdiction—Federal question.

In Error to the District Court of the United States for the Eastern District of Missouri to review a judgment in favor of plaintiff in an action on a policy of life insurance for a portion only of the sum demanded.

Messrs. Frederick N. Judson and John F. Green for plaintiff in error.

Mr. James C. Jones for defendant in error.

February 28, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of Cornell v. Green, 163 U. S. 75, 79, 80, 41 L. ed. 76-78, 16 Sup. Ct. Rep. 969; Arkansas v. Schlierholz, 179 U. S. 598, 601, 45 L. ed. 335, 337, 21 Sup. Ct. Rep. 229; Lampasas v. Bell, 180 [643] U. S. 276, 282, 45 L. ed. 527, 530, 21 Sup. Ct. Rep. 368; Itow v. United States, 233 U. S. 581, 583, 584, 58 L. ed. 1102, 1103, 34 Sup. Ct. Rep. 699.

EX PARTE: IN THE MATTER OF DAVID LAMAR, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus herein, and that a rule to show cause issue.

Mr. A. Leo Everett for petitioner.

February 28, 1916. Denied. It is further ordered that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to bring up the record in the case of David Lamar, Plaintiff in Error v. United States.

EX PARTE: IN THE MATTER OF WALTER BRANDT, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. Frans E. Lindquist for petitioner.

No appearance for respondent.

February 28, 1916. Denied.

STATE OF SOUTH DAKOTA EX REL. R. O. RICHARDS et al., Plaintiffs in Error, v. M. D. WHISMAN, as County Auditor of Beadle County, South Dakota. [No. 819.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of South Dakota to review a judgment which affirmed a judgment of the Circuit Court of Beadle County, in that state, sustaining a demurrer to a complaint by which it was sought to enjoin the enforcement of a state primary election law.

See same case below, — S. D. —, L.R.A. —, —, 154 N. W. 707.

Messrs. T. H. Null and Webster Ballinger for plaintiffs in error.

Messrs. Clarence C. Caldwell and Samuel Herrick for defendant in error.

March 6, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parker v. McLain, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632; (2) Luther v. Borden, 7 How. 1, 12 L. ed. 581; Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; [644] Pacific States Teleph. & Teleg. Co. v. Oregon, 233 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; O'Neill v. Leamer, 239 U. S. 244, 248, ante, 249, 36 Sup. Ct. Rep. 54.

HITCHMAN COAL & COKE COMPANY, Appellant and Petitioner, v. JOHN MITCHELL, Individually, et al. [No. 241.]

Appeal—from circuit court of appeals—jurisdiction below—diverse citizenship.

Appeal from and Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Mr. Hannis Taylor for appellant.

Mr. Charles E. Hogg for appellees.

March 13, 1916. *Per Curiam:* (1) Appeal dismissed for want of jurisdiction upon the authority of Shulthis v. McDougal, 225 U. S. 561, 569, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704; Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974; St. Anthony Church v. Pennsylvania R. Co. 237 U. S. 575-577, 59 L. ed. 1119, 1121, 1122, 35 Sup. Ct. Rep. 729. (2) Considering the petition for certiorari hitherto filed and upon which action was previously postponed until the merits of the case came to be disposed of, it is ordered that the said petition be, and the same is, granted, the record on appeal to stand as a return to the writ of certiorari. It is further ordered that the case, on the return to the writ of certiorari, be placed on the docket for argument before a full bench.

CHARLES A. THATCHER, Appellant and Plaintiff in Error, v. UNITED STATES OF AMERICA et al. [No. 484.]

Appeal—in disbarment proceeding.

Appeal from and in Error to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed an order of the Circuit Court for the Northern District of Ohio, disbarring an attorney.

See same case below, 129 C. C. A. 255, 212 Fed. 801; on rehearing, 135 C. C. A. 71, 219 Fed. 173.

Messrs. Rhea P. Cary, J. Raymond Hoover, and Everett V. Abbot for appellant.

Mr. Solicitor General Davis for appellees.

March 13, 1916. *Per Curiam:* Dismissed for want of [645] jurisdiction upon the authority of Ex parte Bradley, 7 Wall. 364, 376, 19 L. ed. 214, 218; Ex parte Robinson, 19 Wall. 513, 22 L. ed. 205.

FARMERS & MERCHANTS STATE BANK OF WACO, Appellant, v. M. C. H. PARK, Trustee of Slayden Kirksey Woolen Mill, Bankrupt. [No. 108.]

Appeal—review of facts—concurrent findings.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Texas, refusing to allow a set-off in bankruptcy proceedings.

See same case below, 126 C. C. A. 607, 209 Fed. 613.

Mr. O. L. Stribling for appellant.

Messrs. James D. Williamson and Rhodes S. Baker for appellee.

March 20, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of First Nat. Bank v. Littlefield, 226 U. S. 110, 112, 57 L. ed. 145, 146, 33 Sup. Ct. Rep. 69; Washington Securities Co. v. United States, 234 U. S. 76, 78, 58 L. ed. 1220, 1222, 34 Sup. Ct. Rep. 725; Wright-Blodgett Co. v. United States, 236 U. S. 397, 402, 59 L. ed. 637, 639, 35 Sup. Ct. Rep. 339; National Bank of Athens v. Shackelford, 239 U. S. 81, 82, ante, 158, 36 Sup. Ct. Rep. 17, and cause remanded to the District Court of the United States for the Western District of Texas.

ROSA FALCO, Representing Her Minor Child, Manuel Adoaldo Tiberio Catinchi y Falco, Appellant, v. SUCCESSION OF SALVADOR SUAU MULET, Composed of His Widow, Meria Hernandez Rodriguez, et al. [No. 295.]

Appeal—from Porto Rico supreme court—jurisdiction.

Appeal from the Supreme Court of Porto Rico to review a decree which affirmed a decree of the District Court of Mayagüez, in favor of defendants in a suit to recover back sums paid which were not due.

See same case below, 18 P. R. R. 713.

[646] Mr. José R. F. Savage for appellant.

Mr. Edward S. Paine for appellees.

March 20, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of § 244 of the Judicial Code, Elzaburu v. Chaves, 239 U. S. 283, 285, ante, 290, 36 Sup. Ct. Rep. 47; Gsell v. Insular Collector, 239 U. S. 93, ante, 163, 36 Sup. Ct. Rep. 39.

DAVID H. GLASS, Appellant, v. ALFRED H. WOODMAN et al.[1] [No. 721.]

Appeal—from circuit court of appeals—jurisdiction—diverse citizenship case.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed an order of the District Court for the Eastern District of Missouri, denying a petition for intervention in a suit for the appointment of a receiver and foreclosure.

See same case below, 139 C. C. A. 167, 223 Fed. 621.

Messrs. W. F. Guthrie and Emmet H. Gamble for appellant.

Messrs. John S. Leahy, Walter H. Saunders, and Irvin V. Barth for appellees.

March 20, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Omaha Electric Light & P. Co. v. Omaha, 230 U. S. 123, 57 L. ed. 1419, 33 Sup. Ct. Rep. 974; St. Anthony Church v. Pennsylvania R. Co. 237 U. S. 575-577, 59 L. ed. 1119-1123, 35 Sup. Ct. Rep. 729; (2) St. Louis, K. C. & C. R. Co. v. Wabash R. Co. 217 U. S. 247, 250, 54 L. ed. 752, 754, 30 Sup. Ct. Rep. 510; Railroad Commission v. Worthington, 225 U. S. 101, 104, 56 L. ed. 1004, 1006, 32 Sup. Ct. Rep. 653; Shulthis v. McDougal, 225 U. S. 561, 568, 56 L. ed. 1205, 1210, 32 Sup. Ct. Rep. 704.

The petition for Writ of Certiorari is denied.

F. P. SEEKATZ, Plaintiff in Error, v. MEDINA VALLEY IRRIGATION COMPANY et al. [No. 294.]

Appeal—from district court—Federal question.

In Error to the District Court of the United States for the Western District of Texas to review a decree fixing the amount of damages in eminent domain proceedings.

Mr. C. L. Bass for plaintiff in error.

Mr. Floyd McGown for defendants in error.

March 20, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874; Easterling Lumber Co. v. Pierce, 235 U. S. 380, 59 L. ed. 279, 35 Sup. Ct. Rep. 133. (2) Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Madisonville Traction Co. v. St. Bernard Min. Co. 196 [647] U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. ed. 629, 27 Sup. Ct. Rep. 321; (3) Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 244, 245, 41 L. ed. 979, 987, 988, 17 Sup. Ct. Rep. 581; Bauman v. Ross, 167 U. S. 548, 593, 42 L. ed. 270, 289, 17 Sup. Ct. Rep. 966; A Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 557, 569, 42 L. ed. 853, 859, 18 Sup. Ct. Rep. 445; (4) Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; O'Neill v. Leamer, 239 U. S. 244, 253, 254, ante, 249, 36 Sup. Ct. Rep. 54.

EX PARTE: IN THE MATTER OF PAUL BUKVA, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. William Wilhelm for petitioner.

No appearance for respondent.

March 20, 1916. Denied.

EX PARTE: IN THE MATTER OF WILLIAM SAGE, JR., Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. Edward A. Alexander for petitioner.

No appearance for respondent.

March 20, 1916. Denied.

[1] Death of Alfred H. Woodman suggested, and appearance of James P. Newell, public administrator of the city of St. Louis, and administrator of the estate of Alfred H. Woodman, deceased, filed and entered on March 13, 1916.

UNITED RAILWAYS COMPANY OF S. LOUIS, Plaintiff in Error, v. CITY OF ST. LOUIS. [Nos. 365 and 367.]

Error to state court—Federal question—decision on non-Federal ground.

Two Writs of Error to the Supreme Court of the State of Missouri to review judgments which affirmed judgments of the Circuit Court of the City of St. Louis, enforcing a license tax on street railway companies.

See same case below in No. 365, 263 Mo. 387, 174 S. W. 78, No. 367, 263 Mo. 507, 174 S. W. 109.

Mr. Henry S. Priest for plaintiff in error.

Mr. Truman P. Young for defendant in error.

April 10, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of: (1) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Holden Land & Live Stock Co. v. Inter-State Trading Co. 233 U. S. 536, 541, 58 L. ed. 1083, 1086, 34 Sup. Ct. Rep. 661; Mellon Co. v. McCafferty, 239 [648] U. S. 134, ante 181, 36 Sup. Ct. Rep. 94; (2) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parker v. McLain, 237 U. S. 469, 471, 59 L. ed. 1051, 1053, 35 Sup. Ct. Rep. 632; Stewart v. Kansas City, 239 U. S. 14, ante, 120, 36 Sup. Ct. Rep. 15; (3) Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 78, 55 L. ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; Chicago Dock & Canal Co. v. Fraley, 228 U. S. 680, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715; Denver v. New York Trust Co. 229 U. S. 123, 143, 57 L. ed. 1101, 1124, 33 Sup. Ct. Rep. 657; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 366, 59 L. ed. 265, 273, 35 Sup. Ct. Rep. 99.

ST. LOUIS & SUBURBAN RAILWAY COMPANY et al., Plaintiffs in Error, v. ST. LOUIS [No. 366]; UNITED RAILWAYS COMPANY OF ST. LOUIS, Plaintiff in Error, v. CITY OF ST. LOUIS, [No. 368]; UNITED RAILWAYS COMPANY OF ST. LOUIS, Plaintiff in Error, v. CITY OF ST. LOUIS [No. 369]; UNITED RAILWAYS COMPANY OF ST. LOUIS, Plaintiff in Error, v. CITY OF ST. LOUIS [No. 370]; UNITED RAILWAYS COMPANY OF ST. LOUIS, Plaintiff in Error, v. CITY OF ST. LOUIS [No. 371]; and ST. LOUIS TRANSIT COMPANY, Plaintiff in Error, v. CITY OF ST. LOUIS [No. 372].

Error to state court—Federal question—decision on non-Federal ground.

Six Writs of Error to the Supreme Court of the State of Missouri to review judgments which affirmed judgments of the Circuit Court of the City of St. Louis, enforcing a license tax on street railway companies.

See same case below, Nos. 366, 372, 263 Mo. 508, 174 S. W. 109, 110, Nos. 368–371, 263 Mo. 507, 174 S. W. 109.

Mr. Henry S. Priest for plaintiffs in error.

Mr. Truman P. Young for defendant in error.

April 10, 1916. Dismissed for the want of jurisdiction.

H. E. FILLER, Appellant, v. BEN STEELE, Sheriff, etc. [No. 731.]

Habeas Corpus—Federal interference with state administration of criminal law.

Appeal from the District Court of the United States for the Western District of Pennsylvania to review an order denying a petition for a writ of habeas corpus.

See same case below, 228 Fed. 242.

Messrs. Ralph D. Hurst and Thomas H. Greevy for appellant.

Messrs. Cecil E. Heller, C. Ward Eicher, and George E. Barron for appellee.

April 10, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of: (1) Ex parte Parks, 93 U. S. 18, 21, 23 L. ed. 787, 788; Tinsley v. Anderson, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; Frank v. Mangum, 237 U. S. 309, 326, 59 L. ed. 969, 979, 35 Sup. Ct. Rep. 582; (2) Allen v. Georgia, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Jordan v. Massachusetts, 225 U. S. 167, 56 L. ed. 1038, 32 Sup. Ct. Rep. 651; (3) Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; [649] Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14; Stewart v. Kansas City, 239 U. S. 14, ante, 120, 36 Sup. Ct. Rep. 15.

MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. LARABEE FLOUR MILLS COMPANY. [No. 460.]

Error to state court—second appeal—dismissal.

In Error to the Supreme Court of the State of Kansas to review a judgment entered pursuant to the mandate of the Supreme Court of the United States on a former writ of error.

See same case below, 94 Kan. 683, 147 Pac. 492.

Messrs. Balie P. Waggener, A. E. Crane, and W. P. Waggener for plaintiff in error.

Messrs. Joseph G. Waters and Charles Blood Smith for defendant in error.

April 17, 1916. *Per Curiam:* Dismissed for want of jurisdiction with 10 per centum damages, upon the authority of: (1) Roberts v. Cooper, 20 How. 467, 481, 15 L. ed. 969, 973; Wayne County v. Kennicott, 94 U. S. 498, 24 L. ed. 260; Clark v. Keith, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; Chaffin v. Taylor, 116 U. S. 567, 572, 29 L. ed. 727, 728, 6 Sup. Ct. Rep. 518; Thompson v. Maxwell Land Grant & R. Co. 168 U. S. 451, 456, 42 L. ed. 539, 541, 18 Sup. Ct. Rep. 121; Illinois v. Illinois C. R. Co. 184 U. S. 77, 90–93, 46 L. ed. 440, 446, 447, 22 Sup. Ct. Rep. 300; (2) Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214; Missouri P. R. Co. v. Larabee, 234 U. S. 459, 58 L. ed. 1398, 34 Sup. Ct. Rep. 979.

ALLISON MANCHESTER, Plaintiff in Error, v. BOARD OF WATER COMMISSIONERS OF THE CITY OF HARTFORD [No. 863]; ALLISON MANCHESTER et al., Plaintiffs in Error v. BOARD OF WATER COMMISSIONERS OF THE CITY OF HARTFORD [No. 864]; and EMMA MANCHESTER et al., Plaintiffs in Error, v. BOARD OF WATER COMMISSIONERS OF THE [650] CITY OF HARTFORD [No. 865].

Constitutional law—due process—eminent domain—taking land for storage reservoir — municipal water supply.

Three Writs of Error to the Supreme Court of Errors of the State of Connecticut to review judgments which affirmed judgments of the Superior Court of Littlefield County, in that state, in favor of the petitioners in condemnation proceedings.

See same case below, first appeal, 87 Conn. 193, 87 Atl. 870, Ann. Cas. 1915A, 1105, second appeal, 89 Conn. 671, 96 Atl. 182.

Mr. Edward D. Robbins for plaintiffs in error.

Messrs. Edward M. Day and Alvan Waldo Hyde for defendant in error.

April 17, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of: Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 160, 41 L. ed. 369, 389, 17 Sup. Ct. Rep. 56; Clark v. Nash, 198 U. S. 361, 367–369, 49 L. ed. 1085, 1087, 1088, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; Hairston v. Danville & W. R. Co. 208 U. S. 598, 52 L. ed. 637, 28 Sup. Ct. Rep. 331, 13 Ann. Cas. 1008; Union Lime Co. v. Chicago & N. W. R. Co. 233 U. S. 211, 218, 219, 58 L. ed. 924, 928, 34 Sup. Ct. Rep. 522; O'Neill v. Leamer, 239 U. S. 244, 253, ante, 249, 36 Sup. Ct. Rep. 54; Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 32, ante, 507, 511, 36 Sup. Ct. Rep. 234.

EX PARTE: IN THE MATTER OF JAMES J. GRIFFIN and Gordon M. Peacock, Petitioners. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Mr. Arthur E. Dowell for petitioners.

April 17, 1916. Denied.

MARY MULCARE et al., Administrators, etc., Plaintiffs in Error, v. CITY OF CHICAGO, [No. 312.]

Constitutional law—equal protection of the laws—restriction of right to appeal.

In Error to the Supreme Court of the State of Illinois to review a judgment refusing a writ of error to the Appellate Court of that state for the First District, which had affirmed a judgment of the Circuit Court of Cook County in favor of defendant in an action on a contract.

See same case below, in Appellate Court of Illinois, 172 Ill. App. 195.

Mr. John W. Walsh for plaintiffs in error.

Mr. Chester E. Cleveland for defendant in error.

April 24, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 35–37, 48 L. ed. 604, 607, 608, 24 Sup. Ct. Rep. 319.

KANSAS CITY, MEXICO, & ORIENT RAILWAY COMPANY, Plaintiff in Error, v. STATE OF TEXAS. [No. 188.]

Error to state court—moot case—Federal question.

[651] In Error to the Supreme Court of the State of Texas to review a judgment which modified a judgment of the Court of Civil Appeals of that state for the Third District, affirming a judgment of the District Court of Travis County, requiring a railway company to build its line to a county seat, by directing that the mandatory writ be suspended while the railway remains in the hands of receivers.

See same case below, 106 Tex. 249, 163 S. W. 582.

Mr. Herbert S. Garrett for plaintiff in error.

Mr. Frank L. Snodgrass for defendant in error.

April 24, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of: (1) Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43; Stearns v. Wood, 236 U. S. 75, 59 L. ed. 475, 35 Sup. Ct. Rep. 229; (2) Kansas City Star Co. v. Julian, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406; Forbes v. State Council, 216 U. S. 396–399, 54 L. ed. 534–536, 30

Sup. Ct. Rep. 295; St. Louis & S. F. R. Co. v. Shepherd, 240 U. S. 240, ante, 622, 36 Sup. Ct. Rep. 274; (3) Henkel v. Cincinnati, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; Fullerton v. Texas, 196 U. S. 192, 194, 49 L. ed. 443, 444, 25 Sup. Ct. Rep. 221; Allen v. Arguimbau, 198 U. S. 149, 156, 49 L. ed. 990, 993, 25 Sup. Ct. Rep. 622; Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 55, 59 L. ed. 127, 128, 35 Sup. Ct. Rep. 21; (4) Deming v. Carlisle Packing Co. 226 U. S. 102, 57 L. ed. 140, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Parkér v. McLain, 237 U. S. 469, 471, 59 L. ed. 1051, 1053, 35 Sup. Ct. Rep. 632. See Pinney v. Nelson, 183 U. S. 144, 147, 46 L. ed. 125, 127, 22 Sup. Ct. Rep. 52; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 5, 57 L. ed. 707, 709, 33 Sup. Ct. Rep. 409; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 289, et seq., 43 L. ed. 702, 703, 19 Sup. Ct. Rep. 465; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336, 54 L. ed. 1060, 31 Sup. Ct. Rep. 93, 20 Ann. Cas. 1206; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 283, et seq., 54 L. ed. 472, 481, 30 Sup. Ct. Rep. 330.

IGNATIUS TIMOTHY TRIBICH LINCOLN, Appellant, v. JAMES M. POWER, MARSHAL, etc. [No. 793.]

Foreign extradition—habeas corpus.

Appeal from the District Court of the United States for the Eastern District of New York to review an order refusing relief by habeas corpus to a person in custody under an extradition warrant.

See same case below, 228 Fed. 70.

Mr. Addison S. Pratt for appellant.

Mr. Charles Fox for appellee.

May 1, 1916. *Per Curiam:* Judgment affirmed with costs upon the authority of (1) Re Oteiza y Cortes, 136 U. S. 330, 334, 34 L. ed. 464, 466, 10 Sup. Ct. Rep. 1031, 8 Am. Crim. Rep. 241; Ornelas v. Ruiz, 161 U. S. 502, 508, 40 L. ed. 787, 789, 16 Sup. Ct. Rep. 689; [652] Bryant v. United States, 167 U. S. 104, 105, 42 L. ed. 94, 95, 17 Sup. Ct. Rep. 744; Terlinden v. Ames, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424; Elias v. Ramirez, 215 U. S. 398, 406, 407, 54 L. ed. 253, 256, 257, 30 Sup. Ct. Rep. 131; McNamara v. Henkel, 226 U. S. 520, 523, 57 L. ed. 330, 332, 33 Sup. Ct. Rep. 146; (2) David Kaufman & Sons Co. v. Smith, 216 U. S. 610, 54 L. ed. 636, 30 Sup. Ct. Rep. 419; Toop v. Ulysses Land Co. 237 U. S. 580, 59 L. ed. 1127, 35 Sup. Ct. Rep. 739; Manila Invest. Co. v. Trammell, 239 U. S. 31, ante, 129, 36 Sup. Ct. Rep. 12.

WILSON CYPRESS COMPANY, Appellant, v. ENRIQUE DEL POZO Y MARCOS et al. [No. 135, October Term, 1914.]

Motion for leave to file in the trial court a supplemental bill in the nature of a bill of review.

See 236 U. S. 635, 59 L. ed. 758, 35 Sup. Ct. Rep. 446.

Mr. John C. Cooper for appellant.

Messrs. Joseph H. Jones, William W. Dewhurst, and John C. Jones for appellees.

May 1, 1916. Denied.

DANIEL A. LONG, Plaintiff in Error, v. JOHN E. SHEPARD. [No. 324.]

Error to state court—Federal question—local law.

In Error to the Supreme Court of the State of Oklahoma to review a judgment which, reversing a judgment of the District Court of Hughes County, in that state, denying plaintiff's motion for judgment on the pleadings in a suit to cancel a deed, directed the entry of judgment for the cancelation of such deed as to a part of the land covered by it.

See same case below, 35 Okla. 489, 130 Pac. 131.

Messrs. Lewis C. Lawson and C. Dale Wolfe for plaintiff in error.

No appearance for defendant in error.

May 8, 1916. *Per Curiam:* Dismissed for the want of jurisdiction upon the authority of National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 237, 46 L. ed. 157, 170, 22 Sup. Ct. Rep. 111; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130; Brinkmeier v. Missouri P. R. Co. 224 U. S. 268, 270, 56 L. ed. 758, 760, 32 Sup. Ct. Rep. 412.

EX PARTE: IN THE MATTER OF ELBERT R. ROBINSON, Petitioner. [No. ——, Original.]

Motion for leave to file petition.

Messrs. George W. Ellis and R. E. Westbrooks for petitioner.

No appearance for respondent.

[653] May 8, 1916. Denied.

ANNA C. DUNHAM et al., Plaintiffs in Error, v. CLARA V. KAUFFMAN et al. [No. 189.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Ohio to review a decree which affirmed a decree of the Court of Appeals of Franklin County, in that state, affirming a

decree of the common pleas court which refused to enjoin the consolidation of two corporations.

See same case below, 90 Ohio St. 419, 108 N. E. 1118.

Mr. D. K. Watson for plaintiffs in error.

Mr. Charles C. Pavey for defendants in error.

May 22, 1916. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of (1) Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 314, 47 L. ed. 190, 193, 23 Sup. Ct. Rep. 123; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Manhattan L. Ins. Co. v. Cohen, 234 U. S. 123, 137, 58 L. ed. 1245, 1254, 34 Sup. Ct. Rep. 874. (2) Pennsylvania College Cases, 13 Wall. 190, 20 L. ed. 550; Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553; Missouri P. R. Co. v. Kansas, 216 U. S. 262, 274, 275, 54 L. ed. 472, 477, 478, 30 Sup. Ct. Rep. 330 (3) Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Ennis Waterworks v. Ennis, 233 U. S. 652, 658, 58 L. ed. 1139, 1141, 34 Sup. Ct. Rep. 767; Parker v. McLain, 237 U. S. 469, 471, 59 L. ed. 1051, 1053, 35 Sup. Ct. Rep. 632.

ROBERT D. KINNEY, Plaintiff in Error, v. PLYMOUTH ROCK SQUAB COMPANY et al. [No. 344.]

Appeal—from circuit court of appeals—jurisdiction.

In Error to the United States Circuit Court of Appeals for the First Circuit to review a judgment which affirmed a judgment of the District Court of Massachusetts in favor of defendant in an action on an alleged judgment.

See same case below, 131 C. C. A. 178, 214 Fed. 766.

Mr. Robert D. Kinney, plaintiff in error, *pro se.*

No appearance for defendants in error.

May 22, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Bagley v. General Fire Extinguisher Co. 212 U. S. 477, 53 L. ed. 605, 29 Sup. Ct. Rep. 341; Weir v. Rountree, 216 U. S. 607, 54 L. ed. 635, 30 Sup. Ct. Rep. 418; St. Anthony Church v. Pennsylvania R. Co. 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729; (2) Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 641, 642, 29 L. ed. 261, 263, 264, 5 Sup. Ct. Rep. 1104; Metcalf v. Watertown, 128 U. S. 586, 588, 32 L. ed. 543, 544, 9 Sup. Ct. Rep. 173; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 580, 581, 43 L. ed. 814, 817, 818, 19 Sup. Ct. Rep. 500. See United States ex rel. Kinney v. United States Fidelity & G. Co. 222 U. S. 283, 56 L. ed. 200, 32 Sup. Ct. Rep. 101; [654] Kinney v. Plymouth Rock Squab Co. 236 U. S. 43, 59 L. ed. 457, 35 Sup. Ct. Rep. 236.

FIRST NATIONAL BANK OF DEFIANCE, Plaintiff in Error, v. WILLIAM A. KEHNAST et al. [No. 333.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Defiance County, in that state, which had in turn affirmed a judgment of the Common Pleas Court in favor of defendants in an action by a national bank upon certain promissory notes.

See same case below, 91 Ohio St. 377, 110 N. E. 1059.

Messrs. Robert Newbegin and Henry Newbegin for plaintiff in error.

Messrs. T. T. Shaw, Henry B. Harris, E. J. Marshall, and H. W. Fraser for defendants in error.

May 22, 1916. *Per Curiam:* Dismissed for want of jurisdiction upon the authority of (1) Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Chemical Nat. Bank v. City Bank, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; Mellon Co. v. McCafferty, 239 U. S. 134, ante, 181, 36 Sup. Ct. Rep. 94; (2) Leather Mfrs. Nat. Bank v. Cooper, 120 U. S. 778, 781, 30 L. ed. 816, 818, 7 Sup. Ct. Rep. 777; Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 530, 33 L. ed. 1002, 1004, 10 Sup. Ct. Rep. 592; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; Herrmann v. Edwards, 238 U. S. 107, 59 L. ed. 1224, 35 Sup. Ct. Rep. 839.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plaintiff in Error, v. JOHN H. MOUNTS. [No. 362.]

Carriers—limiting liability to agreed value—Carmack amendment.

In Error to the Supreme Court of the State of Oklahoma to review a judgment of the District Court of Tillman County, in that state, against a carrier, for the full value of a horse killed in transit in interstate commerce, notwithstanding a limitation of liability in the bill of lading to an agreed value.

See same case below, 44 Okla. 359, 144 Pac. 1036.

Mr. R. A. Kleinschmidt for plaintiff in error.

No counsel appeared for defendant in error.

June 5, 1916. *Per Curiam:* Judgment reversed with costs, and cause remanded for further proceedings upon the authority of Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, ante, 948, 36 Sup. Ct. Rep. 541.

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[655] Ex parte: In the Matter of Elbert R. Robinson, Petitioner. [No. —, Original.]

Motion for leave to file an amended petition.

Mr. Richard E. Westbrooks for petitioner.

June 5, 1916. Denied.

Orange Wilson White, Plaintiff in Error, v. State of Wyoming. [No. 578.]

Error to state court—frivolous Federal question.

In Error to the Supreme Court of the State of Wyoming to review a judgment which affirmed a conviction of murder in the District Court of Natrona County, in that state.

See same case below, — Wyo. —, 147 Pac. 171; on rehearing, 148 Pac. 342.

Mr. A. E. L. Leckie for plaintiff in error.

Mr. Douglas A. Preston for defendant in error.

June 12, 1916. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Deming v. Carlisle Packing Co. 226 U. S. 102, 105, 57 L. ed. 140, 142, 33 Sup. Ct. Rep. 80; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. 228 U. S. 596, 600, 57 L. ed. 982, 983, 33 Sup. Ct. Rep. 609; Overton v. Oklahoma, 235 U. S. 31, 59 L. ed. 112, 35 Sup. Ct. Rep. 14; Parker v. McLain, 237 U. S. 469, 471, 472, 59 L. ed. 1051, 1053, 1054, 35 Sup. Ct. Rep. 632.

Timothy Healy, Appellant, v. Samuel W. Backus, Commissioner, etc. [No. 687.]

Appeal—from circuit court of appeals—habeas corpus cases—certiorari.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the District Court for the Northern District of California, denying writs of habeas corpus.

See same case below, 137 C. C. A. 166, 221 Fed. 358.

Mr. Marshall B. Woodworth for appellant.

Mr. Solicitor General Davis for appellee.

June 12, 1916. *Per Curiam:* Dismissed for want of jurisdiction, upon the authority of Lau Ow Bew v. United States, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517; Whitney v. Dick, 202 U. S. 132, 135, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; McClellan v. Carland, 217 U. S. 268, 278, 54 L. ed. 762, 765, 30 Sup. Ct. Rep. 501.

Petition for Writ of Certiorari herein granted.

Ex parte: In the Matter of Watts, Watts, & Co., Ltd., Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Messrs. Mark W. Maclay, Jr., J. Parker Kirlin, and John M. Woolsey for petitioner.

[656] June 12, 1916. Denied.

Ex parte: In the Matter of John H. Sears, as Trustee, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. A. H. Ferguson, in behalf of Mr. Carroll G. Walter, for petitioner.

No appearance for respondent.

June 12, 1916. Denied.

Martin H. Free, Plaintiff in Error, v. Western Union Telegraph Company. [No. 225.]

Motion to vacate judgment of dismissal herein, and to restore case to the docket.

Messrs. B. I. Salinger and Frederick S. Tyler for plaintiff in error.

Messrs. Rush Taggart and Francis Raymond Stark for defendant in error.

June 12, 1916. Granted.

Wells Fargo & Company, Petitioner, v. Mayor and Aldermen of Jersey City. [No. 792.]

This case, as reported in vol. 241 U. S. 656, has been already reported herein, ante, p. 485.

[657] ST. LOUIS UNION TRUST COMPANY, Petitioner, v. MARY E. MELLON et al. [No. 735.]

See same case below, 140 C. C. A. 567, 225 Fed. 603.

Mr. W. F. Wilson for petitioner.

No appearance for respondents.

January 24, 1916. Order of December 20, 1915, denying petition, vacated and set aside, and a writ of certiorari granted.

WALDO P. CLEMENT et al., Petitioners, v. D. W. JAMES. [No. 720.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 128 C. C. A. 470, 211 Fed. 972.

Messrs John R. Abney and Hollins N. Randolph for petitioners.

Messrs. Alexander W. Smith, Theodore A. Hammond, Victor Lamar Smith, and Alexander W. Smith, Jr., for respondent.

January 24, 1916. Denied.

YEE KONG, Petitioner, v. W. W. SIBRAY, Immigration Inspector, et al. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 141 C. C. A. 555, 227 Fed. 1.

Mr. Lowrie C. Barton for petitioner.

No appearance for respondents.

January 24, 1916. Denied.

HOUSTON OIL COMPANY OF TEXAS et al., Petitioners, v. CORNELIA G. GOODRICH et al. [No. 784.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Thomas M. Kennerly and William [658] L. Marbury for petitioners.

No appearance for respondents.

January 31, 1916. Granted.

WILLIAM A. STOWE, Plaintiff in Error, v. EMMA F. TAYLOR. [No. 221.]

Petition for a Writ of Certiorari to the Superior Court of the State of Massachusetts, or other proper proceeding under the act of Congress of December 23, 1914.

Mr. Hollis R. Bailey for plaintiff in error.

Mr. James H. Vahey for defendant in error. [1]

January 31, 1916. Denied.

NATIONAL BANK OF COMMERCE OF SEATTLE, Petitioner, v. UNITED STATES. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 140 C. C. A. 219, 224 Fed. 679.

Messrs. James A. Kerr and E. S. McCord for petitioner.

No brief filed for respondent.

January 31, 1916. Denied.

GEORGE L. DURE, Receiver, etc., Petitioner, v. WILLIAM C. WRIGHT, Trustee, etc. [No. 804.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 228 Fed. 1021.

Mr. John R. L. Smith for petitioner.

Messrs. Orville A. Park and Geo. S. Jones for respondent.

January 31, 1916. Denied.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Petitioner, v. UNITED STATES. [No. 805.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 229 Fed. 501.

[659] Mr. Richard V. Lindabury for petitioner.

Mr. G. Carroll Todd, Assistant to the Attorney General, for respondent.

February 21, 1916. Denied.

BRUCE BORLAND, Petitioner, v. NORTHERN TRUST SAFE DEPOSIT COMPANY. [No. 821.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 228 Fed. 1019.

Messrs. George P. Fisher and Josiah McRoberts for petitioner.

Messrs. Robert H. Parkinson and Wallace R. Lane for respondent.

February 21, 1916. Denied.

NATIONAL BRAKE & ELECTRIC COMPANY, Petitioner, v. NEILS A. CHRISTENSEN et al. [No. 824.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 229 Fed. 564.

Messrs. Parker W. Page, Thomas B. Kerr, J. Snowden Bell, and Charles A. Brown for petitioner.

Messrs. Joseph B. Cotton, Willet M Spooner, and William R. Rummler for respondents.

February 21, 1916. Denied.

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[1] Appearance of Mr. Vahey entered for defendant in error, but he filed no brief on this petition.

CLARK PEASE, Petitioner, v. RATHBUN-JONES ENGINEERING COMPANY. [No. 820.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Perry J. Lewis and E. C. Brandenburg for petitioner.

No appearance for respondent.

February 28, 1916. Granted.

WILLIAM FILENE'S SONS COMPANY, Petitioner, v. CHARLES F. WEED et al. [No. 827.]

Petition for a Writ of Certiorari to the United States [660] Circuit Court of Appeals for the First Circuit.

Messrs. Louis D. Brandeis, William H. Dunbar, and J. Butler Studley for petitioner.

Messrs. Charles F. Choate, Jr., and Frederick H. Nash for respondents.

February 28, 1916. Granted.

ROBERT H. GARDINER, etc., Petitioner, v. WILLIAM S. BUTLER (Inc.) etc. [No. 831.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Bentley J. Warren and Francis B. James for petitioner.

Messrs. Charles F. Choate, Jr., and Frederick H. Nash for respondent.

February 28, 1916. Granted.

ANTONIO CIFFO, Petitioner, v. MARIE CIFFO. [No. 825.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 44 App. D. C. 217.

Mr. Charles F. Carusi for petitioner.

Mr. W. Gwynne Gardiner for respondent.

February 28, 1916. Denied.

JOSEPH H. COURTNEY, Trustee, etc., Petitioner, v. EUGENE A. GEORGER. [No. 834.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 228 Fed. 859.

Messrs. Charles P. Hine and Rufus S. Day for petitioner.

Mr. E. H. Letchworth for respondent.

February 28, 1916. Denied.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Petitioner, v. CECELIO MACIEL et al. [No. 836.]

[661] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 141 C. C. A. 671, 227 Fed. 1021.

Messrs. E. B. Perkins and Edward A. Haid for petitioner.

Mr. Perry J. Lewis for respondents.

February 28, 1916. Denied.

PRESS PUBLISHING COMPANY, Petitioner, v. CASSIUS E. GILLETTE. [No. 841.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 229 Fed. 108.

Messrs. Joseph H. Choate and Howard Taylor for petitioner.

Mr. D. Cady Herrick for respondent.

February 28, 1916. Denied.

HARRY B. HOLLINS, Petitioner, v. A. LEO EVERETT, Receiver, etc. [No. 844.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 229 Fed. 349.

Messrs. Charles K. Beekman and William C. Armstrong for petitioner.

Mr. Leonard B. Smith for respondent.

February 28, 1916. Denied.

MARY C. KEYSER et al., Petitioners, v. W. H. MILTON, Receiver, etc. [No. 851.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 228 Fed. 594.

Messrs. Francis B. Carter, W. A. Blount, and A. C. Blount for petitioners.

Mr. W. H. Watson for respondent.

February 28, 1916. Denied.

EL DIA INSURANCE COMPANY, Petitioner, v. WILLIAM S. SINCLAIR. [No. 852.]

Petition for [662] a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 228 Fed. 833.

Mr. Wendell P. Barker for petitioner.

Mr. William Otis Badger, Jr., for respondent.

February 28, 1916. Denied.

W. E. MARTIN, JR., Trustee, etc., Petitioner, v. COMMERCIAL NATIONAL BANK OF MACON, GA. [No. 839.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Rudolph S. Wimberly for petitioner.

No appearance for respondent.

March 6, 1916. Granted.

JESSE ISIDOR STRAUS et al., etc., Petitioners, v. VICTOR TALKING MACHINE COMPANY. [No. 840.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Edmond E. Wise and Walter C. Noyes for petitioners.

Messrs. Frederick A. Blount and Hector T. Fenton for respondent.

March 6, 1916. Granted.

UNION TRUST COMPANY, Petitioner, v. MINNIE KAHN GROSMAN et al. [No. 862.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William H. Atwell for petitioner.

Messrs. Francis Marion Etheridge and J. M. McCormick for respondents.

March 6, 1916. Granted.

JACOB BLUMENTHAL, Trading as J. Blumenthal & Company, et al., Petitioners, v. BENJAMIN L. [663] STRAT et al., etc. [No. 797.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 227 Fed. 843.

Mr. George F. Deiser for petitioners.

No appearance for respondents.

March 6, 1916. Denied.

TUBULAR WOVEN FABRIC COMPANY, Petitioner, v. NATIONAL METAL MOLDING COMPANY. [No. 871.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 227 Fed. 884.

Messrs. William Quinby, F. W. Lehmann, Frank G. Gladney, Livingston Gifford, and Peter G. Gerry for petitioner.

Mr. Charles F. Perkins for respondent.

March 6, 1916. Denied.

CECIL F. ADAMSON, Petitioner, v. DAVID C. GILILLAND. [No. 878.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Percy B. Hills for petitioner.

No appearance for respondent.

March 13, 1916. Granted.

GEORGE RUE, Petitioner, v. UNITED STATES. [No. 848.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 228 Fed. 1022.

Mr. Cecil H. Smith for petitioner.

No appearance for respondent.

March 13, 1916. Denied.

EDWARD W. G. MEERS, et al., Petitioners, v. ALBERT CHILDERS. [No. 877.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals [664] for the Eighth Circuit.

See same case below, 228 Fed. 640.

Messrs. Julian C. Wilson, Walter P. Armstrong, and Daniel W. Baker for petitioners

No appearance for respondents.

March 13, 1916. Denied.

OSCAR J. WEEKS, Petitioner, v. UNITED STATES. [No. 870.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Walter Jeffreys Carlin for petitioner.

Mr. Solicitor General Davis for respondent.

March 20, 1916. Granted.

CITY OF COLORADO, TEXAS, Petitioner, v. CLARISSE M. HARRISON. [No. 880.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 228 Fed. 894.

Mr. Robert Toombs Neill for petitioner.

Mr. James T. Neville for respondent.

April 3, 1916. Denied.

ALVIN H. STOUT, Petitioner, v. UNITED STATES. [No. 894.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 227 Fed. 799.

Mr. H. L. Stuart for petitioner.

No appearance for respondent.

April 3, 1916. Denied.

WILLIAM E. CRUTCHLEY, Petitioner, v. NATIONAL FIREPROOFING COMPANY. [No. 898.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 44 Wash. L. Rep. 20.

Mr. Daniel W. Baker for petitioner.

Messrs. Walter C. Clephane and Alan B. Clephane for respondent.

April 3, 1916. Denied.

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[665] C. W. JOHNSON, TRUSTEE, etc., Petitioner, v. LOUISVILLE WOOLEN MILLS. [No. 901]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 228 Fed. 606.

Mr. D. A. Sachs for petitioner.

Mr. Keith L. Bullitt for respondent.

April 3, 1916. Denied.

GEORGE A. FULLER COMPANY, Petitioner, v. OTIS ELEVATOR COMPANY. [No. 909.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. Edward S. Duvall, Jr., for petitioner.

Messrs. Frederick D. McKenney and J. S. Flannery for respondent.

April 10, 1916. Granted.

CLARK PEASE et al., Petitioners, v. RATHBUN-JONES ENGINEERING COMPANY. [No. 911.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Perry J. Lewis and Edwin C. Brandenburg for petitioners.

No appearance for respondent.

April 10, 1916. Granted.

VICTOR HERBERT et al., Petitioners, v. SHANLEY COMPANY. [No. 924.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Nathan Burkan and W. J. Hughes for petitioners.

Mr. Abraham S. Gilbert for respondent.

April 10, 1916. Granted.

JOHN CHURCH COMPANY, Petitioner, v. HILLIARD HOTEL COMPANY et al. [No. 930.]

Petition [666] for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Moses H. Grosman for petitioner.

Mr. Levi Cooke for respondents.

April 10, 1916. Granted.

HELEN HISE et al., Petitioners, v. WESTERN COAL & MINING COMPANY. [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 132 C. C. A. 482, 216 Fed. 338.

Mr. John H. Vaughn for petitioners.

Messrs. Edward J. White and Thomas B. Pryor for respondent.

April 10, 1916. Denied.

MONADNOCK MILLS, Petitioner, v. HENRY E. FUSHEY, Administrator, etc. [No. 683.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 140 C. C. A. 72, 224 Fed. 386.

Mr. H. W. Parker for petitioner.

Mr. George F. Morris for respondent.

April 10, 1916. Denied.

GOLD MEDAL CAMP FURNITURE MANUFACTURING COMPANY, Petitioner, v. TELESCOPE COT BED COMPANY. [No. 861.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 229 Fed. 1002.

Mr. Charles F. Fawsett for petitioner.

Mr. Alan D. Kenyon for respondent.

April 10, 1916. Denied.

PERCY B. SULLIVAN, Petitioner, v. UNITED STATES. [No. 906.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for [667] the Seventh Circuit.

Messrs. Leslie A. Gilmore and Frank S. Bright for petitioner.

Mr. Solicitor General Davis for respondent.

April 10, 1916. Denied.

FRANKLIN HUFF et al., Petitioners, v. UNITED STATES. [No. 917.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 228 Fed. 892.

Messrs. C. L. Bartlett, John D. Little, Marion Smith, A. G. Powell, and M. F. Goldstein for petitioners.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

April 10, 1916. Denied.

BELER WATER HEATER COMPANY, Petitioner, v. PITTSBURGH WATER HEATER COMPANY. [No. 922.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 228 Fed. 674.

Mr. Melville Church for petitioner.

No appearance for respondent.

April 10, 1916. Denied.

PAUL ENGLISH et al., Petitioners, v. ELLA WYMAN BROWN et al. [No. 931.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 229 Fed. 34.

Messrs. H. C. Brome and Andrew Foulds, Jr., for petitioners.

Mr. Chauncey G. Parker for respondents.

April 10, 1916. Denied.

HENRY C. CALLAGHAN, Petitioner, v. COMMONWEALTH OF MASSACHUSETTS. [No. 937.]

[668] Petition for a Writ of Certiorari to the Superior Court of the State of Massachusetts.

See same case below, in Supreme Judicial Court of Massachusetts, 223 Mass. 150, 111 N. E. 773.

Messrs. Joseph F. O'Connell, Bernard J. Killion, and Charles Toye for petitioner.

No appearance for respondent.

April 10, 1916. Denied.

W. A. GAINES & COMPANY, Petitioner, v. HELLMAN DISTILLING COMPANY, etc. [No. 905.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 88 C. C. A. 437, 161 Fed. 495.

Messrs. Edmund F. Trabue, D. W. Lindsey, and James Love Hopkins for petitioner.

Messrs. W. T. Ellis and Luther Ely Smith for respondent.

April 17, 1916. Denied.

W. G. SIMPSON et al., Petitioners, v. UNITED STATES. [No 916.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 229 Fed. 940.

Mr. William H. Atwell for petitioners.

No appearance for respondent.

April 17, 1916. Denied.

CHARLES T. TUCKER, Petitioner, v. UNITED STATES. [No. 921.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 140 C. C. A. 279, 224 Fed. 833.

Messrs. Charles T. Tucker, *in propria persona*, Nathaniel H. Maxwell, and Francis B. James for petitioner.

Mr. Solicitor General Davis and Mr. Assistant Attorney General Wallace for respondent.

April 17, 1916. Denied.

JOHN K. ROSE, etc., et al., Petitioners, v. PETER MCCLELLAND, Jr. [No. 933.]

Petition for a Writ of Certiorari to the United States Circuit Court of [669] Appeals for the Fifth Circuit.

See same case below, 137 C. C. A. 519, 222 Fed. 67.

Messrs. Richard I. Munroe, Marshall Surratt, and J. J. Darlington for petitioners.

Messrs. Francis Marion Etheridge and James Manson McCormick for respondent.

April 17, 1916. Denied.

ANNA S. HOPKINS, Petitioner, v. LAWRENCE HULL, Trustee, etc. [No. 944.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 229 Fed. 378.

Mr. J. Grattan MacMahon for petitioner.

Winifred Sullivan for respondent.

April 17, 1916. Denied.

ALEXANDER NISBET, as Commissioner, etc., Petitioner, v. FEDERAL TITLE & TRUST COMPANY. [No. 946.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 229 Fed. 644.

Messrs. Elijah N. Zoline and John T. Bottom for petitioner.

Messrs. Ernest Morris and William W. Grant, Jr., for respondent.

April 17, 1916. Denied.

UNITED STATES, as Trustee, etc., Petitioner, v. HIRAM CHASE. [No. 954.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Solicitor General Davis for petitioner.

Messrs. Hiram Chase and William R. King for respondent.

April 24, 1916. Granted.

R. L. MOULDEN, Trustee, etc., Petitioner, v. PARLIN & ORENDORFF IMPLEMENT COMPANY et al. [No. 923.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, L.R.A. —, —, 228 Fed. 111.

Mr. Jesse P. Gates for petitioner.

Messrs. Francis Marion Etheridge and Joseph Manson McCormick for respondents.

[670] April 24, 1916. Denied.

MASON & HANGER COMPANY, Petitioner, v. MICHAEL SHARON. [No. 948.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, first appeal, 135 C. C. A. 276, 219 Fed. 526; second appeal, 231 Fed. 861.

Mr. Herman S. Hertwig for petitioner.

Mr. Sydney A. Syme for respondent.

April 24, 1916. Denied.

STEARNS COAL AND LUMBER COMPANY, Petitioner, v. JOHN S. VAN WINKLE et al. [No. 956.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 137 C. C. A. 314, 221 Fed. 590.

Mr. James N. Sharp for petitioner.

Mr. James Garnett for respondents.

April 24, 1916. Denied.

HARRY OLIVER, Petitioner, v. UNITED STATES. [No. 938.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 230 Fed. 971.

Messrs. George A. Knight and Charles J. Heggerty for petitioner.

Mr. Solicitor General Davis for respondent.

May 1, 1916. Denied.

JOHN P. BEOGAN, Petitioner, v. NATIONAL SURETY COMPANY. [No. 949.]

Petition for a Writ of Certiorari to the United States Circuit Court of [671] Appeals for the Sixth Circuit.

See same case below, L.R.A.—, —, 228 Fed. 577.

Mr. John A. Cline for petitioner.

Mr. Thomas H. Hogsett for respondent.

May 1, 1916. Denied.

GEORGE W. BOWEN, etc., Petitioner, v. DICKS PRESS GUARD MANUFACTURING COMPANY et al. [No. 856.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 229 Fed. 573.

Mr. Charles F. Fawsett for petitioner.

No counsel appeared for respondents.

May 8, 1916. Denied.

MAYOR AND CITY COUNSEL OF BALTIMORE, Petitioner, v. UNITED RAILWAYS & ELECTRIC COMPANY OF BALTIMORE. [No. 955.]

Petition for a Writ of Certiorari to the Court of Appeals of the State of Maryland.

See same case below, — Md. —, 96 Atl. 880.

Mr. S. S. Field for petitioner.

Mr. Sylvan Hayes Lauchheimer for respondent.

May 8, 1916. Denied.

WILLIAM W. DOWNEY, Receiver, etc., Petitioner, v. HARTFORD FIRE INSURANCE COMPANY. [No. 958.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 139 C. C. A. 237, 223 Fed. 707.

Messrs. John O. Henson and Malcolm Jackson for petitioner.

Messrs. W. Calvin Chesnut and John W. Davis for respondent.

May 8, 1916. Denied.

GUARANTY TRUST COMPANY OF NEW YORK et al., Petitioners, v. BETTENDORF AXLE COMPANY. [No. 967.]

Petition for a Writ of Certiorari to the [672] United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 139 C. C. A. 132, 223 Fed. 542.

Mr. Alfred W. Kiddle for petitioners.

Mr. James R. Sheffield for respondent.

May 8, 1916. Denied.

BRONX NATIONAL BANK, Petitioner, v. MARCUS ROSENTHAL, Trustee, etc. [No. 970.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 231 Fed. 691.

Messrs. Charles D. Folsom and John Hall Jones for petitioner.

Mr. Eugene L. Bondy for respondent.

May 8, 1916. Denied.

J. A. FELLERS, Administrator, etc., Petitioner, v. CHICAGO, LAKE SHORE, & SOUTH BEND RAILWAY COMPANY. [No. 972.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. John N. Hughes for petitioner.

Mr. S. H. Tolles for respondent.

May 8, 1916. Denied.

BATES COUNTY, in the State of Missouri, et al., Petitioners, v. PERCY A. HIPPLE et al., etc. [No. 976.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 138 C. C. A. 436, 223 Fed. 22.

Mr. John T. Barker for petitioners.

Mr. William M. Williams for respondents.

May 8, 1916. Denied.

VIRGINIA RAILWAY & POWER COMPANY et al., Petitioners, v. CHARLES HALL DAVIS. [No. 980.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 229 Fed. 633.

Messrs. [673] E. Randolph Williams, Charles P. Howland, Eppa Hunton, Jr., Arthur H. Van Brunt, and Henry W. Anderson for petitioners.

Mr. James Mann for respondent.

May 8, 1916. Denied.

BRITISH STEAMSHIP COMPANY (Ltd.), etc., Petitioner, v. MARY A. CLARKE. [No. 983.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. Parker Kirlin, Charles R. Hickox, and Mark W. Maclay, Jr., for petitioner.

Messrs. W. A. Blount, A. C. Blount, and F. B. Carter for respondent.

May 8, 1916. Denied.

NATIONAL CARBON COMPANY et al., Petitioners, v. OHIO MOTOR CAR COMPANY et al. [No. 984.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 230 Fed. 370.

Mr. W. B. Mente for petitioners.

Messrs. Province M. Pogue and Harry M. Hoffheimer for respondents.

May 22, 1916. Denied.

W. L. WILSON, Petitioner, v. FRANK WALDO et al. [No. 996.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 231 Fed. 654.

Messrs. Julius C. Martin, Thomas S. Rollins, and George H. Wright for petitioner.

Mr. James H. Merrimon for respondents.

May 22, 1916. Denied.

CRESCENT MILLING COMPANY, Petitioner, v. H. N. STRAIT MANUFACTURING COMPANY. [No. 939.]

[674] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 227 Fed. 804.

Messrs. Harris Richardson and E. C. Brandenburg for petitioner.

Mr. John I. Dille for respondent.

May 22, 1916. Denied.

ALICE STATE BANK et al., Petitioners, v. HOUSTON PASTURE COMPANY. [No. 973.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Henry W. Taft and Walter P. Napier for petitioners.

Mr. William D. Gordon for respondent.

May 22, 1916. Granted.

L. T. HAYS, Petitioner, v. UNITED STATES. [No. 978.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Harry O. Glasser for petitioner.

No appearance for respondent.

May 22, 1916. Granted.

William MCCOACH, Collector, etc., Petitioner, v. INSURANCE COMPANY OF NORTH AMERICA. [No. 998.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Solicitor General Davis for petitioner.

Messrs. G. W. Pepper and Bayard Henry for respondent.

May 22, 1916. Granted.

WILLIAM H. MINER, Petitioner, v. T. H. SYMINGTON COMPANY. [No. 1018.]

Petition for a [675] Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Charles C. Lenthicum and George I. Haight for petitioner.

Messrs. Melville Church and Gilbert P Ritter for respondent.

June 5, 1916. Granted.

H. B. HOLLINS & COMPANY, Petitioner, v. A. LEO EVERETT, as Receiver, etc. [No. 985.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 232 Fed. 124.

Messrs. Charles K. Beekman and William C. Armstrong for petitioner.

Mr. Leonard B. Smith for respondent.

June 5, 1916. Denied.

LEHIGH & WILKESBARRE COAL COMPANY, Petitioner, v. HARTFORD & NEW YORK TRANSPORTATION COMPANY. [No. 994.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 140 C. C. A. 1, 225 Fed. 483.

Mr. Jackson E. Reynolds for petitioner.

Mr. John W. Griffin for respondent.

June 5, 1916. Denied.

WILLIAM H. COOPER, Petitioner, v. UNITED STATES. [No. 1005.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 232 Fed. 81.

Mr. John W. Griggs for petitioner.

Mr. Solicitor General Davis for respondent.

June 5, 1916. Denied.

WILLIAM F. MURRAY, Postmaster, Petitioner, v. POST PUBLISHING COMPANY. [No. 1007.]

Petition for a Writ of Certiorari to the United States Circuit [676] Court of Appeals for the First Circuit.

See same case below, 230 Fed. 773.

Mr. Solicitor General Davis for petitioner.

Mr. Edmund A. Whitman for respondent.

June 5, 1916. Denied.

WILLIAM I. LEWIS, etc., Petitioner, v. INTERNATIONAL STEAM PUMP COMPANY et al. [No. 1015.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Merritt Lane and W. Bourke Cockran for petitioner.

Messrs. Charles H. Russell, Paul D. Cravath, and William W. Green for respondents.

June 5, 1916. Denied.

DISTRICT OF COLUMBIA, Petitioner, v. WASHINGTON GAS LIGHT COMPANY. [No. 1017.]

Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

See same case below, 44 Wash. L. Rep. 262.

Messrs. Conrad H. Syme and F. H. Stephens for petitioner.

Messrs. Benjamin S. Minor, Colley W. Bell, and J. J. Darlington for respondent.

June 5, 1916. Denied.

WHITNEY EARLE HARMON, Petitioner, v. UNITED STATES. [No. 1022.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 139 C. C. A. 19, 223 Fed. 425.

Mr. A. Coulter Wells for petitioner.

No counsel appeared for respondent.

June 5, 1916. Denied.

MARCONI WIRELESS TELEGRAPH COMPANY OF AMERICA, Petitioner, v. EMIL J. SIMON. [No. 1013.]

Petition for a Writ of Certiorari to the United States [677] Circuit Court of Appeals for the Second Circuit.

Mr. John W. Griggs for petitioner.

Mr. Walter H. Pumphrey for respondent.

June 12, 1916. Granted.

WATTS, WATTS, & COMPANY, Petitioner, v. UNIONE AUSTRIACA DE NAVIGAZIONE, etc. [No. 1046.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. J. Parker Kirlin, John M. Woolsey, and Mark W. Maclay, Jr., for petitioner.

Mr. Charles S. Haight for respondent.

June 12, 1916. Granted.

FIELDS S. PENDLETON, Petitioner, v. BENNER LINE. [No. 1041.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Avery F. Cushman and Harvey D. Goulder for petitioner.

Mr. D. Roger Englar for respondent.

June 12, 1916. Granted, conditioned on the petitioner furnishing a bond within twenty days, in an amount to secure payment of the judgment, the amount of the bond to be satisfactory to the circuit justice, and to be approved by him.

UNITED STATES EX REL. WILLIAM F. ARANT v. FRANKLIN K. LANE, Secretary of the Interior. [No. 706.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia to bring up the whole record and cause.

Messrs. Samuel Maddox, H. Prescott Gatley, and J. H. Carnahan for petitioner.

No brief filed for respondent.

June 12, 1916. Denied.

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[678] CYNTHIA LINDSAY, Petitioner, v. CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY. [No. 764.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. E. F. Thompson for petitioner.

Messrs. F. B. Daniels and William Burry for respondent.

June 12, 1916. Denied.

BADDERS CLOTHING COMPANY, Petitioner, v. BURNHAM-MUNGER-ROOT DRY GOODS COMPANY et al. [Nos. 991, 992.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 228 Fed. 470.

Messrs. James H. Harkless, D. R. Hite, and Clifford Histed for petitioner.

Mr. Edwin A. Krauthoff for respondents.

June 12, 1916. Denied.

JOHN W. ENRIGHT et al., Petitioners, v. ARTHUR YANCEY. [No. 1001.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 230 Fed. 641.

Mr. Grafton L. McGill for petitioners.

Messrs. John Dymond, Jr., and A. Giffen Levy for respondent.

June 12, 1916. Denied.

UNION TERMINAL COMPANY et al., Petitioners, v. TURNER CONSTRUCTION COMPANY. [No. 1006.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 229 Fed. 702.

Mr. J. T. G. Crawford for petitioners.

Mr. Richard P. Marks for respondent.

June 12, 1916. Denied.

JAMES F. BISHOP, Administrator, etc., Petitioner, v. EDWARD B. PRYOR, Receiver, etc. [No. 1014.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. E. F. Thompson for petitioner.

Messrs. John M. Zane, Charles F. Morse, and James L. Minnis for respondent.

[679] June 12, 1916. Denied.

FIRST NATIONAL BANK OF ROSWELL, Petitioner, v. HODGSON BROTHERS. [No. 1019.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 231 Fed. 869.

Mr. William C. Reid for petitioner.

Mr. Selden Bacon for respondents.

June 12, 1916. Denied.

JOSEPH F. WILSON & COMPANY, Claimant, etc., Petitioner, v. SOUTH ATLANTIC STEAMSHIP COMPANY. [No. 1020.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 231 Fed. 101.

Messrs. J. Parker Kirlin, William R. Leaken, and Mark W. Maclay, Jr., for petitioner.

Mr. Samuel B. Adams for respondent.

June 12, 1916. Denied.

CORNELIA E. CLEMENT, Petitioner, v. MARY ANN WHITTAKER, etc. [No. 1024.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 231 Fed. 940.

Messrs. Robert H. McCarter, Gilbert Collins, and A. V. Dawes for petitioner.

Mr. Bayard Stockton for respondent.

June 12, 1916. Denied.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Petitioner, v. W. H. MCLAUGHLIN et al. [No. 1026.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 232 Fed. 578.

Messrs. Edward A. Haid, A. L. Burford, and W. T. Wooldridge for petitioner.

Messrs. George B. Rose, W. E. Hemingway, J. F. Loughborough, and V. M. Miles for respondents.

[680] June 12, 1916. Denied.

MALDONADO & COMPANY, Petitioner, v. NEW YORK & CUBA MAIL STEAMSHIP COMPANY. [No. 1027.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 140 C. C. A. 377, 225 Fed. 353.

Mr. Daniel P. Hays for petitioner.

Messrs. Norman B. Beecher and Roscoe H. Hupper for respondent.

June 12, 1916. Denied.

J. BACON & SONS, Petitioner, v. ROBERT C. KINKEAD. [No. 1028.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 230 Fed. 362.

Mr. William Marshall Bullitt for petitioner.

Mr. H. H. Nettelroth for respondent.

June 12, 1916. Denied.

MONTGOMERY WARD & COMPANY (Inc.), Petitioner, v. IOWA WASHING MACHINE COMPANY. [No. 1036.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Messrs. Taylor E. Brown and Clarence E. Mehlhope for petitioner.

Messrs. Robert H. Parkinson and Wallace R. Lane for respondent.

June 12, 1916. Denied.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY et al., Petitioners, v. IDAHO-OREGON [681] LIGHT & POWER COMPANY et al. [No. 1039.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 139 C. C. A. 503, 224 Fed. 39.

Mr. Charles E. Rushmore for petitioners.

Messrs. James H. Richards and Oliver O. Haga for respondents.

June 12, 1916. Denied.

GRAND TRUNK RAILWAY COMPANY, Petitioner, v. UNITED STATES. [No. 1040.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 229 Fed. 116.

Mr. G. W. Kretzinger, Jr., for petitioner.

No appearance for respondent.

June 12, 1916. Denied.

WILLIAM E. D. STOKES et al., Petitioners, v. HOWARD H. WILLIAMS et al. [No. 1042.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 141 C. C. A. 146, 226 Fed. 148.

Mr. Charles L. Craig for petitioners.

Messrs. Howard H. Williams and George C. Kobbi for respondents.

June 12, 1916. Denied.

TRUSSED CONCRETE STEEL COMPANY, Petitioner, v. CORRUGATED BAR COMPANY. [No. 1045.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 138 C. C. A. 114, 222 Fed. 514.

Mr. Fred L. Chappell for petitioner.

Mr. James A. Carr for respondent.

June 12, 1916. Denied.

L. P. & J. H. SMITH COMPANY, Petitioner, v. CALUMET TRANSIT COMPANY, etc. [No. 1050.]

Petition for a Writ of Certiorari to the United States [682] Circuit Court of Appeals for the Sixth Circuit.

See same case below, 228 Fed. 481.

Messrs. Harvey D. Goulder and Frank S. Masten for petitioner.

Messrs. William B. Cady and Francis S. Laws for respondent.

June 12, 1916. Denied.

HAWGOOD & AVERY TRANSIT COMPANY, Petitioner, v. MEAFORD TRANSPORTATION COMPANY [No. 1051]; and HAWGOOD & AVERY TRANSIT COMPANY, Petitioner, v. ELLA WILLIAMS, Administratrix, etc. [No. 1052].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 232 Fed. 564.

Mr. Harvey D. Goulder for petitioner.

Messrs. Charles E. Kremer and George L. Canfield for respondents.

June 12, 1916. Denied.

INDEPENDENT PNEUMATIC TOOL COMPANY, Petitioner, v. BURKE ELECTRIC COMPANY. [No. 1053.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John Robert Taylor for petitioner.

Mr. Clifton V. Edwards for respondent.

June 12, 1916. Denied.

CARRIE H. COLLINS et al., Plaintiffs in Error, v. RUFUS PHILLIPS[1] et al., Trustees, etc., et al. [No. 173.]

In Error to the Supreme Court of the State of Pennsylvania.

Messrs. Charles K. Robinson and Jas. W. Collins for plaintiffs in error.

Messrs. William J. Kyle and John C. Bayne for defendants in error.

[683] January 12, 1916. Dismissed with costs, pursuant to the Tenth Rule.

D. F. DEATON, Plaintiff in Error, v. COMMONWEALTH OF KENTUCKY. [No. 177.]

In Error to the Court of Appeals of the State of Kentucky.

Mr. Edward S. Jouett for plaintiff in error.

No appearance for defendant in error.

January 13, 1916. Dismissed with costs, pursuant to the Tenth Rule.

UNITED STATES, Appellant, v. MELVEN BOOTH,[2] Administrator, etc. [No. 192.]

Appeal from the Court of Claims.

The Attorney General for appellant.

Mr. George A. King for appellee.

January 17, 1916. Dismissed on motion of counsel for the appellant.

J. C. MCCLELLAND, as State Auditor of the State of Oklahoma, et al., Appellants, v. MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY. [No. 206.]

Appeal from the District Court of the United States for the Western District of Oklahoma.

Mr. Charles West for appellants.

No appearance for appellee.

January 20, 1916. Dismissed with costs, pursuant to the Tenth Rule.

REBECCA LOTH et al., Plaintiffs in Error, v. CITY OF ST. LOUIS et al. [No. 190.]

In Error to the Supreme [684] Court of the State of Missouri.

Mr. David Goldsmith for plaintiffs in error.

Mr. Truman P. Young for defendants in error.

January 20, 1916. Dismissed with costs on motion of counsel for the plaintiffs in error.

CHU TAI NGAN, Petitioner, v. SAMUEL W. BACKUS, Commissioner, etc. [No. 753.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 141 C. C. A. 276, 226 Fed. 446.

Messrs. O. P. Stidger and C. L. Bouvé for petitioner.

No appearance for respondent.

January 24, 1916. Dismissed on motion of counsel for the petitioner.

MARTIN H. FREE, Plaintiff in Error, v. WESTERN UNION TELEGRAPH COMPANY. [No. 225.]

In Error to the Supreme Court of the State of Wisconsin.

Mr. B. I. Salinger for plaintiff in error.

Messrs. Rush Taggart, George H. Fearons, and Francis Raymond Stark for defendant in error.

January 24, 1916. Dismissed with costs pursuant to the Tenth Rule.

ANNA YOUNG, Appellant, v. WEST END STREET RAILWAY COMPANY et al. [No. 251.]

Appeal from the District Court of the United States for the District of Massachusetts.

Mr. Burton E. Eames for appellant.

Messrs. Alex. Britton, Evans Browne, and Charles A. Williams for appellees.

January 26, 1916. Dismissed with costs, pursuant to the Tenth Rule.

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[685] AMY CURTIS, Appellant, v. WEST END STREET RAILWAY COMPANY et al. [No. 252.]

Appeal from the District Court of the United States for the District of Massachusetts.

Mr. Burton E. Eames for appellant.

Messrs. Charles A. Williams, Alex. Britton, and Evans Browne for appellees.

January 26, 1916. Dismissed with costs, pursuant to the Tenth Rule.

CONGREGACIÓN DE LA MISIÓN DE SAN VICENTE DE PAUL, Appellant, v. FRANCISCO REYES Y MIJARES and El Banco Español Filipino. [No. 868.]

Appeal from the Supreme Court of the Philippine Islands.

No appearance for appellant.

Mr. Evans Browne for appellees.

February 21, 1916. Docketed and dismissed with costs, on motion of counsel for the appellees.

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[1] Appearance of Rufus Phillips, William Phillips, Phœbe Jane Phillips, Emily Phillips, Ruth Phillips, William Phillips, and Charles Phillips, trustees under the will of William S. Phillips, etc., et al., as parties defendant in error in this cause, filed and entered on October 12, 1915.

[2] Death of Olin R. Booth suggested, and appearance of Melven Booth, as administrator of Olin R. Booth, deceased, as the party appellee herein, filed and entered on January 10, 1916.

W. C. HAGAN et al., Plaintiffs in Error, v. MADISON F. LARKIN. [No. 313.]

In Error to the Superior Court of Cochise County, State of Arizona.

Mr. Benjamin C. Tunison for plaintiffs in error.

No appearance for defendant in error.

February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

SOUTHERN OREGON COMPANY, Plaintiff in Error, v. W. W. GAGE, Sheriff of Coos County, Oregon [No. 544.]

In Error to the Supreme Court of the State of Oregon.

Messrs. Joseph Simon and John M. Gearin for plaintiff in error.

No appearance for defendant in error.

February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

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[686] ERIE RAILROAD COMPANY, Plaintiff in Error, v. GEORGE PROWSKI, as Administrator, etc. [No. 584.]

In Error to the Supreme Court of the State of New York.

Mr. George F. Brownell for plaintiff in error.

No appearance for defendant in error.

February 21, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

CURTICE BROTHERS COMPANY, Appellant, v. HARRY E. BARNARD et al. [No. 243.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Lawrence Maxwell for appellant.

Mr. Bert Winters for appellees.

February 23, 1916. Dismissed without costs to either party, per stipulation of counsel.

STATE OF SOUTH DAKOTA, Complainant, v. CHARLES H. CASSILL. [No. 13, Original.]

Messrs. Clarence C. Caldwell, Robert J. Gamble, and Edward E. Wagner for complainant.

No appearance for respondent.

February 29, 1916. Dismissed per stipulation of counsel.

NORTHERN EXPRESS COMPANY, Plaintiff in Error, v. STATE OF WASHINGTON. [No. 298.]

In Error to the Supreme Court of the State of Washington.

See same case below, first appeal, 80 Wash 309, 141 Pac. 757; second appeal, 81 Wash. 701, 143 Pac. 99.

Mr. Charles W. Bunn for plaintiff in error.

No appearance for defendant in error.

February 29, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

JOE JUDGE and M. Bunting, Plaintiffs in Error, v. FRANK M. POWERS, Judge, etc., et al. [No. 10.]

In Error [687] to the Supreme Court of the State of Iowa.

See same case below, 156 Iowa, 251, 136 N. W. 315, Ann. Cas. 1915B, 280.

Messrs. B. I. Salinger and Frederick S. Tyler for plaintiffs in error.

No appearance for defendants in error.

March 2, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

NATIONAL SURETY COMPANY et al., Plaintiffs in Error, v. UNITED STATES TO THE USE OF J. A. HOLLINGER et al. [No. 267.]

In Error to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, first appeal, 130 C. C. A. 65, 213 Fed. 429.

Mr. A. C. Stamm for plaintiffs in error.

Mr. John E. Fox for defendants in error.

March 6, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

WILLIAM A. STOWE, Plaintiff in Error, v. EMMA F. TAYLOR. [No. 221.]

In Error to the Superior Court of the State of Massachusetts.

Mr. Hollis R. Bailey for plaintiff in error.

Mr. James H. Vahey for defendant in error.

March 8, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

J. F. CUNNINGHAM, Appellant, v. J. P. FLOURNOY, Sheriff, etc., et al. [No. 297.]

Appeal from the District Court of the United States for the Western District of Louisiana.

Mr. Taliaferro Alexander for appellant

No appearance for appellees.

March 14, 1916. Dismissed with costs, pursuant to the Tenth Rule.

MASSACHUSETTS BONDING & INSURANCE COMPANY, Plaintiff in Error, v. REALTY TRUST COMPANY [688] et al. [No. 304.]

In Error to the Supreme Court of the State of Georgia.

See same case below, 142 Ga. 499, 83 S. E. 210.

Messrs. John D. Little, Arthur G. Powell, Marion Smith, Max F. Goldstein, and Eugene Dodd for plaintiff in error.

Messrs. Hudson Moore, William A. Wimbish, and Leonard Haas for defendants in error.

March 15, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

JUDSON HARMON, Receiver, etc., Plaintiff in Error, v. ANDREW C. BROWN, Administrator, etc. [No. 738.]

In Error to the Supreme Court of the State of Indiana.

Mr. John B. Elam for plaintiff in error.

No appearance for defendant in error.

March 17, 1916. Dismissed with costs, per stipulation.

FRANCISCO GOENAGA Y OLSA et al., Appellants, v. ELISA GALLARDO Y SEARY et al. [No. 315.]

Appeal from the District Court of the United States for Porto Rico.

Mr. N. B. K. Pettingill for appellants.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury for appellees.

March 17, 1916. Dismissed with costs, on motion of counsel for the appellants.

GEORGE WAKEFIELD, Appellant, v. JOHN J. BRADLEY, Marshal, etc., et al. [No. 932.]

Appeal from the District Court of the United States for the Northern District of Illinois.

No appearance for appellant.

The Attorney General and the Solicitor General for appellees.

April 3, 1916. Docketed and dismissed with costs, on motion of counsel for the appellees.

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[689] LUCIUS E. JUDSON, as Trustee, etc., Petitioner, v. WILLIAM A. NASH, as Trustee, etc., et al. [No. 276.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 130 C. C. A. 288, 213 Fed. 774.

Mr. Oscar A. Lewis for petitioner.

Mr. John M. Bowers for respondents.

April 3, 1916. Dismissed with costs, on motion of counsel for the petitioner.

WILLIAM WHALLEY, Plaintiff in Error, v. PHILADELPHIA & READING RAILWAY COMPANY. [No. 526.]

In Error to the Supreme Court of the State of Pennsylvania.

See same case below, 248 Pa. 298, 93 Atl. 1016.

Messrs. John C. Bell and A. Frank Ashton for plaintiff in error.

Mr. William Clarke Mason for defendant in error.

April 3, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

CHIN QUOCK WAH, Appellant, v. HENRY M. WHITE, Commissioner, etc. [No. 713.]

Appeal from the District Court of the United States for the Western District of Washington.

Mr. Joseph F. O'Connell for appellant.

No appearance for appellee.

April 3, 1916. Dismissed with costs, pursuant to the Tenth Rule.

M. HEIMER, Plaintiff in Error, v. STATE OF GEORGIA. [No. 934.]

In Error to the Court of Appeals of the State of Georgia.

No appearance for plaintiff in error.

Mr. William Wallace, Jr., for defendant in error.

April 5, 1916. Docketed and dismissed with costs on motion of counsel for defendant in error.

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[690] AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff in Error, v. STATE OF IDAHO, TO AND FOR THE USE AND BENEFIT OF CLARA MILLS, et al. [No. 609.]

In Error to the Supreme Court of the State of Idaho.

Messrs. James H. Richards and Oliver O. Haga for plaintiff in error.

No appearance for defendant in error.

April 17, 1916. Dismissed, each party paying its own costs, per stipulation of counsel.

S. S. WHITE DENTAL MANUFACTURING COMPANY, Petitioner, v. OSCAR H. PIEPER et al., etc. [No. 718.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 228 Fed. 30.

Messrs. Henry N. Paul, Jr., Jos. C. Fraley, and Edward Rector for petitioner.

Mr. Charles A. Brown for respondents.

April 17, 1916. Dismissed with costs, on motion of counsel for the petitioner.

GEORGE W. CALDWELL et al., etc., Plaintiffs in Error, v. GEORGE W. DONAGHEY et al. [No. 461.]

In Error to the Supreme Court of the State of Arkansas.

Mr. J. W. Blackwood for plaintiffs in error.

Messrs. W. E. Hemingway, G. B. Rose, and J. F. Loughborough for defendants in error.

April 24, 1916. Dismissed with costs, on motion of counsel for the plaintiffs in error.

SWIFT & COMPANY, Plaintiff in Error, v. AGNES CATANI. [No. 789.]

In Error to the Supreme Court of the State of Pennsylvania.

See same case below, 251 Pa. 52, L.R.A. —, —, 95 Atl. 931.

Mr. Charles B. Lenahan for plaintiff in error.

Mr. Rush Trescott for defendant in error.

April 24, 1916. Dismissed per stipulation.

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[691] JOHN F. CUBBINS, Appellant, v. MISSISSIPPI RIVER COMMISSION et al. [No. 39.]

Appeal from the District Court of the United States for the Western District of Tennessee.

Mr. Barnette E. Moses for appellant.

Mr. H. F. Roleson for appellees.

April 24, 1916. Dismissed with costs, pursuant to the Tenth Rule.

EX PARTE: IN THE MATTER OF THE MOTION PICTURE PATENTS COMPANY, Petitioner. [No. 24, Original.]

Petition for Writ of Mandamus.

Mr. Melville Church for petitioner.

No appearance for respondent.

April 24, 1916. Dismissed on motion of counsel for petitioner.

JAMES F. THRIFT, Comptroller of the city of Baltimore, Plaintiff in Error, v. PHILIP D. LAIRD. [No. 379.]

In Error to the Court of Appeals of the State of Maryland.

See same case below, 125 Md. 55, 93 Atl. 449.

Messrs. Alexander Preston and S. S. Field for plaintiff in error.

Mr. W. Cabell Bruce for defendant in error.

April 28, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

UNITED STATES OF AMERICA, Appellant, v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY et al. [No. 346.]

Appeal from the District Court of the United States for the Southern District of Ohio.

The Attorney General for appellant.

No appearance for appellees.

May 1, 1916. Dismissed on motion of counsel for the appellant.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error, v. KATE SETERA, as Administratrix, [692] etc. [No. 238.]

In Error to the Supreme Court of the State of New York.

See same case below, in Appellate Division, 162 App. Div. 927, 147 N. Y. Supp. 1140.

Messrs. Frederic D. McKenney and Harold J. Adams for plaintiff in error.

No appearance for defendant in error.

May 1, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

A. S. DOWD, Receiver, etc., et al., Plaintiffs in Error, v. UNITED MINE WORKERS OF AMERICA et al. [No. 771.]

In Error to the District Court of the United States for the Western District of Arkansas.

Mr. James B. McDonough for plaintiffs in error.

Messrs. George L. Grant and Henry Warrum for defendants in error.

May 2, 1916. Dismissed with costs on motion of counsel for the plaintiffs in error.

MARK CRAIG, Plaintiff in Error, v. COMMONWEALTH OF KENTUCKY. [No. 272.]

In Error to the Hardin County Quarterly Court, the State of Kentucky.

Mr. Hobson L. James for plaintiff in error.

Mr. Arthur H. Mann for defendant in error.

May 3, 1916. Judgment reversed with costs, and cause remanded for further proceedings upon confession of error by the defendant in error, and on motion of counsel for the defendant in error.

PORTER LAWSON, Plaintiff in Error, v. STATE OF LOUISIANA. [No. 377.]

In Error to the Supreme Court of the State of Louisiana.

Mr. Taliafero Alexander for plaintiff in error.

No appearance for defendant in error.

May 4, 1916. Dismissed with costs, pursuant to the Tenth Rule.

[693] UNITED STATES et al., Appellants, v. ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY et al. [No. 306.]

Appeal from the District Court of the United States for the Eastern District of Illinois.

See same case below, 217 Fed. 80.

The Attorney General for appellants.

Messrs. Edw. A. Haid and Henry G. Herbel for appellees.

May 22, 1916. Dismissed on motion of counsel for the appellants.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, Plaintiff in Error, v. E. G. MASSINGALE, as Administrator, et al. [No. 387.]

In Error to the Court of Appeals of the State of Kentucky.

See same case below, 161 Ky. 640, 171 S. W. 430.

Messrs. John Galvin and Edward Colston for plaintiff in error.

Mr. James N. Sharp for defendants in error.

May 22, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

POSTAL TELEGRAPH COMPANY, Appellant, v. CITY OF PORTLAND. [No. 873.]

Appeal from the District Court of the United States for the District of Oregon.

Messrs. William D. Fenton and Alfred A. Hampson for appellant.

No appearance for appellee.

June 5, 1916. Dismissed with costs, on motion of counsel for the appellant.

NICOLA CERRI, as Italian Consular Agent, etc., Plaintiff in Error, v. GIOVANNI PAGANO, Administrator, etc. [No. 903.]

In Error to the Supreme Court of the State of Ohio.

Mr. Newton D. Baker for plaintiff in error.

No counsel appeared for defendant in error.

June 5, 1916. Dismissed with costs, on motion of counsel for the plaintiff in error.

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[694] CHARLES FRANK et al., Appellants, v. UNION PACIFIC RAILROAD COMPANY et al. [No. 727.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Samuel Untermyer, Louis Marshall, Myron L. Learned, and Abraham Benedict for appellants.

Mr. N. H. Loomis for appellees.

June 12, 1916. Dismissed with costs, on motion of counsel for the appellants.

GAST REALTY & INVESTMENT COMPANY et al., Plaintiffs in Error, v. SCHNEIDER GRANITE COMPANY. [No. 211.]

Error to state court—rehearing.

In Error to the Supreme Court of the State of Missouri to review a judgment which affirmed a judgment of the St. Louis City Circuit Court in favor of plaintiff in a suit to collect a paving tax. On petition for rehearing.

See ante, 523.

Messrs. Hickman P. Rodgers, William K. Koerner, Charles H. Daues, Truman P. Young, Frederick W. Lehmann, and Benjamin Schnurmacher for the petition.

Messrs. Robert A. Holland, Jr., Thomas G. Rutledge, Jacob M. Lashly, and David Goldsmith, opposed.

March 20, 1916. Memorandum by Mr. Justice Holmes: Our decision is limited, of course, to the particular ordinance before the court; to the assessment of three quarters, determined in the mode described, and to those who, like the plaintiff in error, have suffered from the inequalities that have no justification in law.

Motion for leave to file petition denied.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

It is ordered that general order in bankruptcy No. 21 be amended so as to read as follows:

XXI. Proof of Debts.

1. Depositions to prove claims against a bankrupt's estate shall be correctly entitled in the court and in the cause. When made to prove a debt due to a partnership, it must appear on oath that the deponent is a member of the partnership; when made by an agent, the reason the deposition is not made by the claimant in person must be stated; and when made to prove a debt due to a corporation, the deposition shall be made by the treasurer, or, if the corporation has no treasurer, by the officer whose duties most nearly correspond to those of treasurer; if the treasurer or corresponding officer is not within the district wherein the bankruptcy proceedings are pending, the deposition may be made by some officer or agent of the corporation having knowledge of the facts. Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it. All such depositions shall contain an averment that no note has been received for such account, nor any judgment rendered thereon. Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.

November 1, 1915.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1915.

IN MEMORIAM, JOSEPH RUCKER LAMAR.

Upon the convening of the court on January 3, 1916, the Chief Justice said:

Gentlemen of the Bar:

It gives me the profoundest sorrow to state the severance which has taken place of those ties of personal affection and respect which united us to our brother, Mr. Justice Lamar, caused by his untimely death last night. And this sorrow, I know, is shared by his brethren of the Bar, to whom he was so strongly and devotedly attached, and will, I am confident, be participated in by all his countrymen as they come to feel that the country will be for the future deprived of the blessings which would have come from the future discharge of his duties as a member of this court with that conspicuous ability and enlightened devotion to duty so clearly manifested during the period which has gone by since he took up his duties here this day five years ago.

The funeral ceremonies will take place at his home in Augusta, Georgia, on Wednesday next. Mr. Justice Van Devanter, Mr. Justice Pitney, and Mr. Justice McReynolds will, as a committee appointed by the court, attend the funeral as its representatives. As a mark of the affection we bore him and of respect for his memory, the court will stand adjourned until Thursday morning next.

The bar of the Supreme Court of the United States and the officers of the court met in the court-room in the Capitol at 12 o'clock, on Saturday, May 27, 1916.

On motion of Mr. Solicitor General Davis, Honorable Hoke Smith was elected chairman and Mr. James D. Maher was elected secretary.

On taking the chair, Senator Smith said:

We meet to-day as members of the bar of the Supreme Court to pay tribute to the memory of Mr. Justice Lamar. He took his seat on this bench January 3, 1911. The sickness which stopped his work began in the summer of 1915. In this short period he fixed his place among the great justices of this court.

Those of us who practised law with him in his native state, and before him while he was a justice of the supreme court of Georgia, were not surprised at the ease with which he won the confidence and admiration of the bar of the nation.

Joseph Rucker Lamar was born in Elbert county, Georgia. His parents were Mary Rucker, daughter of a successful planter and banker, and James S. Lamar, a minister of the Gospel.

He was educated in the best schools and at the University of Georgia. Sickness, and the removal of his father to Louisville, Kentucky, to take charge of a church there, forced him to leave the University before graduation. He subsequently graduated from Bethany College, West Virginia. He studied law at Washington and Lee University, and was admitted to the bar at Augusta, Georgia, in April, 1878.

Possessed of a bright, logical mind, a retentive memory, and a thirst for knowledge, he applied himself with intense zeal to the study of law. He made rapid progress in his profession, and soon became one of the leaders of a bar of unusual ability.

While his life was devoted to the Bar and the bench, his culture was broad, and he did not fail to meet the highest responsibilities of a citizen. He took active interest in every movement to serve his fellowmen. He found time to teach a Bible class in his father's church, and gave to the class his rich knowledge of the Scriptures and his general learning.

Responding to the call of his fellow citizens, he served two terms in the Georgia legislature, from 1886 to 1889. Many gifted men were his colleagues, but all gave him first place as a profound lawyer.

He was the author of several important acts of judicial reform, and was subsequently selected as one of the three commissioners to codify the laws of Georgia. While engaged in this service he prepared several other important acts simplifying judicial procedure.

In the division of the work of the commission, revision of the Civil Code was assigned to Mr. Lamar. The scheme of the original Code embodied the statutes of the state, and common-law principles, in sections clearly and briefly expressed. Mr. Lamar completed the Code to date, adding, according to the original scheme, all material furnished by decisions of the supreme court. The manner in which he did this work classes him as one of the most capable of civil code authors.

He was appointed in January, 1903, a justice of the state supreme court. His talents and his temperament peculiarly fitted him for the bench. He loved judicial labor. While upon the supreme court bench of Georgia I heard him say that he was almost afraid to admit how much he enjoyed the work. In two years he wrote more than two hundred opinions. The reader of his opinions cannot fail to be impressed with the learning of the writer, and with the clear and striking form or expression, carrying satisfactory and convincing reasoning.

His conscientious devotion to the duties of the office taxed his health, and by advice of his physician, he resigned in April, 1905. Speaking of his resignation, his learned associate upon the bench, Judge Andrew Cobb, wrote: "His retirement from the bench of the state supreme court was the occasion of the greatest regret on the part of his associates, who had been so much aided by his presence among them, and called forth expressions of the sincerest regret from members of the bar."

Immediately upon his resignation Judge Lamar returned to the active practice of law at Augusta, Georgia.

As a practitioner at the bar, Mr. Lamar had few equals. He was always thoroughly prepared, the entire master of the case in hand. Whether discussing law or facts, before court or jury, he was clear, brilliant, logical, and convincing. When you opposed him, you felt his power, but appreciated his courtesy and perfect fairness. When associated with him, there was a sense of relief. You could be certain that his part of the trial would be splendidly sustained, with never the possibility of blunder.

Justice Lamar was a man of great determination and perfect courage, but he was so gentle and unselfish that all who knew him loved him. In this he was not different from his great kinsman, L. Q. C. Lamar. I once heard President Cleveland compare John G. Carlisle and L. Q. C. Lamar. He paid tribute to the great ability of each, and then said "but I *loved* Lucius Lamar."

President Taft, just after his election, spent part of the winter at Augusta. He was frequently thrown with Mr. Lamar.

Fairly acquainted with President Taft from his decisions as circuit court judge, believing that a great judge would recognize the judicial qualifications of another, and knowing Judge Lamar, I that early ventured the opinion that, if a vacancy occurred

upon the Supreme Court to which the President could appoint a Southern Democrat, he would name Joe Lamar.

In answer to an inquiry by President Taft asking for an opinion as to his qualifications for justice of the Supreme Court, the Hon. Joseph R. Cumming, fitted by intimate acquaintance and otherwise to give opinion, answered: "In the symmetry of Lamar's makeup I do not know which most to commend, the man or the lawyer. His present learning is vast; his facility for acquiring more, remarkable. If I were called upon to construct a model for a judge, I would take Lamar as he is, only chipping off somewhat of his too painstaking search for finality of truth, which sometimes keeps him reaching out beyond the sea mark, where other excellent judges would be willing to drop anchor."

The Constitution of the United States is the greatest political legacy ever given to a people. Mr. Justice Lamar was devoted to the Constitution, and to all the institutions of his country.

He was fifty-four years of age when he began his work here. To him it was the ideal service, and to us he was the ideal judge.

"When the ermine fell upon his shoulders it touched nothing less spotless than itself."

"How great is the office of judge, and the honor of him who worthily fills it. There is nothing beyond it."

We honor his memory, and mourn that he was not permitted to serve the allotted period of three-score years and ten.

In the language of the bar of his own state, we can truthfully say of him:

"Great jurist, great judge, great man, thou hast done well."

On motion of Mr. W. G. Brantley, the Chair appointed a Committee on Resolutions:

COMMITTEE ON RESOLUTIONS.

Mr. Wm. G. Brantley, Chairman; Mr. Thomas W. Hardwick; Mr. John W. Davis; Mr. Nathaniel Wilson; Mr. Frederick W. Lehmann; Mr. Frederic D. McKenney; Mr. Hannis Taylor; Mr. Alfred P. Thom; Mr. Henry E. Davis; Mr. S. S. Gregory.

Mr. Wm. G. Brantley, for the Committee, presented the following:

RESOLUTIONS.

Resolved, That the members of the bar of the Supreme Court of the United States lament the untimely death of the late Joseph Rucker Lamar, Associate Justice of the Supreme Court of the United States, and record their appreciation of his learning, ability, and high character, the affectionate regard with which they now cherish his memory, and the great loss to the bench and the country occasioned by his death.

A native Georgian, he was born of an illustrious family, and by his life's work not only sustained the best traditions thereof, but added lustre to the great name he bore. He was the second of the Georgia Lamars to win a place on the bench of the Supreme Court of the United States, the first being the late L. Q. C. Lamar, appointed from the state of Mississippi. Each of these two Lamars brought to the court superb mental equipment, lofty ideals, intense Americanism and consecration to duty, and by the product of his labors more than vindicated the wisdom of his appointment.

Joseph Rucker Lamar was born October 14th, 1857, and after a collegiate education came to the bar at twenty-one years of age. His entire life thereafter was one of devotion to the law, for he never knew any other field of labor.

As a practitioner at the bar he won renown and success, and, at a comparatively early age, easily ranked among the leaders of the bar of his state. As an antagonist he was always formidable, for he was always prepared, but he was also always delightful. His

courtesy was disarming. He was always fair, and neither sought nor would he have any mean advantage.

In 1892 he was chosen as one of three commissioners to codify the laws of his state and the work he there did, resulting in the Code of 1895, will ever stand as a monument to his discriminating judgment, to his industry, and to the thoroughness and completeness with which he performed each task assigned to him.

Prior to this work of codification he served for two terms as a member of the lower house of the general assembly of Georgia, and to the legislative field he carried the training and habits of the lawyer, giving to his state, upon all public questions, the careful preparation, the thoughtful consideration, the sound advice, and unswerving loyalty of attorney to client. He was always earnest, always sincere, and never knew but one way to discharge any duty, and that way was to discharge it to the very best of his ability.

On January 13th, 1903, he took his seat as an associate justice of the supreme court of the state of Georgia, and resigned therefrom in 1905 on account of his health, and resumed the practice of law.

The fruits of this service were found in the affection and admiration for him of his associates on the bench, and of the bar of the state, and in strong virile opinions, classically expressed, which to-day, as then, enrich the permanent judicial literature of his state.

On December 12th, 1910, he was appointed an associate justice of the Supreme Court of the United States. His appointment was shortly thereafter confirmed by the senate, and on January 3d, 1911, he took his seat on the bench. He died at his home in the city of Washington on January 2d, 1916, not quite completing five years of service.

From the day upon which he entered this service he consecrated his life and all that was in him to the faithful performance of its duties. His application, his untiring research, his painstaking care, and his patient labor were known to all who had dealings with the court.

Others have been and no doubt will be permitted to give more years of service to their country on this great bench than was he, but to him was given the high privilege, by excessive and never-ending toil, to give his life. No man could give more.

Measured by time, his service was not long, but measured by results, a great service was completed. He served long enough to demonstrate his aptitude and fitness for the work, and long enough to leave upon the archives of his country the enduring impress of a great and just Judge.

His life was one of devotion to American ideals. He was ever a student of his country's history, and no man was more familiar than he with the origin of the government under which he lived, or with the foundation principles upon which it rests. The extent and the limitations of its power were clearly defined in his mind and full well he knew how liberty came, and how, only, it can be preserved.

To the office of associate justice of the Supreme Court of the United States he brought the ability, the strength, the courage, and the patriotism to preserve our Republic as the Fathers founded it, and all these he dedicated to that great end.

In May, 1914, he was invited by the President to serve as a special commissioner of the President, in connection with commissioners from certain South American countries, in the matter of mediation in the troubled affairs of our neighboring Republic of Mexico. With his habitual response to every call of duty he accepted the invitation and assumed the responsibilities thereby imposed. The commissioners so selected met with commissioners from Mexico at Niagara Falls soon after their appointment, and concluded their delicate and important labors in the month of July following, to the satisfaction of the several governments participating.

He was by nature kind and gentle, but beneath his kindliness of manner there was a fixedness of purpose and a courage of steel that knew no yielding. He was cautious and careful, but once the path of duty became clear he followed it to the end. He never faltered in the pursuit of truth.

The sweetness and gentleness of his nature, the charm of his personality, the readiness of his sympathy were such that to know him was to love him. The same listening ear

that as judge he gave to advocate, he always kept attuned to hear the voice of humanity. He loved his fellows, and to him the breath of friendship was as incense. It sweetened, inspired, and strengthened his life.

In the rich fullness of his sympathetic heart, when he came to prepare his last will and testament, in 1899, he incorporated therein the following beautiful statement: "My friendships many and precious I leave to my family in the hope that they will be cherished and continued. I know of no enmities; but if such unhappily hereafter arise, let them be forgotten."

When the end came for him, it is precious to believe that there was still an absence of all enmities, and that he went out into the Great Beyond, leaving behind him a world of friends only. What more priceless heritage could he have bequeathed?

Resolved, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the chairman of this meeting be directed to forward a copy of them to the family of the late Justice Lamar, accompanied by an expression of our profound sympathy for them in their overwhelming bereavement.

REMARKS OF WM. G. BRANTLEY.

Mr. Chairman:

It was my privilege to know Justice Lamar long and intimately. He possessed my respect, my admiration, and my affection. I first knew him when we served together as members of the Georgia legislature, and it was there that I came to know the wonderful clearness of his perception, the power of his logic, the varied character of his information, and the thoroughness and conscientiousness with which he did his work; and also came to know the cleanliness of his life and the gentleness of his nature.

I had the opportunity to bear testimony to his worth to President Taft prior to his appointment to this great court. On that occasion, President Taft said to me, that in filling the vacancies then existing on the bench of the Supreme Court it was his desire to find men who were big enough, courageous enough, able enough, and patriotic enough, to preserve this Republic as it was founded, and it mattered not to him from what section of our common country they came, nor what their politics were. I was proud to give my assurance that Mr. Lamar measured up to these great qualifications, and I am happy now to believe that this assurance was more than vindicated by the record of Justice Lamar in the discharge of his judicial duties.

Mr. Chairman, the purity of the life that Justice Lamar lived, and the deeds he wrought, known to us all, speak their own eloquent eulogy of the man and his life, and there are no words of mine that can add anything thereto. I can only bear testimony to the strength of my devotion to him, and declare my high estimate of him as man, as lawyer, and as judge, and the great sorrow into which we were all plunged when he was taken from us. I move the adoption of the resolutions submitted.

REMARKS OF MR. E. MARVIN UNDERWOOD.

Mr. Chairman:

We of the state of Georgia were glad and proud when the great ability and sterling character of our compatriot, the late Justice Lamar, were recognized and rewarded by his elevation to the bench of the Supreme Court of the United States.

We were happier still to see our faith justified in his splendid work, evidenced from the beginning by the clear and learned opinions he wrote while a member of this Court, and we noted with greatest satisfaction the progressive development of his powers.

We now mourn his untimely death at the very zenith of his powers and usefulness, and sadly realize that our country has lost one of her ablest and most faithful servants and humanity one of its choicest spirits.

We who knew him, already, have been taught by his absence how much we shall

miss his cordial and loving nature and the delightful charm of personal communion with him. Like all of his friends, I cherish his memory as a personal blessing.

As a citizen of the state which gave him birth and which he honored and served so well, I pay tribute to his memory.

REMARKS OF MR. HANNIS TAYLOR.

Mr. Chairman:

In his tender and noble-minded essay on Friendship Cicero has said: "What can be more delightful than to be near to one to whom you may speak on all subjects just as to yourself. Where would be the great enjoyment in prosperity, if you had not one to rejoice in it equally with yourself? And adversity would indeed be difficult to endure without someone who would bear it even with greater regret than yourself. In short, all other objects that are sought after are severally suited to some one single purpose: Riches, that you may spend them; power, that you may be courted; honors, that you may be extolled; pleasures, that you may enjoy them; good health, that you may be exempt from harm, and perform the functions of the body. Whereas friendship comprises the greatest number of objects possible; wherever you turn it is at hand; shut out of no place, never out of season, never irksome; and therefore we do not use fire and water, as they say, on more occasions than we do friendship. And I am not now speaking of commonplace or ordinary friendship (though even that brings delight and benefit), but of real and true friendship, such as belonged to those of whom very few are recorded; for prosperity, friendship renders more brilliant; and adversity more supportable, by dividing and communicating it."

I have borrowed these reflections on friendship, Mr. Chairman, from one of the greatest masters of human emotions, because Mr. Justice Lamar possessed in a very eminent degree what may be called, without exaggeration, a genius for friendship. It was a part of his religion; it was a part of his life. To such an extent was that true that when the time came for him to execute his last will and testament he described his friendships as the most precious of his possessions. In his will he said, with touching pathos—"I bequeath my friendships to my children." I cannot claim to have been within the charmed circle of the dead Justice's friendships. And yet a very cordial acquaintance was fast ripening into friendship when the pale messenger came with his inverted torch and beckoned him away. As our homes were not far apart it was my habit, during the last few years of his life, to visit him at stated intervals, and to commune with him upon all the problems now pressing upon us. In that way I was able to make a rough inventory of his thoughts and feelings; in a word, to understand his estimates of the duties and responsibilities of life.

No member of this court was ever more impressed than Justice Lamar with its august dignity and its national and international importance. He realized the fact that he had been called to a great magistracy, and the single ambition of his life was to discharge its duties worthily. A ripe culture and a long and active experience at the bar had well equipped him for his task. And so, surrounded in his home with an ample and well-selected library, he wrought for five years in laying the foundations of a reputation as a judge which will be permanent. Those of you who are familiar with his decisions fully appreciate not only their depth and breadth, but the finished elegance and lucidity of the language in which they were expressed. Through them all there is a clear-mindedness which never missed the real point at issue; through them all there is an honesty of purpose which never stopped to shallow sophistries as a means of forcing a conclusion. To his judicial style we may well apply the Horatian epigram—*Simplex atque rotundus.*

There is only one kind of sectionalism of which I approve. I refer to that commendable spirit of generous rivalry which prompts each grand division of our common country to send to this capital as its representatives its best and wisest men. In that way each section makes for itself a place in our invisible hall of fame. As a Southern man I confess that I feel a special pride in the remarkable contributions my section has

made to the personnel of this great court. Of its nine Chief Justices, four have been contributed by the South: Rutledge, Marshall, Taney and White. Of its sixty Associate Justices, twenty have been contributed by the South: Harrison of Maryland, Blair of Virginia, Iredell of North Carolina, Chase of Maryland, Washington of Virginia, Moore of North Carolina, Johnson of South Carolina, Todd of Virginia, Duvall of Maryland, Trimble of Virginia, Wayne of Georgia, Barbour of Virginia, Catron of Tennessee, McKinley of Alabama, Daniel of Virginia, Campbell of Alabama, L. Q. C. Lamar of Mississippi, Jackson of Tennessee, Lurton of Tennessee, and Joseph Rucker Lamar of Georgia. Only the families of Field and Lamar have enjoyed the distinction of contributing two members each to the staff of this court.

In a proud yet stricken spirit the South views these obsequies of her distinguished son, because she feels that her last contribution to the staff of this court was in every way a worthy one. Within the brief time allotted to him Joseph Rucker Lamar achieved as much as the most ambitious and exacting mother could have expected of him. He was adequate in all things. I shall therefore close this humble tribute as I began it, with a quotation from the famous essay on Friendship, in which Cicero epitomized, twenty centuries ago, the life and character of Justice Lamar as I understand it. In speaking of his lost and cherished friend Scipio, the great word-painter said: "What shall I say of his most engaging manners; of his dutiful conduct to his mother; his generosity to his sisters; his kindness to his friends; his uprightness toward all. These are known to you; and how dear he was to the state, was displayed by her mourning at his death. How, therefore, could the accession of a few years have benefited such a man? For although old age is not burdensome (as I recollect Cato asserted, in conversation with myself and Scipio the year before he died), yet it takes away that freshness which Scipio even then possessed. Wherefore his life was such that nothing could be added to it, either in respect of good fortune or of glory: moreover, the very suddenness of his death took away the consciousness of it."

Vivit tamen semperque vivet; virtutem enim amari illius viri quae extincta non est. De Amicitia, XXVII.

He lives and shall forever live; for it was his virtues that endeared him to me, and they can never die.

REMARKS OF MR. FRANK WARREN HACKETT.

We of the bar have listened with sympathetic ear to what has been said of our friend, Mr. Justice Lamar, by lawyers from Georgia and Alabama. Perhaps it is now appropriate that, coming as I do from New Hampshire, I add a word of tribute to his memory. I am the further encouraged, Mr. Chairman, because of the felicitous relation you yourself bear to the state of New Hampshire.

Sometimes I have wondered whether the public, who are not lawyers, or familiar with the traditions of our profession, understand what these bar meetings mean. I fear that there may be those who imagine that what is said is perfunctory, and that the custom is followed only because it has been long established. That is far from the truth. I can myself certify, from forty-three years' experience as a member of the bar of this court, how genuine and heartfelt are the expressions that on these occasions come from the bar, in testimony of the worth of a deceased justice.

I recall the circumstance of my being present, at the meeting held in 1873, in memory of Chief Justice Chase; and I believe that I can say that since that time I have attended nearly every one of the bar meetings held in this room. Well do I remember the proceedings that took place upon the death of Matt Carpenter, when Judge Black, speaking from where I now stand, closed his remarks with the exclamation, "I did love the man." We were overcome with emotion at hearing those simple words.

I wish I had time, but there is no time, to go a little into an expression of the meaning and the value of these meetings. They furnish the only opportunity that the bar has to testify to the merits of a judge whom they have learned to esteem, and to regard as a friend. These occasions have their value, because they bring to light, as it were, and

emphasize the relation that exists between bench and bar. Unless that relation be cordial, unless the two have confidence, each in the other, the cause of justice is not subserved as it should be. There is a pride on the part of the bar in the conviction that we not only trust each other, as we do implicitly in our business, but that we trust the judge, and the judge trusts us. This feeling of the existence of a genuine and complete confidence helps measurably in the administration of justice.

But I must hasten to say a word in regard to the personality of Mr. Justice Lamar. It was not my privilege to know him any further than by way of a passing acquaintance. Let me confess, however, that the first time I saw him on this bench I was captivated by his countenance. I do not recall another instance of, at first sight, becoming wholly conquered by the looks of a man, as in the case of Mr. Justice Lamar. It may be sentimental to say it, but it seemed to me that there was in his face an aspect of benignity, of gentleness, and of happiness,—and yet no lack of vigor or firmness. That I feel sure, sums up the best qualities a judge can possess. The thought came into mind,—here is one who will listen to you kindly and considerately, and then decide justly.

Trivial though this circumstance may be, I deem it not unworthy of being mentioned, in order that it may go upon record; for in years to come the bar will be grateful to learn, be it never so little, of the personal characteristics of any justice of this court.

We have already heard with what signal ability Mr. Justice Lamar served as a member of the highest court in his native state of Georgia. We know what promise attended his taking a seat upon this bench.

Heretofore, these meetings have been called to express the feelings of the bar upon the passing away of a justice, or—on very rare occasions—of a great lawyer. These men had finished their lifework. The record of usefulness had been made up. To-day, we mourn because one who had scarcely reached the maturity of his powers has been cut down.

But we must be thankful that Mr. Justice Lamar, in the span of life that was his, had indeed accomplished so much. We know that he approved himself an able, a faithful, and a true man. We can assure ourselves that, had he lived, his work would have been of increasingly large value to his country.

I am grateful for the privilege, coming as I do from New England, of adding a word to what has been said by my friends from the South, and of bearing witness with them that there was plainly to be seen in Mr. Justice Lamar a man of noble build who had already advanced far on the road to distinction—a man whose name shall be borne upon the records of this court as, in a marked degree, a wise, a pure-minded, and a sound jurist.

REMARKS OF MR. ALFRED P. THOM.

A little over five years ago many members of the American bar stood in this room with uncovered heads, and saw one of their number take the oath as a justice of this Honorable Court.

It was my privilege to be here and to witness the induction into office of the new Justice, Joseph Rucker Lamar of Georgia.

Nowhere in that assemblage of lawyers—nowhere in any part of this nation where he was known—was there a doubt of the purity of his soul or of the elevation or rectitude or soundness of his moral standards. By universal acclaim he was welcomed here as worthy to be trusted with the ideals and responsibilities of justice, as justice existed and was cherished in the hearts and consciences of the American people.

It was known that he had lived an upright life; that he cherished no enmities; that he possessed no class consciousness or hatreds; that he loved his neighbor; that he had no purpose, and, in his purity and majesty of soul, there could exist no purpose, except to learn what justice was and to administer it with equal hand and in untainted quality to all men alike.

It was realized that by his whole life he had fitted himself for this great work, and that he measured up to the standard set by the American people for their judges, which

required, not only that they should live upright, moral, and intellectual lives, but that they must preserve an untarnished reputation, so that no shadow of doubt could rest upon the quality of justice as administered in the courts. To be a judge, a lawyer is responsible not only for what he is, but for what he is thought to be. It is essential that he should have not only character but standing. All men knew that Justice Lamar not only had deserved but had achieved this spotless reputation, and so, in the silent verdict of the bar and of the people, he stood approved.

For five years he continued in the high office of justice of this court. By no act of his on the bench, by no act of his in private life, did he disappoint public expectation or lower the standards appropriate to be maintained by a member of this great tribunal. Called upon to consider and determine great controversies in which the interests and passions of men, of parties and of governments, were acutely involved, he never lost his judicial poise, he never descended from the serene heights of impartial judgment, he never turned his back on weakness or cringed before the demands of power.

His name has passed into history in important, and, in many instances, in controlling association with great causes, which have become creative forces in moulding our jurisprudence, and have served to advance the standards and conceptions of justice among men.

He was faithful to the Constitution. He did not regard it as an antiquated or outgrown instrument, but as a living force, embodying the true principles of liberty and justice, and capable of adaptation, in the realm of government, so as to meet justly and equitably the demands of human justice and of human progress, just as, in the moral and spiritual world, the principles of the sermon on the Mount are eternal and capable of adaptation to all the changing needs of the human soul.

At the altar of the Constitution he worshipped with the simple faith of one who never doubted, and who found both his strength and his inspiration in the great principles of justice, equality, and liberty, which he believed to be eternal as they were announced by the Fathers when they created this Republic and dedicated it to mankind. He believed, as strongly expressed in a recent patriotic utterance, that,—

> With wisdom and with patient skill,
> Wide learning and profoundest thought,
> With zealous and unselfish will,
> Our patriotic fathers wrought.
>
> They laid foundations deep and wide,
> They made their own immortal plan,
> And reared on lines before untried,
> A home for freedom and for man.
>
> They fortified each sacred right,
> They shielded all from fraud or wrong,
> They curbed the power of selfish might,
> And armed the weak against the strong.
>
> Upon themselves they put restraint
> Lest hasty passion, given range,
> Should silence reason with complaint,
> And bring some needless harmful change.
>
> Through storm and stress, through many fears,
> Through war and fierce domestic strife
> Down through the lapse of changing years,
> They guarded well the Nation's life.
>
> The Constitution; still it stands,
> August, majestic, lofty, lone;
> No fabric wrought by human hands
> Such strength and symmetry has shown.
>
> The Constitution; there it stands
> A beacon in a storm-tossed world;
> And peace will reign in other lands
> When they its banner have unfurled.
> • • • • • • • • •

We love the men who gave it birth,
We venerate its every clause;
Benign protector of the hearth,
Stern guardian of the country's laws.

To us belongs the pious task
To ward from it all threatening foes,
Both those who lurk 'neath friendship's mask,
And those who deal it hostile blows;

To rouse the people of the land
To know the treasure they possess,
And smite each sacrilegious hand
That's raised to harm or make it less.

Now that Justice Lamar's career is ended, and he has been laid by tender hands in an honored grave, we who survive can begin to take some just measure of his life, and can truly say of him that in all that he did here he strengthened the confidence of mankind in the purity of justice and kept inviolate the faith of the Constitution.

The Resolutions were adopted, and, on motion of Mr. Solicitor General Davis, the meeting adjourned.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 12, 1916.

Present: The Chief Justice, Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice Pitney, Mr. Justice McReynolds, and Mr. Justice Brandeis.

Mr. Attorney General Gregory addressed the court as follows:

May it please your Honors: For the second time within a year it has become my duty and sad privilege to present to you Resolutions passed by the bar on the death of a member of this court.

Upon the former occasion I paid an inadequate tribute to one who had been a friend from my youth. It was not my privilege to come in intimate contact with the late Justice Lamar until a very few years before his death, and yet the feeling which moves me most is one of keen personal loss, a feeling that a great light has gone out, not merely one that illumined the legal shadows, but one that warmed the hearts of men and made them kinder, nobler, and more charitable.

In recalling the personality of a really great man who has left us we do not see him as a combination of various intellectual and moral qualities. On the contrary, we remember him as the possessor of some one striking characteristic, which, like Saul, son of Kish, towered above its brethren and challenged the attention of all observers.

While Justice Lamar was a powerful advocate, a wise counselor, an able and just judge, a cultured gentleman, and a great citizen, his dominating characteristic was a peculiarly winning courtesy, a kindly consideration for all with whom he came in contact. He was born and bred among a people who have always cherished this quality, and yet in his case it was not the result of association and training. By a perfectly natural process he garnered the sunshine of life and dispensed it with a prodigal hand.

In contemplating a life like this you think of Hawthorne's tribute to the fragrant white water lily of the Concord river, of how he marveled at its capacity for absorbing only loveliness and perfume, and we reflect, as did the author, on how some persons assimilate only what is ugly and evil from the same moral circumstances which supply

good and beautiful results,—the fragrance of celestial flowers,—to the daily lives of others.

The power to see, to appreciate, to absorb, and to express what is good comes from the heart, and this man, like Abou Ben Adhem, would have said to the angel with the golden book, "Write me as one that loves his fellow men."

I doubt not that it was because of this marked characteristic that Justice Lamar was selected by the President in the summer of 1914, from all the able men of the nation, to represent the United States at the conference called by Argentina, Brazil, and Chile, to consider the delicate Mexican problem. Surely no more critical situation could have arisen to test to the utmost the best qualities of heart and mind. He approached its consideration carrying in his right hand "gentle peace to silence envious tongues," and no such mission was ever more successfully carried out.

Being a man of this type, and of strong intellect and wide learning, he naturally brought to the study of questions of abstract law a sympathetic interest and enthusiasm which made even the dry bones live again. He was never satisfied with his work while any possibility of further effort remained. Where others would have rested content, his ardent zeal for perfect accomplishment spurred him to continued labor. Accuracy, simplicity, and clearness of expression were his constant aim and his marked achievement.

In appraising the work of his professional brethren he was most generous. He took intense pleasure in the accomplishments of others, and often pronounced their work "well done," with genuine enthusiasm, where he would have criticized it if his own.

Joseph Rucker Lamar was the son of Rev. James S. Lamar and Mary Rucker Lamar. His family was of Huguenot descent, the founder, Thomas Lamar, having settled in Maryland in 1663. His ancestors moved to Georgia in 1755, and have taken a prominent part in the public life of the state.

After attending preparatory schools in Georgia, he matriculated at the State University in 1874, but before graduating entered Bethany College, West Virginia, of which Dr. William Kimbrough Pendleton, afterwards his father-in-law, was president. He graduated from this institution in 1877, and after studying law at Washington and Lee University was, on April 16, 1878, admitted to the bar in Augusta, Georgia, where he opened an office and established his home. On January 30, 1879, he married Miss Clarinda Huntington Pendleton, who, with two sons, survives him.

The society of Augusta has always been cultured, and young Lamar was from early manhood one of the most charming of that delightful circle, and rapidly became one of the leading spirits in the social and civic life of the community.

From 1886 through 1889, Mr. Lamar represented Richmond county, in which Augusta is situated, in the Georgia legislature. He was the author of some of the most important legislation of his state, notably the act regulating the exercise of the right of eminent domain, and the laws governing voluntary assignments.

Shortly after ending his legislative services he was appointed one of the codifiers who revised and edited the Code of Georgia of 1895. His labors on this commission were most able and of great service to the state.

Meanwhile his practice had become wide and varied, and extended throughout Georgia and neighboring states. There were few cases of great magnitude in that section in which he was not employed.

On January 13, 1903, the governor appointed Mr. Lamar a justice of the supreme court of the state to fill a vacancy on that bench, and he was elected to the position in 1904. He resigned in the spring of 1905 and returned to the practice of law at Augusta.

He was the author of a number of historic and literary contributions, many of which are to be found in the printed volumes of the reports of the Georgia Bar Association, of which he was an active member.

Except while on the state bench, he served as a member of the board of law examiners for admission to the bar of Georgia from the organization of that institution until his appointment as a member of this court. He was chairman of this board from the spring of 1905 until his removal to Washington.

On December 12, 1910, he was nominated by President Taft to be an associate justice of the Supreme Court of the United States, was confirmed by the Senate on December 15th, and took his seat on January 3, 1911.

His services on the bench of this court are well known. During the five years of its duration, he participated in the decisions of 1,179 cases, wrote the opinion of the court in 114 and the dissenting opinion in 8. His opinions are found in volumes 220 to 238, inclusive, of the United States Reports. His sound judgment, wide learning, and great clearness and facility of expression won for him the confidence and admiration of the bar and the public.

Perhaps the most important opinions rendered by Justice Lamar were in the cases of United States v. Grimaud, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; Gompers v. Buck's Stove & Range Co. 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492; United States v. Midwest Oil Co. 236 U. S. 459, 59 L. ed. 673, 35 Sup. Ct. Rep. 309; United States v. Delaware, L. & W. R. Co. 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873.

In United States v. Grimaud, the Secretary of Agriculture had passed an order forbidding grazing on public lands without permits. The defendants were charged with violating this order, and contended that the act of Congress making it an offense to disobey the regulation of the Secretary was unconstitutional in that it attempted to delegate legislative authority. The decision overrules this contention.

In the case of Gompers v. Buck's Stove & Range Co., plaintiffs in error were charged with contempt in violating an injunction of the supreme court of the District of Columbia by publication of an "unfair" list. It was held that the publication was a contempt, but that the proceedings were not properly brought.

The case of United States v. Midwest Oil Co., was brought to test the government's right to oil lands valued at many millions of dollars, and involved the authority of the President to withdraw such lands from public entry. It was decided that the President had this authority.

United States v. Delaware, L. & W. R. Co., arose under the commodity clause of the act to regulate commerce and under the anti-trust act. The railroad company at the time of the passage of the commodity clause was engaged in mining, buying, transporting, and selling anthracite coal. To devest itself of title before transportation began, it caused the coal company to be organized with stockholders and officers in common with itself. The railroad company then caused the output of its mines to be transferred to the coal company under a contract which placed the latter company largely, if not completely, within the power of the former.

The district court dismissed the petition. The Supreme Court reversed this decision, holding that by reason of having stockholders and officers in common, and by reason, further, of the above-mentioned contract, the two companies were so united in ownership and management as to give the railroad company an interest in the coal of the coal company, and that, therefore, the transportation of such coal by the railroad company constituted a violation of the commodity clause. The court also held that the contract in question violated the anti-trust act.

In 1911 Yale University, in recognition of his learning and ability, conferred on Justice Lamar the degree of Doctor of Laws.

He was active in many spheres of public work in the communities in which he lived, and in the Christian Church, of which he was a devout member.

He died in this city on January 2, 1916, having just entered upon his fifty-ninth year. He was in the zenith of his powers and usefulness when seized with the fatal illness which terminated his life.

This is a brief outline of the man's character and life. It conveys no idea of his vivid personality. It faintly portrays his kindly nature and the loving service to country, family, and friends bereft.

Beyond their admiration for his talents and accomplishments will stand foremost with all privileged to know him, their recollection of his warm, magnetic nature.

Strong, ardent, a man among men, a warrior in every battle for truth and right,

always ready for every conflict which would advance the cause he espoused, he was one of whom it could with perfect truth be said:

"His life was gentle; and the elements
So mix'd in him, that Nature might stand up
And say to all the world, 'This was a man.'"

I now read the Resolutions.[1]

The Chief Justice responded:

Mr. Attorney General, there is nothing to be added to the beautiful tribute which the resolutions of the bar, so appreciatively by you presented, pay to the memory of Mr. Justice Lamar. As I grasp their ultimate significance, they are intended principally to express the appreciation by his brethren of the bar of his fealty to the noble ideals of the profession and of the honor which his life and work have reflected on that profession. In fact, while expressing the profound regret which the death of Mr. Justice Lamar has occasioned, as I understand the resolutions, they seek not simply to express that regret, but rather, as it were, to lay the foundations in the permanent records of this court of a monument to his memory which shall continue to speak of his great moral and mental qualities, of his courageous and conscientious discharge of judicial duty, long after we ourselves shall have gone.

Admirable as are these aims of the resolutions, I find it difficult to completely adjust myself to them. Ah, how can it be otherwise, since at the very mention of the death of our brother Lamar all sense of exultation or pride at the high ideals to which his life conformed fades out of my thoughts, and there remains only the sense of personal sorrow at the loss occasioned by the severance of those ties which were so cherished and by which his brethren were bound to him,—a sorrow whose depth cannot be fully fathomed without the knowledge begotten by association in judicial work of the attributes of his nature, so gentle, so true, so faithful, so brave, so generous, so devoted! But controlling personal feelings, let me endeavor to bring myself into harmonious relations with the purposes of the resolutions by making some few suggestions as to impressions made upon me by his work on this bench, and pointing out the dominant intellectual influences which, in my opinion, formed and controlled his abstract conceptions as to some important questions, and which consequently tended to shape the conclusions which he reached in the discharge of his duties concerning such questions.

Too young to have been a participant in the Civil War, he was yet old enough to have appreciated the anguish of that appalling conflict, the multitude of noble lives on both sides which were forever stilled, the homes made desolate, the fields wasted, and the blight of a destroyed society and of nearly all prosperity, which came at least in one section, as a result of that struggle,—impressions which in the very nature of things indelibly stamped upon his developing life the dread consequences which necessarily would follow in the wake of a disintegrated union and a destroyed national life. He was, moreover, old enough to have understood and appreciated the anguish, more appalling than the calamity of the war, of the period which followed in its wake, and thus to have also impressed upon his nature beyond the possibility of forgetfulness the destruction of individual right which would arise from reducing the states to mere dependent vassals deprived of local autonomy and to be governed from afar by a centralized government, whether of executive power or of bureaucratic authority. Thus indubitably, my belief is, it resulted that when by training his mind came to explore the sources of our constitutional life, his opinions came to be composite; that is, in his mind there resulted, as it were, a fusion of state and national power, united but not destroyed, both co-operating to the perpetuation of the other. In other words, his opinions came by a natural process to embody the very concepts upon which our institutions must rest.

Reared virtually in the atmosphere of an agricultural community, when by the force of his ability he came in later life to consider a wider range,—that is, the relation to

[1] For these Resolutions, see ante, p. 1244.

each other of diverse and seemingly conflicting activities, and the possibility of co-ordinating and preserving them all,—it also seems to me clear that the process which had shaped his convictions as to our constitutional government came to mold his opinions on the subjects just stated. In other words, he came fully to appreciate that to assume a society resting solely upon the pursuit of agriculture, and which would be confined to that relation, was a negation of the existence of society itself, which in its very essence embodies the complex resultants of all the activities of human life, giving rise to the corresponding duty to harmonize and adjust them to each other so that they all might live and develop for the blessing and advancement of mankind.

In practice it may be said that these ultimate convictions were applied by Mr. Justice Lamar in his discharge of judicial duty in a threefold aspect: First, the relation of the activities of individuals and their results to each other; second, the relation between the power of the states and that of the nation; and, third, the obligation and effect of the limitations imposed upon all government as the consequence of those great guaranties in favor of individual right forming an inherent part of our constitutional system. As to the first, it is enough to say that the opinions expressed by Mr. Justice Lamar in the performance of his duties here afford apt examples of the keenness of his appreciation of the duty to adjust between conflicting activities so as to preserve the rights of all by protecting the rights of each. As to the second, intensely local as were his affections and his ties, nothing is more clearly portrayed by his work on this bench than the broad conception which he entertained of the duty to uphold and sustain the authority of the Union as to the subjects coming within the legitimate scope of its power as conferred by the Constitution. As to the third, no demonstration could be more complete than that afforded by his work, of the fixed opinion on his part as to the duty to uphold and perpetuate the great guaranties of individual freedom as declared by the Constitution, to the end that the freedom of all might not pass away forever. Convinced as he was from his study of the sources of our constitutional institutions, that their enjoyment was dependent upon the limitations in favor of individual right which the Constitution expressed, and that such limitations were essential to secure us from the anguish and turmoil and tyranny and the disappearance of freedom which had always resulted where such guaranties did not exist or were not adhered to, he had come to feel that for the purpose of their preservation he was but a trustee for the millions who were to come. His mind was too penetrating to listen for a moment to the suggestion that freedom would be secured by destroying principles which were essential to its preservation, or that wrong would result unless truths which were eternal were violated. Thus controlled, his work on this bench leaves no room to doubt that no thought of mere expediency, no mere conviction concerning economic problems, no belief that the guaranties were becoming obsolete or that their enforcement would incur popular odium, ever swayed his unalterable conviction and irrevocable purpose to uphold and protect the great guaranties with every faculty which he possessed. In considering such questions there shone ever in his heart the light of Georgia firesides and the great duty he owed to those firesides, indeed, to every individual, not only in Georgia but elsewhere, to see to it that by no act of his did the inherent principles of individual freedom guaranteed by the Constitution fail to receive enforcement, or their efficacy become impaired by misconception or misrepresentation.

O true American and devoted public servant, O cherished friend and faithful comrade, O sweet and noble soul, may it be vouchsafed that the results of your work may endure and fructify for the preservation of the rights of mankind, and may there be given to us who remain, wiping from our eyes the mists begotten by your loss, to see that through the mercy of the inscrutable providence of God you have been called to rest and to your exceeding reward!

Let the Resolutions be recorded.

ADDENDUM.

Report of the Committee appointed by the Supreme Court of Georgia to prepare a Memorial commemorative of the life and character of Honorable Joseph Rucker Lamar,

an Associate Justice of the Supreme Court of the United States, and formerly an Associate Justice of the Supreme Court of Georgia.

Joseph Rucker Lamar was born at Ruckersville, in Elbert county, Georgia, on October 14, 1857, and died in the city of Washington, D. C., on the 2d day of January, 1916. Born—died. These two events come in every life, but life is not measured by the intervening years. The final estimate cannot be made until the close, and then must depend not upon years, but deeds, not upon how long one lived, but how much he lived. Measured by this standard, his life was full and rich.

He was a descendant of Thomas Lamar, a Huguenot, who settled in Maryland in 1663. His ancestors moved to Georgia in 1755, and have acted a prominent part in the public life of the state and country. He was the son of James S. Lamar and Mary Rucker Lamar. His father was a distinguished minister of the Christian Church and for many years pastor of that church in the city of Augusta. He attended school at the Martin Institute at Jefferson, Georgia, and the Richmond Academy at Augusta, Georgia, Penn Lucy School near Baltimore, and matriculated at the University of Georgia in 1874, but before graduating there entered Bethany College, West Virginia, in which he taught for one term and from which he was graduated in 1877. He attended the Law School of Washington and Lee University, and was admitted to the bar in Augusta on April 16, 1878.

On the 30th of January, 1879, he married Miss Clarinda King Pendleton, the daughter of Dr. William K. Pendleton and Catherine Huntington King, a daughter of Judge Leicester King of Warren, Ohio. Her father was President of Bethany College until his resignation in 1885, and afterwards President Emeritus until his death in 1899. No better fortune ever came to him than this marriage. It was a life of congenial companionship, mutual admiration, esteem, and love. Her fine literary tastes and her liberal culture fitted her for the best social and official circles. As wife and mother she filled the highest offices of her sex, and was a blessing to their home.

From 1886 to 1889 he represented Richmond county in the Georgia legislature. He was the author of the eminent domain act, the auditors act, and the assignment act. He was appointed to fill the unexpired term of Justice Little on the bench of the supreme court of Georgia, on January 13, 1903, was elected to that office in 1904, and resigned in 1905, when he resumed the practice of law at Augusta. He wrote more than two hundred opinions, embraced in six volumes of the Georgia Reports. He was appointed by President Taft to the Supreme Court of the United States on December 12, 1910, was confirmed within three days thereafter, and took the oath of office on January 3, 1911. His appointment was hailed with universal and supreme satisfaction and approval by the bench and bar of Georgia, and his fellow-citizens generally.

He was at once recognized by his associates as eminently qualified to sit with them in that highest of judicial tribunals, fulfilled the high expectation of the profession, and vindicated the wisdom of his appointment. It may be said of him, as was said of another distinguished justice of that court, that "when the ermine fell upon his shoulders it touched nothing less spotless than itself." As was aptly said by Dr. Hadley, President of Yale University, in conferring upon him the degree of LL.D., in 1911, the honor conferred by his selection for this exalted station was emphasized by the fact that the President who appointed him is himself a great jurist who had more than once been invited to a seat in that court, and who ignored party lines in the appointment.

In the beginning of his career in this court he was called on to pass upon the Standard Oil Case and the Tobacco Trust Company case. His opinions as a judge were brief but comprehensive, and displayed a thorough knowledge of the law involved, expressed with clearness and force.

He was appointed by President Wilson as a member of what is known as the A. B. C. Conference, growing out of the situation with Mexico. It was a very high honor that out of all the jurists, statesmen, and diplomats of the country, he should have

been one of the two selected for this place. The place called for a very high order of ability, for tact, for wisdom, for that self-control that could listen when silence was called for, and speak when something must be said and rightly said. An excess of temper or an inapt or ambiguous speech might have defeated the purpose of the Conference. Its record in detail has not been made public, but it may be said that it resulted in a better feeling between the United States and the countries of South America, and while we cannot now fully see the importance of what it accomplished, we must recognize it as a great public service.

The high honors he enjoyed came to him unsought. Using a much-misused word, and without flattery, which he never used of others, and of himself would not receive with favor, which is an offense alike to good morals and good taste, we call him a *great* Jurist, a *great* Judge, and a *great* Man.

His knowledge of law was encyclopedic. He understood its philosophy and was permeated by its spirit. He was versed in its general principles and familiar with the technicalities of pleading and practice. It cannot be truly said of any man that he knows it all, but it may be said of him that he had unusual knowledge of every branch of law, English and American, its history, growth, and development, whether contained in the common law, in statutes or constitutions or judicial decisions. His investigations were exhaustive. As a counselor he was wise. In argument he employed the force of the best logic and the attraction of the most lucid and felicitous expression.

He had a just conception of the dignity and importance of the legal profession, of the qualifications necessary to constitute one a worthy member, a keen sense of the duties and responsibilities it imposed, and never lowered the standard required by the highest ideals. In answer to an inquiry by President Taft, asking for an opinion as to his qualifications as a lawyer for Supreme Court Justice, the Honorable Joseph B. Cumming, eminently qualified by intimate acquaintance and otherwise, answered: "In the symmetry of Lamar's makeup I don't know which most to commend, the man or the lawyer. In the latter aspect, as far as I can judge, his present learning is vast, and his facility for acquiring more, remarkable. He digs deep, is closely logical, but at the same time intellectually candid and broadminded, and with a great gift for clear and forcible exposition of his views. If I were called on to construct a model for a judge, I would take Lamar as he is, only chipping off somewhat of his too painstaking search for finality of truth, which sometimes keeps him reaching out beyond the sea mark, where other excellent judges would be willing to drop anchor. This characteristic, however, increases the burden but lessens not the excellence of his work."

How great is the office of the judge and the honor of him who worthily fills it! There is nothing beyond it. It is the *ne plus ultra* of the loftiest ambition. What dignity, what majesty, what solemnity invests it. It speaks with the voice of supreme authority. It is clothed with the power to deal with property, with reputation, with liberty. It may pronounce the sentence which deprives of that which God only can give. To pronounce final judgment from which there is no appeal is a divine prerogative.

His historic and literary contributions to the profession may be found in the Reports of the Georgia Bar Association of 1892, 1898, 1900, 1907, 1908, 1913, and embrace the following subjects: "Georgia's Contribution to Law Reform," "Georgia Law Books," "A Century's Progress in Law," "History of the Establishment of the Supreme Court of Georgia," "Memorial of Chief Justice Logan E. Bleckley," and "The Bench and Bar of Georgia During the Eighteenth Century," which he began with the query, "Who was the first lawyer in Georgia?" and with the characteristic tenacity of purpose pursued it until he found not only the first lawyer, but the first judge and the first jury.

His work in the preparation of these papers and addresses, involving, as it did, the careful examination of the earliest records at home, including the voluminous Colonial and Revolutionary records of Georgia, compiled by Governor Candler, which he read through and upon which he made marginal notes, and the obtaining of some from abroad, is a monument of his passionate devotion to the earliest history of Georgia. The historical knowledge furnished is of incalculable value to the present and future generations, *and the honor due him for these treasuries is increased by the fact that they*

were given without any thought of pecuniary reward, but from love of his state and profession.

These papers and addresses relating to Georgia law are eminently worthy of a place in the curriculum of every law school in the state, and the state library and would justify the necessary expenditure for that purpose.

His address before the Alabama State Bar Association on July 4, 1910, was a splendid tribute to the "Work and Position of American Courts." In this address he informs us, what it would be well to recall in this day when it has been assailed, that the power to pass upon the validity of laws was involved if not expressly conferred by the provision of Magna Charta, "that if anything be procured by any person contrary to the premises, the same shall be null and void." Splendidly reviewing the work of American courts, he was inspired by the feeling "that we are a part of a great system which is disseminating its benign influence to the isles of the sea and the uttermost parts of the earth;" and looking down the vista of the future he was thrilled by a vision of the day when our courts should take part in a case and announce some vital principle that would be cited and followed around the globe.

One of his greatest addresses was before the Ladies' Memorial Association of Athens, Georgia, on April 26, 1902, on "The Private Soldier of the Confederacy." In all that has been spoken and written there cannot be found a more splendid tribute. He speaks of "The War without adjective, without word of explanation." He graphically portrays the South's unpreparedness for war; recalls that the combined losses of the English, Prussian, and French armies at Waterloo did not exceed the losses at Gettysburg; that the casualties at Sadowa fought between the Austrians and Prussians, where a quarter of a million men were engaged on each side, each army greater than the combined forces of the Federals and Confederates at Gettysburg, were much less, as they were also at Sedan. He detracts nothing from the honor due those who commanded, but he gives highest honor to the courage and endurance of the private soldier, whom he calls the hero of the Confederacy. It was a statesmanlike discussion of the causes that led to the war, and a patriotic warning against the dangers which it left in its path. It was loyal to Southern sentiment and pride, but without a note of sectional animosity. The greatness of this address can be better appreciated by recalling that its author, who with such familiarity and philosophy discusses the causes, the progress, the achievements, and the results, with the knowledge of an intelligent participant, was not born when these causes began, and was only five years old when they culminated in that struggle, which he calls the overshadowing event in our history.

It was heard by a number of distinguished men from every section of the country, members of an educational convention in session at the time, and the editor of the "Brooklyn Eagle" asked for the privilege of publishing it for general distribution. This was done, with an introduction by Dr. Shaw, editor of the "Review of Reviews."

He was one of the three citizens, learned in the law, selected by the governor, the chief justice and associate justices of the supreme court of the state, to prepare the Code of 1895, and if he had done nothing else, this alone would stand as a perpetual monument commemorating eminent public service.

His learning was far beyond the domain of the law. It embraced the classic, the historic, the scientific. He was a scholar without pedantry, a genius without eccentricity. His makeup was such a combination of strength and simplicity, of merit and modesty, of public and private virtue, of intellectual ability and nobility of character, as made him a great man.

He lived the best of all lives, a life of service,—the service that has that divine attribute of forgetfulness of self and thought of others.

He was an humble, consistent Christian. His knowledge of the Scriptures was vast and accurate, and for many years was employed in teaching a Bible class in the church of which he was a loyal member. He was not driven about by strange and divers doctrines, but stood steadfastly by the old landmarks.

He lived much because he loved much. He loved the beautiful in nature and art: he loved birds and trees and flowers; he loved his fellows.

"'I pray thee, then,
Write me as one who loves his fellow-men.'

"The angel wrote and vanished. The next night
It came again, with a great wakening light,
And showed the names whom love of God had blest;
And, lo! Ben Adhem's name led all the rest."

He loved his friends. His elevation to the highest station never spoiled him. Its altitude never chilled the warmth and glow of his friendships, nor cooled the cordiality of his manner to the humblest acquaintance.

He loved his native state, her history, her traditions, her people. In the warp and woof of his being he was a Georgian. His legal domicil may have been in Washington City, but in spirit he had never removed from Georgia and Augusta. He loved his country, her system of government, her contributions to human liberty and to the progress and civilization of the world. He was through and through an American.

Pursuant to his expressed desire, he was laid to rest with simple funeral ceremony, attended by the presence of Mr. Justice Pitney, Mr. Justice Van Devanter and Mr. Justice McReynolds, and the Marshal of the Supreme Court of the United States, representatives from the local and State Bar Associations, and a concourse of friends and fellow-citizens whose admiration and esteem he had so richly merited and enjoyed.

His body lies buried in the city he loved with such passionate devotion, and to whose interests—social, educational, religious, and commercial—he had generously contributed with heart and mind and purse, but he lives and will live. The highest tribute we can offer is worth more to us than to him. He needs it not. He has written his own eulogy, more eloquent than any words of ours can pronounce. He has builded his own monument in strength and symmetry more enduring than marble or granite, and more beautiful than was ever conceived by the mind of genius, or chiseled by the deft hand of sculptor.

He may not hear what we say of him. Let us listen to what he says to us. He speaks in a voice solemn with the emphasis of another world. It says to his family in the first item of his last will and testament: "My friendships, many and precious, I leave to my family in the hope that they will be cherished and continued. I know of no enmities, but if such hereafter unhappily arise, let them be forgotten."

It says to his friends, "Say not goodnight, but in some brighter clime bid me good morning."

It says to us, Honor and dignify your profession. Cherish the memory and imitate the example of the great and good men who have gone before you. Love truth; love justice; uphold constituted authority. Remember you are sworn officers of the law, and it should be your supreme pleasure, as it is your sacred duty, to oppose wrong, to defend the right, and to terminate contentions. Do not forget that you are annointed priests of service in a temple whose altars should be kept undefiled, and whose ministers should be clean.

Let us answer this voice, though our words are a poor expression of what our hearts feel: Great jurist, great judge, great man, thou hast done well. Thou hast shed lustre upon thy state and country. Thou hast been a worthy exemplar of faithful, intelligent service in the highest stations, and adorned every private relation in life, and into this high tribunal, enriched and adorned by thy character and services, this high tribunal, the last and surest defender of the right to life, liberty and property, we come mourning thy death, but rejoicing in thy life, and crown thee with our undying gratitude, admiration and esteem.

J. C. C. Black, Horace M. Holden, Spencer R. Atkinson, J. R. Pottle, Wm. A. Little, Joel Branham, Andrew J. Cobb, E. H. Callaway, John S. Candler, A. R. Lawton, Samuel B. Adams, Alex C. King, A. L. Miller, S. H. Sibley, P. W. Meldrim, Sam Bennett, Henry R. Goetchius.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

It is ordered by the court that the bond presented by the marshal this day be approved and recorded.

January 6, 1916.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

The Reporter having represented that owing to the number of decisions at the present term it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year pursuant to § 226 of the Judicial Code, approved March 3, 1911.

March 20, 1916.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

It is ordered by the court that sections 2 and 9 of rule 10 of this court be, and the same are hereby, amended so as to read as follows:

2. Immediately after the designation of the parts of the record to be printed or the expiration of the time allotted therefor, the clerk shall make an estimate of the cost of printing the record, his fee for preparing it for the printer and supervising fee, and other probable fees, and upon application therefor shall furnish the same to the party docketing the case. If such estimated sum be not paid within ninety days after the cause is docketed, it shall be the duty of the clerk to report that fact to the court, and thereupon the cause will be dismissed, unless good cause to the contrary is shown.

9. When the record is filed, or within twenty days thereafter, the plaintiff in error or appellant may file with the clerk a statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party. The adverse party, within thirty days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

These amendments shall go into effect May 1, 1916.

(*Promulgated March 20, 1916.*)

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

The Chief Justice said: "Gentlemen of the bar, it is my privilege to announce that the President of the United States has filled the vacancy on this bench by the appointment of Mr. Louis D. Brandeis, of Massachusetts. Mr. Brandeis is present and ready to take the oath of office. The clerk will read his commission."

The commission was then read, and the oath administered by the clerk, and Mr. Justice Brandeis took his seat upon the bench.

June 5, 1916.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

It is ordered that rule 37 be amended by adding the following section:

4. In any case where the time for presenting a petition for certiorari is expressly limited by statute and where the court has adjourned for the term, the petition may be presented during such adjournment and within the period prescribed, by filing it, together with the printed record and briefs, in the office of the clerk, and such filing shall have the same effect as a presentation in open court.

June 12, 1916.

APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term,

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Louis D. Brandeis, Associate Justice.
For the Third Circuit, Mahlon Pitney, Associate Justice.
For the Fourth Circuit, Edward D. White, Chief Justice.
For the Fifth Circuit, Edward D. White, Chief Justice.
For the Sixth Circuit, William R. Day, Associate Justice.
For the Seventh Circuit, James C. McReynolds, Associate Justice.
For the Eighth Circuit, Willis Van Devanter, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

June 12, 1916.

APPENDIX IX.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided and all the other business of the term not disposed of be, and the same are hereby, continued to the next term.

June 12, 1916.